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In the
Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,
Petitioner,

v.

AMERICAN ATHEISTS, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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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 following questions warrant review because the Tenth Circuit's decision perpetuates a circuit split and conflicts with this Court's precedent:

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?

PARTIES TO THE PROCEEDING

Petitioner is the Utah Highway Patrol Association. This private Association, which created, funded, owns, and maintains the challenged memorials, was a defendant-intervenor in the district court and an appellee in the circuit court.

Additional defendants in the district court and appellees in the circuit court include the following state officials: Colonel Lance Davenport (who replaced Colonel Scott T. Duncan), Superintendent of the Utah Highway Patrol; John Njord, Executive Director of the Utah Department of Transportation; and F. Keith Stepan, Director of the Division of Facilities Construction & Management in the Department of Administrative Services.

Respondents are American Atheists, Inc., a Texas, nonprofit corporation; R. Andrews; S. Clark; and M. Rivers. They were plaintiffs in the district court and appellants in the circuit court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Utah Highway Patrol Association is a private, nonreligious, fraternal nonprofit Utah corporation, exempt from taxation under I.R.S. § 501(c)(8), with a mission to support highway-patrol officers and their families. It does not have parent companies and is not publicly held.

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STATEMENT OF JURISDICTION

On August 18, 2010, the Tenth Circuit issued its original panel decision and entered judgment. Petitioner then sought rehearing en banc, and the state officials requested rehearing with suggestion for rehearing en banc. On December 20, 2010, the Tenth Circuit granted in part the state officials' petition for rehearing, amended the panel decision by changing one word, and denied the petitions for rehearing en banc over four dissenting votes. On March 8, 2011, this Court extended the time to petition for a writ of certiorari until April 20, 2011. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case raises the question whether the Establishment Clause of the United States Constitution demands that a private, nonreligious organization of public-safety officers remove from public and private land roadside memorial crosses honoring fallen colleagues.

A. Factual Background

The Utah Highway Patrol Association (the "Association") is a private, nonreligious, fraternal nonprofit corporation with a mission to support Utah Highway Patrol ("UHP") officers and their families. App. 42a ¶¶ 1-2. In 1998, the tragic ambush and killing of a young officer prompted the Association to begin commemorating fallen troopers, by placing the first of 13 white roadside memorial crosses on public and private property at or near locations where troopers have been mortally injured. App. 42a-44a ¶¶ 4-5, 12; App. 6a-7a.

The memorials are privately originated, financed, administered, and maintained. The Association selected and designed the memorials without government input, App. 45a ¶ 18; erected the memorials without government funding, App. 45a ¶ 17; App. 9a; retains ownership of the memorials, App. 9a; and maintains the memorials without government resources, App. 45a ¶ 17; App. 9a.

The Association erected the memorials to further three purposes: to memorialize troopers who died in the line of duty; to remind the public of those troopers' service and ultimate sacrifice; and to prompt motorists to drive safely and thus abate further highway casualties. App. 45a ¶ 19; App. 7a. To achieve these goals, the Association wanted a memorial symbol that would simultaneously convey to passing motorists that a trooper died while serving near this spot, that the trooper will always be honored and remembered, that the people of Utah are indebted and grateful, and that safety is a paramount concern on the roads. App. 59a.

The Association chose to use a Latin cross—a figure with a shorter horizontal bar intersecting a longer vertical bar above its midpoint—because in this context the cross, unlike any other marker, communicates to motorists passing at highway speeds the "simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety." App. 45a-46a ¶¶ 20, 26; App. 7a-8a. Roadside crosses are widely used to memorialize, and generally understood to represent, traffic-related and other

roadside deaths. App. 34a; App. 110a; *infra* n.11. And by evoking thoughts of highway fatalities, those crosses remind motorists of roadway dangers and urge driver caution. App. 46a ¶ 26. It is undisputed that the Association chose the cross symbol for these reasons; it did not intend to convey a message of religious support or endorsement. App. 46a ¶ 25.

The Association designed the remaining features of the memorials so that they would "conspicuously and immediately convey the death of a Utah Trooper to observers that drive by [them]." App. 46a ¶ 23. Each memorial thus prominently identifies the deceased as a Utah trooper, by displaying the fallen trooper's name, trooper designation, rank, and badge number on the crossbar, and the UHP logo directly beneath that. App. 44a ¶ 15; App. 6a. The Association wants passing motorists to see this biographical information, so the UHP logo is 12 inches tall by 16 inches wide, App 46a ¶ 24; App. 6a; and the personal information—which spans the entire six-foot crossbar of a 12-foot-tall cross, App. 6a—is written in approximately 8-inch-tall, black, capitalized lettering, "the same size text used for posting the words 'SPEED LIMIT' alongside major interstate highways," App. 98a. Directly beneath the UHP logo, similar large, black lettering indicates the year that the trooper died. App. 44a ¶ 15; App. 6a. Below the year of death, a plaque displays a picture of the deceased trooper and recounts his public service and tragic death. App. 44a ¶ 14; App. 6a-7a.[1]

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[1] Pictures of the memorials are in the appendix at App. 39a-40a, 98a.

Each memorial "cross, near the highway, with the inscriptions, symbols and plaques mentioned above, conveys the unmistakable message that a Utah Highway Patrolman died near this spot while serving the people of Utah." App. 8a. Plaintiffs indeed admitted that the Association's memorials communicate this commemorative message to them. App. 114a-116a; App. 118a-119a; App. 121a.

