No. 10-1276

In the Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,

Petitioner,

v.

AMERICAN ATHEISTS, INC., ET AL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE ROBERT E. MACKEY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

A private, nonreligious organization commemorated Utah highway troopers killed in the line of duty by placing, with the State's permission, roadside memorial crosses near the location where each trooper was mortally injured. Each memorial prominently displayed the fallen trooper's name, highway-patrol designation, rank, badge number, year of death, and a biographical plaque. An atheist group and its members sued the State, claiming that the government's accommodation of this private speech violated the Establishment Clause of the United States Constitution and demanding the removal of these memorials. The United States Court of Appeals for the Tenth Circuit agreed, holding that the memorials could not remain and denying rehearing en banc by a 5-4 vote.

The questions presented are:

1. Did the Tenth Circuit err in selecting which Establishment Clause test to apply when analyzing passive public displays, an issue that has divided the circuit courts three ways after *Van Orden v. Perry*?

2. Did the Tenth Circuit err in holding that the Establishment Clause forbids roadside memorial crosses marking the site of death for state highway troopers killed in the line of duty?

3. Did the Tenth Circuit err in classifying as government speech a collection of memorials owned by a private organization, disclaimed by the State, and located on both private and public property?

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INTEREST OF AMICUS CURIAE[1]

Robert E. Mackey – On July 5, 1994, fourteen firefighters lost their lives while fighting the South Canyon Fire near Glenwood Springs, Colorado, including Donald Mackey.[2] See App. 123a-126a. Donald's father, Robert, organized the 1995 initiative to place fourteen granite crosses on Storm King Mountain, located in the White River National Forest. The crosses memorialize the death and sacrifice of the firefighters who lost their lives fighting the South Canyon Fire.

After visiting Storm King Mountain two weeks after the fire and viewing the simple wood crosses that had been placed to mark the location where each firefighter's body was found, Robert Mackey decided to organize an effort to install permanent crosses to mark the location where each firefighter had died. Mr. Mackey chose a Latin cross as a

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[1] The parties were notified 10 days prior to the filing of this brief of amicus Robert E. Mackey's intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or his counsel made a monetary contribution to its preparation or submission.

[2] The events on Storm King Mountain and the tragic deaths of the fourteen firefighters are detailed in Butler, Bret W. et al., "Fire Behavior Associated with the 1994 South Canyon Fire on Storm King Mountain, Colorado," *Forest Service, Rocky Mountain Research Station*, United States Dep't of Agriculture, RMRS-RP-9 (September 1998), available at http://www.fs.fed.us/rm/pubs/rmrs_rp009.pdf, and served as the basis for John N. Maclean's *Fire on the Mountain: The True Story of the South Canyon Fire* (Wash. Sq. Press 1999).

marker because it is an instantly recognizable symbol of a memorial to the dead. In April 1995, Mr. Mackey organized the effort to raise private donations and volunteer labor to install fourteen granite crosses, approximately 18 inches tall, on Storm King Mountain, bearing the name of each firefighter. The crosses were erected with the permission of each firefighter's family and the Bureau of Land Management. At the request of the family of Terri Hagen, a Native American firefighter, her cross was modified to include a circle of black steel symbolizing the circle of life.

In the more than fifteen years since the granite memorial crosses were installed, Mr. Mackey and many others have visited the crosses to pay respect to the firefighters who gave their life fighting the South Canyon Fire. As Mr. Mackey stated in his declaration filed with the District Court, the crosses were erected "to memorialize the deaths of the firefighters" and "have nothing to do with churches, religious denominations or any effort to impose anyone's faith on anyone else." App. 126a.

If the Tenth Circuit's decision in *American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 2010 WL 5151630 (10th Cir. Dec. 20, 2010), stands, not only will Utah be forced to remove the Utah Trooper memorial crosses from state-owned land, but the presence of the Storm King Mountain memorial crosses and other similar memorials around the country on state and federal land will be called into question.

ARGUMENT

I. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO CLARIFY HOW THE COURT'S APPLICATION OF THE GOVERNMENT SPEECH DOCTRINE TO PERMANENT MEMORIALS IN *PLEASANT GROVE CITY, UTAH V. SUMMUM* EXTENDS TO PERSONALIZED MEMORIALS HONORING FALLEN PUBLIC SERVANTS LOCATED ON GOVERNMENT LAND.

In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009), this Court applied its "recently minted government speech doctrine," 129 S.Ct. at 1139 (Stevens, J., concurring), to permanent monuments displayed on public property. Rather than adopting an absolute rule, the Court stated only that such monuments "typically represent government speech," and that "as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property." 129 S.Ct. at 1132 & 1138.

