No. 08-4061

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN ATHEISTS, INC., a Texas, non-profit corporation; R. ANDREWS; S. CLARK; and M. RIVERS,

***Plaintiffs-Appellants*,**

v.

COLONEL SCOTT. T. DUNCAN, Supt., Utah Highway Patrol, et al.,

***Defendants-Appellees*,**

UTAH HIGHWAY PATROL ASSOCIATION,

Defendant/Intervenor/Appellee

On Appeal from the United States District Court for the District of Utah
Case No. 02:05-CV-00994 DS

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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American Atheists, et al., v. Colonel Scott Duncan, et al., 08-4061

CORPORATE DISCLOSURE STATEMENT

08-4061

AMERICAN ATHEISTS, *et al*.,
Plaintiffs-Appellants,
v.
COLONEL SCOTT DUNCAN, *et al.*,
Defendants-Appellees,

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

_____
John A. Eidsmoe
Counsel for *Amicus*

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because religious symbolism in the public sphere does not violate the Constitution. Moreover, the Foundation is concerned that government officials may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to those government officials that have demonstrated indifference, ignorance, or disdain toward them. As the trial court observed, symbols can have multiple meanings. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the use of the cross in the Utah Highway Patrolman's Memorials violates the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a)-(b), and because all parties did not consent to the filing of this brief, *Amicus* has contemporaneously filed with this Honorable Court a motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Utah Highway Patrolman Memorials (Memorials) do not violate the Establishment Clause of the First Amendment because such symbols do not violate the text thereof as it was historically defined by common understanding at the time of the Amendment's adoption. The Memorials are therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis

added). As applied to this case, the placement of these Memorials is not a law, it does not dictate religion, and it does not represent a form of an establishment. Thus, the decision of the court below should be affirmed, but the rationale should rest on an explication of the text of the First Amendment rather than the weak foundation of discordant Establishment Clause precedents.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE UTAH HIGHWAY PATROLMAN'S MEMORIALS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below, while reaching the proper result, applied the Supreme Court's current Establishment Clause jurisprudence; but by ignoring and not even quoting the plain words of the constitutional text, the court's foray into this turbulent field has only perpetuated the hopeless disarray in which this Court found this area of the law a decade ago. The district court in that case also reached the right conclusion, but its analysis of the Memorials should have been governed by the text of "supreme Law of the Land" instead of judicial tests created by the Supreme Court.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support *the Constitution itself*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* …. Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend

> to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). That same year, the United States Supreme Court confirmed that the constitutional words deserve deference and precise definition: "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

On June 26, 2008, the U.S. Supreme Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> In interpreting this text,[1] we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, ___, 128 S.Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

B. The *Lemon* test, the endorsement test, and the *Van Orden/McCreary* compare-and-contrast test, or all of them together, are constitutional counterfeits that contradict and obscure the text of the "supreme Law of the Land."

The district court noted that the *"Lemon* test" of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), is widely used as an analytical framework for analyzing Establishment Clause cases, but added that the test "has been criticized heavily by many, and not all members have adopted the test."[2] *American Atheists,* 528 F. Supp. 2d at 1252.

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[1] By "this text" the *Heller* Court meant the Second Amendment to the United States Constitution, although the principle articulated here is hardly limited to that Amendment: *e.g.*, the *United States v. Sprague* case quoted dealt with Article V of the Constitution.

[2] The district court noted that the *Lemon* test has been refined by the Court, and "under the revised version, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.' *[County of] Alle*gheny *[v. ACLU*, 492 U.S. 573] at 592-93 [1986] (quoting *[Wallace v.] Jaffree,* [472 U.S. 38] at 70 (O'Connor, J. concurring in judgment)." 528 F. Supp. 2d at 1252. Amicus would observe that the *Lemon* test was further revised in *Agostini v. Felton*, 521 U.S. 203 (1997), in which J. O'Connor, writing for the majority, eliminated the third prong ("excessive entanglement") of the *Lemon* test and held that excessive entanglement was simply one of many factors to be

As the district court tried to cobble together an interpretative rule for this Establishment Clause case, it was trying to do the best it could with current Supreme Court jurisprudence. But that is exactly the problem: reliance upon hopelessly inconsistent and illogical Supreme Court decisions and tests instead of using the plain language of the Constitution. It is the Supreme Court's jurisprudential rejection of the First Amendment's text—indeed, its rejection of *any* one firm standard—and lower court cases based upon that rejection that continues the grand legal march away from the Constitution and into ever-increasing jurisprudential disarray.[3]

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considered in determining whether the government action has the principle or primary effect of advancing or inhibiting religion.