Surviving family members approved each memorial, App. 43a ¶ 7; App. 8a; and they have never objected to the use of the roadside cross memorial or requested that the Association commemorate their loved one using a different symbol, App. 8a.

The Association placed the memorials near the site where each trooper had been mortally injured, in a spot visible to passing motorists, and at a location safe for the public to stop and view. App. 44a, 47a ¶¶ 12, 13, 35; App. 8a. Initially, the Association placed three memorials on private property, but those were too far from the roadways and thus not easily seen by passing motorists. App. 9a. The Association then sought and received permission from the Utah Department of Transportation ("UDOT") to erect memorials on public property closer to the roadways. App. 9a. UDOT, in turn, established a procedure for the Association to obtain the State's consent for future memorials. App. 43a-44a ¶ 10.

While the State allowed the Association to erect its memorials on public land, UDOT expressly

declined to endorse those memorials, noting that it "neither approves [n]or disapproves the memorial marker[s]." App. 9a; App. 128a. UDOT also disclaimed ownership of the memorials, denied any legal liability that might result from them, and renounced responsibility to defend their content (particularly, their Latin-cross shape) or placement on public land. App. 128a-129a.

Soon after this lawsuit began, the Utah Legislature issued a resolution supporting the Association's memorials. App. 107a-112a. That resolution acknowledged that "a white cross has become widely accepted as a symbol of a death, and not a religious symbol, when placed along a highway" and that the memorials' cross shape "was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers." App. 110a-111a. The Legislature approved a nearly identical resolution in March 2011. *See* H.C.R. 16, 2011 Leg., Gen. Sess. (Utah 2011).

In Utah, Christians who revere the cross as a symbol of their religion constitute only 18% of the population. App. 37a. The remainder of the State's population is divided primarily between the 57% of citizens who belong to The Church of Jesus Christ of Latter-Day Saints, a denomination that does not use the cross as a symbol of its faith, App. 47a ¶¶ 32-33; App. 23a; and the 20% of citizens who profess no religious affiliation or adhere to other religious faiths that do not venerate the cross as a religious symbol, App. 67a n.7.

B. Procedural Background

On December 1, 2005, Plaintiffs filed this suit against various state officials in their individual and official capacities under 42 U.S.C. § 1983. App. 49a. Plaintiffs' original complaint alleged two causes of action: first, that the State violated the Establishment Clause of the First Amendment to the United States Constitution (and the comparable provision of the Utah Constitution) by allowing a private organization—the Association—to erect roadside memorial crosses on public property and by not objecting to the Association's inclusion of the UHP logo on those memorials; and second, that the State favored the Association's expression and thus violated the Free Expression Clause of the First Amendment by allowing the Association to post its memorials on public property. App. 49a. After learning that three of the challenged memorials are located on private property, Plaintiffs nevertheless insisted that those memorials also violate the Establishment Clause because they display the UHP logo.

Soon after Plaintiffs commenced this action, the Association moved to intervene to defend its memorials. App. 49a. The district court granted that request, allowing the Association to intervene as of right. App. 49a. Plaintiffs then withdrew their Free Expression claim. App. 49a n.1.

All parties filed cross-motions for summary judgment. App. 49a-50a. On November 20, 2007, the district court issued its decision, finding that the Association's memorials did not violate the

Establishment Clause or the Utah Constitution. App. 74a.

The district court applied the endorsement version of the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 51a-54a. The court first held that "the undisputed material facts" show a "secular purpose"—"that of honoring UHP troopers who died during their term of service." App. 58a-59a. The court next considered the effect prong, concluding that a reasonable observer "would not view the memorial crosses as a government endorsement of religion" because "Americans have used [the cross symbol] to honor the place[s] where . . . citizens," "regardless of their religious belief," have "had fatal accidents." App. 66a-67a. And finally, given the absence of any religious purpose or entity in this case, the court easily rejected any suggestion of "excessive entanglement [between] church and state." App. 73a-74a.

The district court acknowledged the Association's argument that the memorials are not government speech, but its own private speech. App. 75a-76a n.10. Yet the court determined that it need not address that issue because it had already held that the State's "limited participation in [the Association's] program" did not violate the Establishment Clause. App. 75a-76a n.10.

Plaintiffs timely appealed to the Tenth Circuit, which reversed the district court's decision and ordered judgment in Plaintiffs' favor. App. 38a. The Tenth Circuit began by relying on *Pleasant Grove*

City v. Summum, 129 S. Ct. 1125 (2009), to characterize the Association's memorials—those on public land as well as those on private land—as official government speech rather than the Association's private speech. App. 14a-18a.[2]

The Tenth Circuit then addressed the question of which Establishment Clause test to apply. App. 19a-20a. After noting its opinion that *Van Orden v. Perry*, 545 U.S. 677 (2005), has generated "confusion" on that issue, App. 20a, the court determined that it must apply the *Lemon*/Endorsement test,[3] App. 19a-20a. The Tenth Circuit then agreed with the district court that the purpose for "erecting these memorials is only secular: to honor fallen troopers and to promote safety on the State's highways." App. 23a. The circuit court nevertheless "conclude[d] that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity" because (1) the memorials "stand[] alone" on "public land" in the shape of a cross, (2) the cross is "the preeminent symbol of Christianity," and (3) the memorials include the UHP logo. App. 29a. That court thus found an Establishment Clause violation.