But "typically" and "general[ly]" are not "always." That is why the Court acknowledged that "[t]o be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument[.]" *Id.* at 1138. And various members of the Court further emphasized the qualified nature of the *Summum* rule in separate opinions. *Id.* at 1140 (Breyer, J., concurring) ("'the government speech' doctrine is a rule of thumb, not a rigid category"); *id.* at 1142 (Souter, J., concurring in judgment) (stating that "this case is not an occasion to speculate" on how "the relatively new category of

government speech will relate to the more traditional categories of Establishment Clause analysis," but rather an occasion "to try to keep the inevitable issues open, and as simple as they can be [by] . . . recogniz[ing] that there are circumstances in which government maintenance of monuments does not look like government speech at all," such as "[s]ectarian identifications on markers in Arlington Cemetery").

The Tenth Circuit in *Davenport* determined that if a memorial is on public land, it is public speech, regardless of how personally tailored it is. App. 15a, 16a, 31a-32a, 34a. This case provides an ideal opportunity for the Court to articulate how the Court's decision in *Summum* should apply to personalized memorials for fallen public servants, which are only one step away from "[s]ectarian identifications on markers in Arlington Cemetery." *Summum*, 129 S.Ct. at 1142 (Souter, J., concurring in judgment).

The creators of hundreds, if not thousands, of government-permitted personal memorials located on public land around the country, such as the Storm King Mountain memorial, designed them to honor loved-ones and fallen public servants. The Tenth Circuit's decision in *Davenport* threatens to transform those personalized memorials from private speech protected by the Free Speech and Free Exercise Clauses of the First Amendment, or government speech to be evaluated under the Establishment Clause. As such, this case presents a question of national significance that warrants review by this Court.

II. THE TENTH CIRCUIT INCORRECTLY INTERPRETED *PLEASANT GROVE CITY, UTAH V. SUMMUM* TO CREATE A RIGID RULE THAT TRANSFORMS NEARLY ALL MEMORIALS ON PUBLIC LAND, NO MATTER HOW PERSONALIZED, INTO GOVERNMENT SPEECH.

The Tenth Circuit in *Davenport* construed this Court's decision in *Summum* as a clear command that "squarely" covered the Utah Trooper memorials. App. 15a. It did so despite this Court's qualification of the rule announced in *Summum*, and its own prior recognition of that qualification. *Cf. Green v. Haskell County Board of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009) ("The Board notes that the Supreme Court did not say that all permanent monuments constitute government speech - just that they typically do - and that the Board has intentionally opened a limited public forum for monuments on the courthouse lawn. We are hard-pressed to view the circumstances here as resembling the 'limited circumstances in which the forum doctrine might properly be applied to a permanent monument.'"). In so doing, the Tenth Circuit refused to distinguish between a personal memorial to a specific public servant "adorned with the state highway patrol insignia and some information about the trooper who died there," App. 34a, and the public displays "typically" at issue in Establishment Clause cases. See *Salazar v. Buono*, 130 S.Ct. 1803 (2010) (a Latin cross-shaped war memorial); *Summum*, 129 S.Ct. at 1129-30 (the Seven Aphorisms of Summum); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (the Ten Commandments);

McCreary County v. ACLU, 545 U.S. 844, 850 (2005) (same); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 578 (1989) (a crèche and a menorah); *Lynch v. Donnelly*, 465 U.S. 668, 670-71 (1984) (a crèche).

As such, the Tenth Circuit failed to provide any principled basis to determine when, if ever, a personalized memorial erected at the location of an individual's death (or even the religious symbols placed on headstones located in federal military cemeteries) may be considered the private speech of the deceased public servant's family and friends, or interested service organizations and, thus, protected by the Free Speech and Free Exercise Clauses. See *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 765 (1995) ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotation omitted).

All that mattered to the court in *Davenport* was that the memorial was erected on public land with the permission of the State. App. 15a ("As permanent monuments erected on public land, the cross memorials at issue in this case fall squarely within the rule pronounced by the Court in *Pleasant Grove City*[.]"). But that analysis, without qualification, leaves no room for the constitutional rights of private individuals and groups to express their respect for fallen loved-ones or comrades at either the location of their loss or the person's burial, if either is on government land. Left unqualified,

Davenport threatens to turn grieving families into little more than content creators for public displays, see App. 36a (the purpose of "the designers and producers of these displays" does not control the government's message), or consumers of government speech. See App. 32a (mentioning that "*the military provides* soldiers and their families with a number of different religious symbols that they *may* use on government-issued headstones or markers") (emphasis added).[3] Or just as likely, it will restrict and silence their speech.