[3] Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

Justice Scalia well described the courts' confusion about the Establishment Clause in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District,* 113 S.Ct. 2141 (1993). Eight Justices used the *Lemon* test to uphold a church's right to rent a public school auditorium. Scalia concurred but wrote separately:

> "As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, to be sure, was not fully six feet under; our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test' but also declined the opportunity to overrule it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. ...
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to its tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts.' Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. (citations omitted)[4]

See also Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1, 45 (Thomas J., concurring in judgment) (collecting cases).

[4] In a footnote to the majority opinion, J. White commented on J. Scalia's concurrence: "While we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that there is a proper way to inter an established decision, and *Lemon,* however frightening it may be to some, has not been overruled."

The more opinions the Supreme Court and lower courts generate under modern Establishment Clause jurisprudence, the more "murky" the waters become, and the courts' repetitious claim of "no clear standard" becomes a self-fulfilling prophecy.

The courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases is so voluminous, incoherent, and incessantly changing that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ."[5] *Van Orden*, 545 U.S. at 694

[5] Recent district court opinions have aimed scathing critiques at the unsettled nature of the law in this area, noting that the Supreme Court's Establishment Clause jurisprudence is: "hardly Paradise" but "more akin to Limbo" than Purgatory, *Green v. Haskell County Bd. of Comm'rs*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005), and "utterly standardless" jurisprudence in which "ultimate resolution depends on the shifting

(Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting). By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *See Marbury*, 5 U.S. at 180; U.S. Const. art. VI. In addition to jurisprudential confusion, even when, as here, the government is allowed to keep whatever religious practice or display is at issue, the practical result of these judicial tests is to foster *hostility* toward religion.

C. The primary effect, if not the purpose, of *Lemon* and other judicial tests is often hostility to the historically important role religion has played in our country.

"There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674; *see also Van Orden*, 545 U.S. at 686-90 (listing numerous examples of the "rich American tradition" of the federal government acknowledging God and religion). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or

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subjective sensibilities of any five members of the High Court." *Newdow v. Congress*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005).

been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853). Even the Supreme Court itself has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Cities across the land, and particularly in the West, have names and symbols that reflect the faith of the Spanish and American setters.[6]

The American Atheists claim that the Utah Highway Patrol Association "argues that based upon history, context, personalization, purpose, use and the intent and motivation of the creator that symbol [the cross] has lost its religious

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[6] Appellants take issue with the trial court's finding of fact # 21 that "the white cross ... is commonly used as a memorial symbol in cemeteries, particularly government owned/sponsored military cemeteries in this country and throughout the world." Appellants insist that the "row upon row of small white crosses" are found in United States military cemeteries in other parts of the world but not at Arlington National Cemetery or at other military cemeteries in the United States. Brief of Appellants at 19-20. If this were correct, it would suggest the absurd conclusion that families of United States military personnel buried overseas have a right to memorialize their loved ones' graves with crosses, but the families of soldiers and sailors buried in the United States have no such right.

However, appellants are mistaken. At Arlington and at other United States military cemeteries, gravestones erected at government expense are white marble slabs with information about the service member inscribed on it. At the top of the slab a symbol may be inscribed, and many, probably the overwhelming majority, of the gravestones are inscribed with a cross. These crosses or other symbols are small, but they are very prominently displayed near the top of the gravestone. Also, throughout Arlington and other military cemeteries one will find many privately-funded memorials in the shape of crosses.

meaning." (Br. of Appellants at 29). Amicus detects no such argument, either in the Brief of Defendants/Appellees or in the opinion of the district court. Rather, the district court said, citing to *Van Orden,* that "even classic religious symbols may have various meanings and purposes depending on their context," and "the court finds that the memorial crosses at issue communicate a secular message, a message that a UHP trooper died or was mortally wounded at a particular location.," *American Atheists* at 1253. The American Atheists repeatedly refer to the Memorials in this case as "heroic Roman crosses" and try to argue that the Roman or Latin cross in particular is a symbol of Christianity. However, they have offered no evidence whatsoever that the UHPA chose the Latin cross because of its identification with Christianity or with any particular denomination of Christianity.