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[2] When characterizing the memorials as government speech, the Tenth Circuit considered all the memorials collectively; it did not distinguish the displays on public land from those on private property, *see* App. 14a-18a; and thus its holding on this issue necessarily applies to the memorials on private land.

[3] The Tenth Circuit used—and we, too, have adopted—the phrase "*Lemon*/Endorsement test" to describe the *Lemon* test as modified by the endorsement concept discussed in this Court's subsequent jurisprudence.

The Association filed a petition for rehearing en banc, and the State filed a petition for rehearing with suggestion for rehearing en banc. App. 79a. On December 20, 2010, the court denied those petitions, except it granted in part the State's request for panel rehearing and amended one word in its original decision. App. 79a.[4] Four of the nine judges eligible to vote on rehearing the case en banc—Judges Kelly, O'Brien, Tymkovich, and Gorsuch—forcefully dissented from the denial of rehearing en banc. App. 80a.

Judge Kelly's dissent, joined by all the dissenting judges, highlighted several flaws with the panel's decision. To begin, the panel's opinion conflicted with this Court's precedent by focusing excessively on the cross shape of the Association's memorials and "effectively presuming that religious symbols on public property are unconstitutional." App. 81a, 84a-86a. Moreover, the panel's "reasonable observer" reached grossly "unreasonable" conclusions because, contrary to this Court's precedent, he failed to consider the memorials' physical characteristics, context, and history. App. 86a-92a. And the panel's decision conflicted with

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[4] The original decision stated that "there is no evidence in the record that the cross has been *universally* embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death." *See* App. 32a (emphasis added); App. 79a. The court's amended decision substituted the word "widely" for "universally," *see* App. 79a, but did not acknowledge that ample evidence in the factual record (and information presented by amici) shows that crosses have been widely used as burial markers and memorials, *see, e.g.*, App. 45a-46a ¶¶ 21-22; App. 65a-67a; App. 123a-126a; *infra* n.12.

this Court's precedent by "requir[ing] the government to strip religious symbols of all religious significance as a condition precedent for display on public property." App. 92a-93a. This error was particularly "remarkable" because just last year a plurality of this Court in *Salazar v. Buono*, 130 S. Ct. 1803 (2010), wrote that "*[a] cross by the side of a public highway marking . . . the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs.*" App. 94a (quoting *Buono*, 130 S. Ct. at 1818) (emphasis added).

Judge Gorsuch authored a second dissent, which was joined by Judge Kelly. Citing decisions from this Court and a circuit split, Judge Gorsuch noted that it "is far from clear" whether the "reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges" to passive public displays. App. 100a. That test, Judge Gorsuch noted, "rests on [the] uncertain premise" that courts may "invalidate not only . . . laws and policies that *actually* respect the establishment of religion, but also laws and policies [that] a reasonable hypothetical observer could *think* do so." App. 101a (quotation marks, alteration, and citation omitted). But even assuming that the endorsement test was the appropriate inquiry, Judge Gorsuch emphasized that the panel's observer—a hopelessly "[b]iased, selective, [and] vision impaired" chap—conflicted with the well-informed "reasonable observer of Justice O'Connor's description." App. 98a-99a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit held that the Establishment Clause forbids a private organization from commemorating the location of a trooper's death with a roadside memorial cross prominently identifying the deceased as an officer killed in the line of duty. This Court should grant the writ and reverse.

The decision below reflects the deep and seemingly intractable doctrinal confusion that has plagued the lower courts in the wake of *Van Orden*. This confusion has generated a three-way circuit split and lower-court disarray regarding the proper test for evaluating Establishment Clause challenges to passive displays on government property. This Court should clarify this oft-litigated area of the law by applying the analytical approach of the *Van Orden* plurality, as informed by *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Moreover, the Tenth Circuit's decision conflicts with this Court's Establishment Clause precedent. The Tenth Circuit invalidated the challenged roadside memorials by (1) fixating on their cross shape, (2) ignoring most of their features, history, and context, and (3) opining that the Establishment Clause forbids such displays unless the overall setting nullifies any religious significance. Yet this Court in *Lynch*, *Van Orden*, and *Buono* (among other cases discussed below) has denounced each of these analytical missteps. In short, the Tenth Circuit's approach, if allowed to stand, will prohibit the government from accommodating public displays of

religious symbols, forbid a widely embraced means of commemorating fallen heroes on public property, and manifest an unconstitutional hostility toward religion.

Finally, by misclassifying the Association's memorials as government speech, the Tenth Circuit overextended *Summum* and needlessly confused the government-speech doctrine. The decision below stretched *Summum* far beyond its reasonable bounds, declaring that all the Association's memorials are government speech even though, unlike in *Summum*, the State here expressly disclaimed the memorials as its own and some of those displays are not even on public land. This Court, therefore, should grant the writ to demonstrate *Summum*'s proper scope and bring clarity to the government-speech doctrine.

I. This Court Should Grant the Writ Because the Circuits Have Split Three Ways in the Wake of *Van Orden* Concerning the Proper Test for Analyzing the Constitutionality of Passive Displays on Public Property, and this Court's Involvement Is Necessary to Restore Nationwide Uniformity.

A. A Three-Way Circuit Split Exists: The Eighth Circuit Follows the *Van Orden* Plurality; the Fifth and Ninth Circuits Apply Justice Breyer's *Van Orden* Concurrence; and the Second, Sixth, and Tenth Circuits Adhere to the *Lemon*/Endorsement Test.