But the Tenth Circuit's reasoning, of course, has never been required by this Court, even in *Summum*, or requested by Respondents. See Brief of Appellants American Atheists, Inc., 2008 WL 3285457, at *26, n.6 (Jul. 28, 2008) ("[T]he UHPA crosses if displayed in cemeteries may well not require the same constitutional analysis as mandated in the instant case"). In *Summum*, the Court noted that there are "limited circumstances in which the forum doctrine might properly be applied to a permanent monument," and offered a hypothetical town monument "on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message" as an example. 129

[3] The Tenth Circuit was clearly bothered by the size of the Utah Trooper memorials. See App. 35a ("[t]he massive size of the crosses displayed on Utah's rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses"); see also App. 35a, n.14. But why a "humble spirit" is a relevant virtue of *government* speech, the Court does not explain.

S.Ct. at 1138. Justice Souter also emphasized that "the interaction between the "government speech doctrine" and Establishment Clause principles has not . . . begun to be worked out," and cautioned the Court to proceed slowly. 129 S.Ct. at 1141 (Souter, J., concurring in judgment). Justice Souter also noted that "there are circumstances in which government maintenance of monuments does not look like government speech at all," such as "[s]ectarian identifications on markers in Arlington Cemetery[.]" *Id.* at 1142.

This is consistent with suggestions made in *Salazar v. Buono* that the use of symbols, even sectarian religious symbols, as markers of fallen public servants or headstones represents the speech of the honorees and those that honor them. See *Salazar v. Buono*, 130 S.Ct. 1803, 1818 (2010) (plurality opinion) (a "cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs"); *id.* at 1820 ("a Latin cross is not merely a reaffirmation of Christian beliefs," but "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people," and "one Latin cross in the desert" evokes "thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten"); *id.* at 1823, n.9 (Alito, J. concurring) ("Today, veterans and their families may select any of 39 types of headstones."); *id.* at 1836, n.8 (Stevens, J. dissenting) ("The cross has sometimes been used,

it is true, to represent the sacrifice of an individual, as when it marks the grave of a fallen soldier or recognizes a state trooper who perished in the line of duty. Even then, the cross carries a religious meaning. But the use of the cross in such circumstances is linked to, and shows respects for, the individual honoree's faith and beliefs."). See also *Trunk v. City of San Diego*, 629 F.3d 1099, 1113 (9th Cir. 2011) (noting that the thousands of crosses in foreign fields were used as "marker[s] of an individual grave, not a universal monument to the war dead").

Clearly there are good reasons to distinguish between general displays of religious symbols or perhaps even group memorials, on the one hand, and individualized memorials on the other. In the first place, the individual memorials are highly personalized, both in creation and content. Highly personalized memorials at uniquely significant locations are less likely to be viewed as a government effort "to speak to the public." *Summum*, 129 S.Ct. at 1132-33.

The Utah Trooper memorials were approved by surviving family members, erected by a related service organization, placed in specific locations that held unique significance for each Trooper, carried biographical information about the Trooper, including a photograph, and ownership was retained by the Utah Highway Patrol Association. See App. 6a-7a, 43a-45a ¶¶ 6, 7, 13, 17, 19. The Tenth Circuit, however, selectively applied the reasonable observer standard in such a way as to see only the putative state sponsorship, and none of the personalizing elements of the memorials. See App.

29a-30a (holding that "[t]he fact that the cross includes biographical in-formation about the fallen trooper does not diminish the governmental message endorsing Christianity," especially "because a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information"); see also App. 89a-90a (Kelly, J., dissenting from denial of rehearing) (criticizing the court's application of the reasonable observer test); App. 96a-99a (Gorsuch, J., dissenting from denial of rehearing) (same). These facts, however, should have been apparent to any reasonable observer, see *Buono*, 130 S.Ct. at 1824 (Alito, J., concurring in part and concurring in the judgment) ("the endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display"), and should have been considered when determining whether the Utah Trooper memorials were government speech. See *Summum*, 129 S.Ct. at 1142 (Souter, J., concurring) (proposing "reasonable observer test for governmental character").