Nevertheless, acknowledgments of religion and God should not be removed simply because they have a religious meaning or because they originate from those with religious purposes. Judicial tests that have departed from the text of the First Amendment, when not merely adding to the confusion that reigns in Establishment Clause jurisprudence, will continue the modern trend of expunging from the public square anything that is remotely religious. It is time for the federal courts to return to the plain and original text of the First Amendment, which, when applied to this case, supports the conclusion of the district court below that uhpa Memorials are is perfectly constitutional.

II. THE UTAH HIGHWAY PATROL ASSOCIATION MEMORIALS DO NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no *law* respecting an *establishment* of *religion*, or prohibiting the free exercise thereof." U.S. Const. amend I (emphasis added). Even if the Memorials contain a symbol that is considered religious, their placement could not be considered a "law respecting an establishment of religion."[7]

A. The placing of a memorial on a highway does not constitute a "law."

The First Amendment begins with the words, "Congress shall make no law...." Unless the placement of these Memorials is a "law," then it could not violate the text of the Establishment Clause.

At the time of the ratification of the First Amendment, Sir William Blackstone defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Only decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or

[7] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

permissive, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 at 72 (Alexander Hamilton) (Carey & McClellan eds. 2001).

The UHPA received permission from the Utah Department of Transportation to erect the Memorials. The Utah Department of Transportation is not a legislative body, and its grant of permission does not constitute a requirement or mandate. In no way can this grant of permission be considered a "law."

B. The Utah Highway Patrol Association Memorials do not "respect[] an establishment of religion."

Moving along the constitutional text, one sees that the Memorials do not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). Amicus will focus upon the terms of this Amendment.

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North

Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[8] In all these instances, "religion" was defined as follows:

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

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[8] Later in *Torcaso v. Watkins*, the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. 488, 492 n.7 (1961).

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The *Reynolds* Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[9] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as

[9] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

Everson, 330 U.S. at 13. The *Virginia Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance*. *See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5 *Founders' Constitution*, 84-85 (Kurland and Lerner eds., U. Chi. Press: 1987). The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. 330 U.S. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339 U.S. at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H.R. Rep. No. 83-1693 (1954). For example, from its inception in 1789

to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as 2005 stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

Even assuming, *arguendo*, that the UHPA Memorials could in some sense be a "law," such an act could not be considered a law respecting "religion" because, even though the cross is a religious symbol sacred to Christians, the

symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is certainly "religious" to some but it is not a "religion," properly defined, to anyone. Moreover, that which constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out. A symbol of the cross does neither and thus cannot be considered a "religion."

Even if the facts in this case showed that the Memorials placed on the highways for religious reasons, *e.g.*, by Christian citizens who wanted to recognize their faith in Jesus Christ, the symbol would still not rise to the level of a "religion." A religious symbol displayed on government property with a religious purpose still does not a religion make. The UHPA Memorials do not meet the constitutional definition of the term "religion."

2. The definition of "establishment"

The UHPA Memorials also do not represent an "establishment" of religion in the State of Utah. If the State of Utah were to establish a religion, it seems likely that it would establish the religion held by the majority of Utah residents. As the district court recognized and as the briefs of the various parties have observed, the religious affiliation of residents of the State of Utah is about 57% Church of Jesus Christ of Latter Day Saints (LDS). If the State of Utah were to

establish a religion, it defies logic and common sense to think the State would do so by adopting a symbol that is not used by LDS churches or people.

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment." *See, e.g.*, Story, *A Familiar Exposition*, *supra,* § 441 (Establishment Clause cannot be attributed to "an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were

required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the erection of UHPA Memorials

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*).

The often overlooked word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. Just as Utah State Highway Patrol logo on the Memorial does not enforce the official orthodoxy of state-worship, so the cross in the Memorial does not enforce the worship of Jesus Christ. Just like the Ohio Motto in *Capitol Square*, *supra*, the UHPA Memorials do not violate the Establishment Clause because they do not create, involve, or concern an "*establishment* of religion."