The Tenth Circuit opined that *Van Orden* generated "confusion" regarding the standard governing Establishment Clause challenges to passive displays on government property. App. 20a. In *Van Orden*, a majority of this Court—the four-justice plurality and Justice Breyer's concurrence—refused to apply the *Lemon*/Endorsement test when analyzing a passive religious display on government land. The plurality's analysis instead considered "the nature of the [display]," "the strong role played by religion and religious traditions throughout our Nation's history," and the Establishment Clause's core concern that "governmental intervention in religious matters [might] itself endanger religious freedom." *Van Orden*, 545 U.S. at 683, 686. Justice Breyer's concurrence, in contrast, emphasized the exercise of "legal judgment" in light of "the context of the display." *Id.* at 700-01.

Subsequently, the appellate courts have split three ways on how to analyze passive displays on public property.

First, the Eighth Circuit, sitting en banc, refused to apply the *Lemon*/Endorsement test to a religious display, opting instead for the *Van Orden* plurality's historically based approach. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 776-77, 778 n.8 (8th Cir. 2005);[5] *cf. Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 402-05 (4th Cir. 2005) (Williams, J.) (analyzing an Establishment Clause challenge to the words "under God" in the Pledge of Allegiance by looking to our historical "recognition of religion" in public life).

Second, the Fifth and Ninth Circuits followed Justice Breyer's contextual legal analysis when analyzing passive displays. *See Staley v. Harris County*, 461 F.3d 504, 511-12, 511 n.8 (5th Cir. 2006); *Card v. City of Everett*, 520 F.3d 1009, 1016-17 (9th Cir. 2008). The Ninth Circuit, in particular, applied Justice Breyer's framework to "religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. But further confounding the issue, that court recently confessed bewilderment over which Establishment Clause test to use when analyzing a memorial cross on public land, ultimately asserting

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[5] While the Eighth Circuit mentioned Justice Breyer's concurrence in its recitation of the *Van Orden* decision, its analysis, like that of the *Van Orden* plurality, focused almost exclusively on "the role of religion in our Nation's heritage." *See ACLU Nebraska Found.*, 419 F.3d at 776-77.

that it "need not resolve th[at] issue" because it would reach the same result under either Justice Breyer's analysis or the *Lemon*/Endorsement test. *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011).

Third, the Second, Sixth, and Tenth Circuits have not followed the *Van Orden* plurality or concurrence, adhering instead to the *Lemon*/Endorsement test. *See Skoros v. City of New York*, 437 F.3d 1, 16-18, 17 n.13 (2d Cir. 2006); *ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); App. 20a.[6]

The circuits are thus in disarray over which test to apply when analyzing Establishment Clause challenges to displays on public property. This Court should grant the writ to bring consistency to this significant and oft-litigated area of constitutional law.

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[6] The *Lemon*/Endorsement test is famously criticized, with the majority of currently sitting justices on record as questioning the application of endorsement analysis to religious displays on public property. *See, e.g., Buono*, 130 S. Ct. at 1819-20 (plurality) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) (reiterating past doubts about the "reasonable observer" standard and its "workability"); *Van Orden*, 545 U.S. at 699-700 (Breyer, J., concurring); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality) (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668-77 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

B. The Analytical Model of the *Van Orden* Plurality, as Informed by the *Lynch* Decision, Is the Proper Approach for Analyzing Passive Displays on Public Property.

This case illustrates the pressing need to establish a nationwide standard for analyzing passive displays on public land. The Tenth Circuit's *Lemon*/Endorsement test rests on the premise that a display violates the Establishment Clause simply because a "hypothetical observer could *think*"—even "*mistakenly*"—that it "respect[s] the establishment of religion." App. 101a-102a. Such an expansive standard produces, as this case illustrates, "remarkable" and unjust "use[s] of the 'awesome power' of judicial review." App. 102a. The more reasoned, historically justifiable approach, as the Eighth Circuit has recognized, is to follow the *Van Orden* plurality—a framework informed by the principles expressed in *Lynch*, one of this Court's original display cases—and thereby target the Establishment Clause's reach to those displays that threaten the core concerns animating that constitutional provision.

This analysis focuses on the nature of the display, "the strong role played by religion and religious traditions throughout our Nation's history," and the Establishment Clause's core concern for the potential harm to "religious freedom" created by "governmental intervention in religious matters." *Van Orden*, 545 U.S. at 683, 686. Our history, in short, is replete with official governmental acknowledgments "of the role of religion in American

life," *id.* at 686, evidenced in countless displays—including the Ten Commandments, various religious messages, Biblical citations, and even Latin crosses—on public land throughout our Nation. *Id.* at 688-90. The Association's memorials, like the overseas military cemeteries lined with Latin-cross headstones, *see Buono*, 130 S. Ct. at 1822 (Alito, J., concurring), are an outgrowth of—and directly in line with—our government's extensive tradition of acknowledging religion in public life.

The relevance of history, however, is "not confined" to "whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part). Our Nation's historical practices instruct courts concerning the proper meaning and application of the Establishment Clause. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Lynch*, 465 U.S. at 678. History also illuminates the Clause's "ultimate constitutional objective," *Lynch*, 465 U.S. at 678; which is to protect "religious freedom" from "governmental intervention in religious matters," *Van Orden*, 545 U.S. at 683 (plurality); and prohibit a government-sponsored "ecclesiastical establishment," *Lynch*, 465 U.S. at 678. The Establishment Clause thus forbids only government conduct that, "in reality," violates this objective, "or tends to do so." *Id.* The lesson of history, then, is that the Constitution "permit[s] not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at

670 (Kennedy, J., concurring in judgment in part and dissenting in part); *see also Marsh*, 463 U.S. at 791; *Lynch*, 465 U.S. at 681-82.