The Tenth Circuit was also uninterested in possible similarities between the hypothetical *Summum* monument that allowed citizens "or all those meeting some other criterion" to honor someone by placing "the name of a person to be honored" on the monument, 129 S.Ct. at 1138, and personalized memorials to fallen public servants, whether located at the spot where they fell, as in this case, or at their grave, as alluded to in *Bouno*. Rather, after narrowly reading the significance of

this Court's decision in *Buono*, App. 11a, n.5, the Tenth Circuit read *Summum* as "strongly impl[ying] that all the monuments in [the City] park were government speech," and therefore "in the vast majority of cases, a permanent monument on public land will be considered government speech." App. 16a. In support of this nearly absolute rule, the Tenth Circuit pointed out that the Court in *Summum* had to create a hypothetical monument that might trigger forum analysis rather than simply "point[ing] to some of the memorials in the park . . . that might be privately owned." App. 16a-17a. In short, the Tenth Circuit read the hypothetical monument in *Summum* as little more than a justification to disregard the private ownership of the Utah Trooper memorials. App. 17a. This preclusive argument from silence is hardly warranted by the actual analysis in *Summum*. Given the Court's repeated references to the monuments being privately funded and then *donated* to governments that in turn act as memorial curators, see *Summum*, 129 S.Ct. at 1133-34, ultimate ownership of the memorial remains a relevant factor in determining whether the memorial is government speech.

Also weighing against a determination that the Utah Trooper memorials are government speech is the fact that they, like most personalized memorials, are placed at locations that are uniquely significant to the honoree. The Utah Trooper memorials and the Storm King Mountain memorial are located where the respective honorees lost their lives in the performance of a public duty. The placement of memorials along roadsides or in national forests -

locations that are significant only because the honoree died there - is a far cry from displaying monuments in a city park "that is linked to the City's identity." *Summum*, 129 S.Ct. at 1134. That such memorials are not located "immediately in front of the [] Statehouse, with the government's flags flying nearby, and the government's statues close at hand," *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part, and concurring in the judgment), should be a significant factor weighing against a determination that a personalized memorial on public land is government speech. The Tenth Circuit did not consider whether the location of the public land at issue was sufficiently linked with Utah's governmental identity to warrant a determination that the memorials constituted government speech.

Finally, the personalized nature of an individual memorial is especially heightened where the State indicates that it neither approves nor disapproves the content of the memorial, as Utah did in this case. See App. 9a. The Tenth Circuit found that this distinction "falls flat" in light of *Summum*'s rejection of formal adoption of the message of a monument in order to find that the monument is government speech. App. 17a, citing *Summum*, 129 S.Ct. at 1134. "Conversely," the court held, "the government's actions in this case – allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land – cannot be overshadowed by its attempts to distance itself from the message conveyed by these displays." App. 17a.

But the converse does not necessarily follow. Government disclaimers of ownership of content

have mattered in the past. See *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (holding that the challenged speech was private because the government "ha[d] disclaimed that the speech [was] its own"); see also *id.* at 241 n.8 (Souter, J., concurring) (the majority "h[e]ld that the mere fact that the [government] disclaims speech as its own expression takes it out of the scope of . . . government directed speech"); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834-35 (1995) (holding that publications of university-recognized organizations were private speech because the government, in its written agreement with those organizations, "declare[d] that the [private] groups . . . are not [its] agents, are not subject to its control, and are not its responsibility"). There is no logically required reason why after *Summum* such disclaimers should not remain a significant factor weighing against a finding of government speech, even if an affirmative resolution is not deemed a prerequisite to government adoption of a permanent memorial.

And, contrary to the Tenth Circuit's characterization, the government conduct in *Summum* that led the Court to conclude that the City had adopted the meaning of the memorial in "dramatic form" was more than merely "the City's decision to display that permanent monument on its property[.]" App. 17a, quoting *Summum*, 129 S.Ct. at 1134. Rather, this Court held in *Summum* that the City had adopted the message of the memorial because "the City took ownership of that monument," "put it on permanent display in a park that it owns and manages and that is linked to the

City's identity," and the donor of the monument relinquished all rights to it. 129 S.Ct. at 1134. That is hardly equivalent to a State's decision to allow private citizens to display privately-owned and maintained personal memorials along roadsides. Compare with App. 16a ("The fact that the UHPA retains ownership over these displays at issue in this case does not materially affect our analysis of whether the displays at issue in this case constitute government speech.").

In sum, the Tenth Circuit incorrectly read *Summum* to create an inflexible rule that could be squarely applied to personalized memorials without further analysis of the factors considered by this Court in *Summum*. This overly restrictive reading of *Summum* should be corrected by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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