III. THE PUBLIC ARENA MUST NOT DISCRIMINATE AGAINST RELIGIOUS EXPRESSION.

America's commitment to freedom of expression is based in large part upon the belief that truth is most likely to win out in competition in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J. , dissent); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). *Keyishian* further recognized that "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 605-06.

Widmar v. Vincent. 454 U.S. 263 (1981) held that a state university may not discriminate against religious expression by making its meeting rooms available to nonreligious organizations but not to religious organizations. A similar principle applies to other forms of government property except closed forums such as jails or military reservations.

In the 207 years since the ratification of the First Amendment, the public arena has expanded exponentially. At that time schools were mostly private or parochial; now public schools and universities are the norm. At that time, except in cities and towns, roads were relatively few and often privately owned; today public streets, roads and highways interlace the nation. Add to this public parks, theaters, coliseums, museums, office buildings, national forests, public radio and television, and a host of other publicly-owned entities, and we find that the public arena has become the primary arena for the exchange of ideas.

The marketplace of ideas involves competition among many ideas -- some religious, some secular, some a combination of both. Sometimes religious ideas compete with other religious ideas; sometimes they compete with secular ideas. Sometimes they involve alternative explanations, approaches, or solutions to the same underlying problems.

If government gives secular expression full access to the public arena, but restricts or prohibits religious expression in the public arena, then government has placed religious ideas at a distinct disadvantage. This has always been true, but the more the public arena expands, the more severe this disadvantage becomes.

A policy that allows display of purely secular symbols on public highways but prohibits display of a cross, constitutes the hostility to religion Justice Clark warned of in *Abington Township v. Schempp*, 374 U.S. 203, 294 (1963), when he said, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."

The UHPA Memorials may or may not be religious expression, but they are a form of expression. We respectfully urge the Court not to interpret the First Amendment in a way that places certain forms of expression at a disadvantage simply because that expression employs symbols that have a religious origin or meaning for someone.

IV. IN THE SPIRIT OF TOLERANCE, THE COURT SHOULD BALANCE THE INTERESTS OF THE MAJORITY AND THE INTERESTS OF THE MINORITY.

As James Madison made clear in *Federalist No. 10,* constitutional government is concerned about balancing the interests of the majority and the interests of the minority. Nowhere is that more important and more difficult than in First Amendment jurisprudence.

In matters concerning public exercises such as prayer, the majority must be especially careful to respect and protect the interests of the minority. That respect and protection might take the form of abstaining from such exercises or allowing the minority to leave the room or remain silent.

In matters concerning the public display of symbols, the balance shifts somewhat toward the interests of the majority and the minority must respect each other. True tolerance does not consist of shutting down any public display with which someone disagrees, but rather of learning to respect the convictions of those who want to display it. The trial court wisely noted that "An informed observer in this case would be more reasonable, neutral, and tolerant than the *Friedman [v. Board of County Commissioners,* 781 F.2d 777 (10th Cir. 1985)] observer." *American Atheists,* 528 F. Supp.2d at 1258-59.

This is a case involving public display of a Memorial, part of which arguably has a religious origin and meaning. Those who do not agree with the

meaning some attach to the cross, should nevertheless respect the right of the Utah Highway Patrol Association to honor fallen troopers and the right of those troopers' loved ones to honor and remember them in the way that is most meaningful to them.[10] The First Amendment should be a shield to protect freedom of expression, not a sword to censor and silence expressions with which one does not agree.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn*., 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. The proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be affirmed, but its rationale should be strengthened to comport with the text of the Establishment Clause of the First Amendment.

[10] See Richard J. Neuhaus, *The Naked Public Square* 2 ed. (Eerdmans1984, 1988).

Dated this 24th day of October, 2008.

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_____
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The undersigned hereby certifies that a true and correct copy of this *Brief of* Amicus Curiae has been served on counsel for each party via first-class U.S. mail, as well as one electronic copy of the *Brief of* Amicus Curiae by electronic mail. Also, an original and seven (7) copies of this *Brief of* Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 10th Circuit, by first-class U.S. Mail, on this 24th day of October, 2008.

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