The State's limited accommodation of the Association's memorials undoubtedly comports with the Establishment Clause under this analytical framework. The State has not intervened in religious matters or jeopardized religious freedom in any way: it has not forced Plaintiffs to revere the memorials, participate in any religious activity, or contribute to religion. *See Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting). Neither do these roadside memorials "pose a real danger of establishment of a state church," *Lynch*, 465 U.S. at 686; for the Association is a nonreligious organization, and no religious entity is remotely involved here.[7]

This Court should grant the writ and adopt the *Van Orden/Lynch* approach to bring analytical

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[7] Under this analytical framework, a passive display on public property violates the Establishment Clause if it is part of "an obvious effort to proselytize on behalf of a particular religion," *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part), or if its sole "significance" is to advance "religion," *Van Orden*, 545 U.S. at 691-92 (plurality). But here, the challenged memorials do not come close to violating those standards because the nonreligious Association erected these passive memorials, and the State permitted their placement on public land, for the secular purposes of promoting highway safety and commemorating fallen troopers. App. 23a-24a, 26a-27a.

clarity and a uniform standard to this muddled area of constitutional jurisprudence.

II. This Court Should Grant the Writ Because the Tenth Circuit's Endorsement Analysis Conflicts with this Court's Precedent, and this Court's Review Is Needed to Restore Consistency and Coherence.

The Tenth Circuit's endorsement analysis, including its hypothetical "observer," conflicts with this Court's precedent. First, the decision below fixated on the religious connotation of the memorials and presumed, before considering all their features and context, that their presence on public property communicated religious endorsement. Second, the Tenth Circuit ruled that the memorials could not survive Establishment Clause scrutiny unless the overall setting *nullified* any religious significance. Third, the Tenth Circuit's hypothetical "observer" either ignored or spurned critical information that would have been considered by the well-informed reasonable observer discussed in this Court's endorsement cases. These errors illustrate a significant risk of inconsistency among the circuits because, as Judge Gorsuch recognized, the Tenth Circuit "has now *repeatedly* misapplied the 'reasonable observer' test, and it is apparently destined to continue doing so until [it is] told to stop." App. 96a.

A. The Tenth Circuit's Fixation on the Religious Connotation of the Memorials' Cross Shape Conflicts with this Court's Precedent.

The Tenth Circuit made its initial determination of religious endorsement by noting only (1) that the memorials "stand[] alone" on "public land" in the shape of a cross, (2) that the cross is "the preeminent symbol of Christianity," and (3) that the memorials contain the UHP logo. App. 29a. While the court later considered *a few* other features and *some* context of the memorials, it did so only to determine whether those factors "diminish[ed]" or "reduce[d]" its initial assessment of religious endorsement. App. 29a ("diminish"); App. 31a ("reduce"); App. 38a ("diminish"). It was therefore an obsessive focus on the memorials' cross shape that led the court to invalidate them. But that myopic analysis conflicts with this Court's decisions in *Lynch* and *Buono*.

The *Lynch* Court specifically warned against "[f]ocus[ing] exclusively on the religious component" of any display because doing so "would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Instead, "the focus of [the] inquiry," the *Lynch* Court said, "must be on the [religious symbol] in [its] context." *Id.* at 679.

The *Buono* plurality similarly rebuked a lower court for "concentrat[ing] solely on the religious aspects of [a] cross [memorial], divorced from its background and context." 130 S. Ct. at 1820. Instead, the proper inquiry is to assess "the message conveyed by the cross" memorial "in the context of

all relevant factors." *Id.*[8] That broader, contextualized inquiry shows that a Latin cross "evokes far more than religion," for it "is not merely a reaffirmation of Christian beliefs," but "a symbol often used to honor and respect . . . heroic acts, noble contributions, and patient striving." *Id.* And even the lead dissenting opinion in *Buono*—authored by Justice Stevens and joined by Justices Ginsburg and Sotomayor—recognized that the "use of a religious symbol in a . . . memorial" would not "indicate government endorsement of a religious message" if the monument "taken as a whole" "may be understood to convey a primarily nonreligious message." *Id.* at 1835 n.7. The memorials challenged here satisfy constitutional scrutiny even under this dissenting analysis because, when viewed in context, their extensive biographical information, UHP logo, and roadside placement convey the nonreligious messages of individualized commemoration and roadway safety.

Notably, the Tenth Circuit's fixation on the religious connotation of the cross shape effectively created a "presumption" against the display of crosses—or other religious symbols—on public property. *See* App. 84a-86a; App. 96a-97a. But such a presumption conflicts with this Court's precedent,

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[8] Justice Breyer's concurrence in *Van Orden* confirmed that the analysis must not fixate on a display's religious connotation. While acknowledging that "the [Ten] Commandments' text undeniably has a religious message," he stressed that "focusing on th[at] text . . . alone cannot conclusively resolve th[e] case." *Van Orden*, 545 U.S. at 700-01. "Rather, to determine the message that the text . . . conveys, [the court] must . . . consider the context of the display." *Id.* at 701.

as evidenced by the three separate occasions that this Court refused Justice Stevens's attempts to create a "presumption against the display of religious symbols on public property." *See Allegheny*, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part); *Pinette*, 515 U.S. at 797 (Stevens, J., dissenting); *Van Orden*, 545 U.S. at 708, 721 (2005) (Stevens, J., dissenting). It also collides directly with the *Buono* plurality's acknowledgement that the Establishment Clause "does not require eradication of all religious symbols in the public realm," such as "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished." 130 S. Ct. at 1818.

The Tenth Circuit's excessive focus on the memorials' religious connotation conflicts not only with this Court's precedent, but also with the other circuits that have followed this Court's guidance. *See Murray v. City of Austin*, 947 F.2d 147, 154-55 (5th Cir. 1991) ("[T]he Supreme Court has rejected focusing exclusively on the religious component of a challenged [display]"); *City of Plattsmouth*, 419 F.3d at 776 ("[F]ocusing on the religious nature of the message alone cannot resolve an Establishment Clause case"); *Mercer County*, 432 F.3d at 639 (similar). Maintaining consistency among the circuits on this issue provides another reason for granting the writ.

B. The Tenth Circuit's Insistence That the Memorials' Overall Context Must Nullify Any Religious Significance Conflicts with this Court's Precedent.

The Tenth Circuit insisted that the memorials could not survive constitutional scrutiny unless their overall context "nullifie[d]" any potentially religious content, App. 32a, and rendered the Latin-cross shape a purely "*secular* symbol" in context, App. 34a. But the Tenth Circuit's nullification standard conflicts with this Court's repeated acknowledgment that the Establishment Clause permits the government to "accommodate" the public display of religious symbols. *See Lynch*, 465 U.S. at 673; *Van Orden*, 545 U.S. at 684, 684 n.3 (plurality); *Buono*, 130 S. Ct. at 1818-19 (plurality).

Indeed, the Tenth Circuit's nullification standard conflicts with what all nine justices in *Van Orden* recognized: that the Ten Commandments monument—an undeniably religious display—need not be stripped of its religious significance to exist on public property. "Simply having religious content" in a display, the plurality noted, "does not run afoul of the Establishment Clause," *Van Orden*, 545 U.S. at 690; and therefore the plurality upheld the monument despite its "religious significance," *id.* Justice Breyer likewise acknowledged that the display "undeniably ha[d] a religious message," while affirming the validity of that display on public property. *Id.* at 700-01. And even the dissenting justices acknowledged that an "obviously religious text" and monument does not offend the endorsement test if, as is true of the Association's

memorials, the setting "indicates that the [displays were] not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others." *Id.* at 737 (Souter, J., dissenting); *see also McCreary County*, 545 U.S. at 868-69.

Neither did the *Lynch* Court require that a profoundly religious crèche—a display depicting the hallowed birth of Christ—forfeit its religious meaning; nor did this Court there demand that the crèche represent a purely secular symbol of Christmas. *Cf.* App. 32a, 34a (requiring the cross here to be a "*generic*" or "*secular*" "symbol of death"). The majority instead, after recognizing that the City's crèche retained a "special" religious "meaning" for adherents of the Christian faith, *Lynch*, 465 U.S. at 685, upheld that display "notwithstanding [its] religious significance," *id.* at 687.[9] Similarly, Justice O'Connor, architect of the endorsement test, repeatedly held that her test does not demand that "the religious [or] sectarian significance" of a religious symbol be "neutralized by the setting." *Id.* at 692; *see also Allegheny*, 492 U.S. at 635 (O'Connor, J., concurring) (same).

Buono further illustrates the conflict. The plurality acknowledged that even though the cross is a "Christian symbol" with religious aspects, *Buono*,

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[9] In fact, *Lynch* found that the Establishment Clause is not offended even if the symbol causes "some observers [to] perceive that the [government] has aligned itself with [a particular] faith," because a passive display may "advance religion" in this "indirect" sense. 465 U.S. at 683.

130 S. Ct. at 1816, it is also a symbol "used to honor and respect . . . heroic acts," *id.* at 1820, like commemorating "the place where a state trooper perished," *id.* at 1818. Notably, the plurality did not require that a cross, when used in a commemorative context, shed all religious connotations. To the contrary, Justice Alito's concurrence recognized that the cross memorial "convey[ed] at least two significantly different messages" to its viewers, one religious and one commemorative. *Id.* at 1822.

Indeed, the cross symbol communicates nonreligious messages in many contexts that no other symbol can. This case plainly illustrates that point: a person viewing a stone or square plaque by the side of the road might think that it marks something, but would not understand its significance without close inspection; a roadside cross, however, immediately communicates to passing motorists that a tragic "death occurred here." App. 133a-134a ¶¶ 15-16. Thus, striking down these memorials because they *might* communicate religious significance to *some* observers ultimately deprives the Association—and, more broadly, our collective society—of a widespread communicative symbol, with no adequate substitute to fill the void. *See Allegheny*, 492 U.S. at 618 (Blackmun, J.) (discussing the "absence of a more secular alternative symbol").

Simply put, the Tenth Circuit, by requiring that the Association nullify any potentially religious significance of the memorials, exhibited a "pervasive devotion to the secular" and an "active[] hostility to the religious" in violation of this Court's precedent.

See Van Orden, 545 U.S. at 699 (Breyer, J., concurring) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). As this Court recently observed, monuments are "interpreted by different observers[] in a variety of ways," *Summum*, 129 S. Ct. at 1135; therefore, requiring that displays be rid of all religious meaning condemns every monument having even tangentially religious significance. For if the Association's memorials—with their admittedly nonreligious purposes and plainly discernable nonreligious messages—cannot withstand scrutiny, the Tenth Circuit's approach, left unchecked, will cause the widespread "eradication of all religious symbols in the public realm," a result contrary to this Court's precedent. *See Buono*, 130 S. Ct. at 1818 (plurality).

C. The Tenth Circuit's Use of a Selectively Informed Observer Conflicts with this Court's Precedent.

The Tenth Circuit considered the perspective of a selectively informed viewer when finding an endorsement of religion here. But in doing so, its analysis broke sharply with this Court's precedent analyzing displays through the eyes of a well-informed observer.

The endorsement test's hypothetical observer is an "unusually informed" onlooker who "knows all the facts and circumstances surrounding a challenged display." *Van Orden*, 545 U.S. at 696 (Thomas, J., concurring); *accord Buono*, 130 S. Ct. at 1819-20 (plurality). He is fully cognizant of the display's

physical features, including the words written on it. *See Allegheny*, 492 U.S. at 598 (noting that the crèche "use[d] words" to make its "meaning unmistakably clear"); *id.* at 619 (considering a display's accompanying sign); *id.* at 635 (O'Connor, J., concurring) (same). But he is far "more informed than the casual passerby," and thus his knowledge is not "limited to the information gleaned simply from viewing the challenged display." *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring). In his mind are the complete "history and context" of the display and the local community. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); *McCreary County*, 545 U.S. at 866. And so imbedded is this information that he cannot "turn a blind eye" to it. *McCreary County*, 545 U.S. at 866.

The Tenth Circuit, in contrast, imbued its observer with very few facts. Concerning the physical features of the memorials, he knew only that they are in the shape of a cross, that the cross is "the preeminent symbol of Christianity," and that the memorials include the UHP logo. App. 29a. But this Court's reasonable observer would have also considered the words written on the memorials, *see Allegheny*, 492 U.S. at 598, 619, 635; which include the fallen trooper's name, trooper designation, rank, and badge number written in large, black, capitalized lettering across a six-foot crossbar, the year of death written beneath it, and the plaque recounting the trooper's service and tragic death, App. 44a ¶¶ 14, 15; App. 6a-7a. These words, particularly those written in large, black letters approximating the size used to write "SPEED

LIMIT" on official highway signs, unmistakably communicate to any reasonably informed observer that the cross is a memorial for a fallen trooper. Also notable is that *all* the words on the memorials reinforce a commemorative message, and none even remotely suggests a religious one.[10]

Furthermore, the Tenth Circuit's observer generally ignored the history surrounding the memorials and did not give weight to their undisputedly nonreligious purpose. App. 26a-27a; App. 27a n.11. This error was critical, as the history here would have dispelled any notion of religious endorsement. It is undisputed that the Association—a private, nonreligious organization—erected the roadside memorial crosses for the nonreligious purposes of commemorating fallen troopers and promoting highway safety and driver caution. App. 45a-46a ¶¶ 19, 25; App. 23a. Indeed, the Utah Legislature confirmed the absence of any religious purpose. App. 111a. The Association selected the cross shape because it is the only symbol, given its historical use, that could simultaneously communicate messages of roadside death, commemoration, and highway safety. App. 45a ¶ 20; App. 7a-8a. And notably, the State's role in the Association's memorials is negligible: it did

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[10] Even if, as the Tenth Circuit asserted, the reasonable observer is limited to what a passing motorist driving 55-plus miles per hour could learn, *see* App. 29a-30a—a premise at odds with this Court's precedent, *see Allegheny*, 492 U.S. at 598, 619, 635—the Tenth Circuit's assumption that a passing motorist could discern the 12-inch by 16-inch UHP logo, while missing the 8-inch by 6-*foot* written message on the crossbar, lacks both evidentiary and logical foundation, *see* App. 29a-30a.

not conceive of, design, erect, fund, or maintain the memorials, App. 45a ¶¶ 17, 18; App. 9a; it expressly disclaimed approval of, ownership over, or responsibility for the memorials, App. 9a; App. 128a-129a; it merely allowed the Association to place some of its memorials on public property and acquiesced in the inclusion of the UHP logo. A reasonable observer equipped with this information could not have reached the Tenth Circuit's errant conclusion of religious endorsement.

In addition to ignoring the relevant historical background, the Tenth Circuit's observer also overlooked critical aspects of the memorials' context and roadside placement. The use of roadside crosses to mark the location of a highway death is widespread, *see* App. 34a; App. 110a;[11] and thus the cross shape of the memorials communicates a commemorative message to the reasonable observer; indeed, Plaintiffs admit that the memorials conveyed this very message to them, App. 114a-116a; App. 118a-119a; App. 121a. And the cross shape, by evoking thoughts of roadway fatalities, reminds the reasonable motorist of highway dangers and encourages him to drive safely. App. 46a ¶ 26.[12]

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[11] *See* Holly Everett, *Roadside Crosses in Contemporary Memorial Culture* 15-17 (2002) (recognizing the widespread use of roadside crosses throughout the United States and illustrating, through newspaper articles, magazine stories, and popular fiction, their deep-seated roots in the public consciousness); *id.* at 1 (noting the "long history" of "roadside crosses" in the United States and other countries).

[12] Amici who supported the Association at the circuit-court level agreed (and provided additional information showing) that the cross is widely used, and generally understood, to communicate

To the limited extent that the Tenth Circuit's observer evaluated the memorials' context, he did so selectively, mentioning only that their size is "larger than the crosses typically found on the side of public roads" and thus, he reasoned, that they "convey[] a message of [religious] endorsement." App. 34a-35a. But he failed to consider that the memorials' size is due to the Association's goal of ensuring that motorists passing through the vast Utah landscape could see and immediately discern the message of commemorating a trooper's death. App. 46a-47a ¶¶ 23, 35. Endowed with this information, the well-informed observer would have concluded that the effect of the memorials' size is not to endorse religion, but to communicate nonreligious messages to rapidly passing highway motorists.

The Tenth Circuit's observer thus spurned this Court's precedent by admittedly ignoring relevant features, history, and context of the Association's memorials. This raises an important constitutional question because, unless this Court corrects this blatant disregard of its case law, the courts of

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commemorative and public-safety messages. *See, e.g.*, Brief of Amicus Curiae Robert E. Mackey, *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 4972696 (discussing the nonreligious use of cross memorials to mark and commemorate the deaths of firefighters in Colorado); Brief Amici Curiae of the State of Colorado et al., *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 6058881 (discussing other States that permit private citizens to erect cross-shaped roadside memorials); Brief of Utah Legislators Amici Curiae et al., *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 4972694 (discussing the widespread and various uses of memorial crosses).

appeals will reach their decisions in Establishment Clause display cases using what the dissenting judges rightly characterized as a myopic and selectively informed observer—an analytical tool incapable of consistent results. *See* App. 86a-92a; App. 96a-99a; *Pinette*, 515 U.S. at 768 n.3 (plurality).

The implications of this case reach beyond roadside memorial crosses. The cross is widely used, even outside the roadside context, as a marker signifying (and a memorial commemorating) the location of a tragic death. The record, despite the appellate court's contrary assertion, *see* App. 32a, contains ample support for this, including evidence from citizens who, for nonreligious, commemorative reasons, placed granite crosses on public land to memorialize the location where brave firefighters died battling forest fires, App. 123a-126a; *see also supra* n.12. This case, therefore, presents issues of far-reaching import: whether the memorials for these (and other) heroes will be impertinently tossed aside or respectfully embraced as part of our constitutional traditions. *See Buono*, 130 S. Ct. at 1817 (plurality). This Court should thus grant the writ to decide that critical question.

III. This Court Should Grant the Writ to Clarify the Government-Speech Doctrine and Demonstrate the Proper Scope of *Summum*.

The Association's memorials are its own private expression, yet the Tenth Circuit misconstrued *Summum* and improperly classified the memorials as "government speech," concluding that those displays (even the three on private property) "fall

squarely within the rule pronounced" in *Summum*. App. 15a. But this case is materially different from *Summum*. Of the many distinguishing factors, two are particularly significant. That the Tenth Circuit dismissed these differences illustrates that other courts are susceptible to similarly flawed views of that case. This Court should thus grant the writ and quash this misunderstanding of *Summum* before it proliferates.

First, the State in this case, through its written agreement with the Association, refused ownership of the memorials, disclaimed them as its own, and renounced responsibility to defend them or their Latin-cross shape. App. 128a-129a. This express disclaimer shows that the memorials are not government speech, but the Association's own private expression. *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 the challenged speech—publications of university-recognized organizations—was private 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").

In contrast, the government in *Summum* did not disclaim the monuments under consideration, and thus that case does not control here. The Tenth Circuit, however, in its attempt to dismiss the State's express disclaimer, unpersuasively relied upon *Summum*'s rejection of the "argument that, in order for a monument to constitute government speech, the state must formally adopt the message." App. 17a. But that portion of the *Summum* opinion considers what is required for the government to *adopt* a privately inspired message as its own; it does not address the situation at hand, where the government expressly *disclaims* responsibility for or ownership of a private message. The Tenth Circuit thus erred by disregarding this decisive distinction and attempting to justify its decision through a distortion of *Summum*'s analysis.

Second, three of the Association's 13 memorials are on private land, App. 43a ¶ 9, whereas all 15 displays considered in *Summum* were on public property, 129 S. Ct. at 1129. Unlike the monuments in *Summum*, the Association's unified collection of memorials, spanning both public and private land, necessarily constitutes private speech, for only the private entity (the Association) was responsible for and involved in the display of all 13 memorials. Otherwise, an anomalous result will occur, senselessly bifurcating the Association's cohesive expressive program, and classifying identical displays differently. The Tenth Circuit thus erred by failing to acknowledge this additional distinction between this case and *Summum*.

Summum indeed recognized that "there are limited circumstances" where a "permanent monument" might properly be characterized as private speech. *Id.* at 1138; *see also id.* at 1132 (noting that there "may be situations" where "[p]ermanent monuments" do not "represent government speech"). This is one of those situations. The Association's memorials, much like graveside headstones on public land, were approved by surviving family members, erected by the deceased's comrades, and placed in meaningful locations for the purpose of individually memorializing the fallen, App. 43a-45a ¶¶ 6, 7, 13, 17, 19; thus they "do[] not look like government speech at all," and it was error for the Tenth Circuit to treat them as such, *see Summum*, 129 S. Ct. at 1142 (Souter, J., concurring) (discussing religious symbols marking death in a government cemetery).

Summum is thus inapposite, and this Court should take this early opportunity to clarify the scope of that decision by granting review in this case.

CONCLUSION

For the foregoing reasons, the Association respectfully requests that this Court grant the writ.

Respectfully submitted,

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