Nos. 10-1276 and 10-1297

MAY 19 2011

In The
Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,

Petitioner,

v.

AMERICAN ATHEISTS, INC., et al.,

Respondents.

LANCE DAVENPORT,
JOHN NJORD, and F. KEITH STEPHAN,

Petitioners,

v.

AMERICAN ATHEISTS, INC.,
R. ANDREWS, S. CLARK, and M. RIVERS,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF NEW TRIBES MISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF NEW TRIBES MISSION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

New Tribes Mission ("NTM") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

NTM is an international, nondenominational Christian mission organization that was founded in 1942. NTM strives to help local churches train and mobilize missionaries to serve individuals in need across the United States and around the world. Members typically focus their efforts on teaching the Gospel while offering humanitarian aid to areas without a strong religious presence.

On July 9, 1953, fifteen men died – including fourteen members of NTM – in the fight against what became known as the "Rattlesnake Fire" in

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that respondents, upon timely receipt of notice of NTM's intent to file this brief, have consented to its filing. Respondents have filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

California's Mendocino National Forest.[2] NTM operated a training base for missionaries located on federal land in Fouts Springs, California, approximately fifteen miles from the place where an arsonist's match sparked the fire. As the wildfire quickly spread, twenty-seven members of NTM joined the effort to extinguish the blaze.

As evening came, it appeared that the Rattlesnake Fire was under control. Members of NTM, who had been tending to a spot fire in a canyon away from the main fire, gathered for sandwiches and milk at a peaceful location downhill from the fire. As they ate, winds that had been blowing gently uphill abruptly changed in both direction and intensity. The Rattlesnake Fire raged as the conflagration raced downhill towards the missionaries at an unprecedented speed – a phenomenon then unknown even to wildfire veterans.

This turn of events, however, initially went unnoticed by the members of NTM, whose view of the fire was obstructed by a ridge. In the confusion that ensued after the missionaries received warning of the approaching fire, members of NTM fled in two

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[2] Books examining the history of this country's wildfires provide detailed accounts of the Rattlesnake Fire and the contribution by members of NTM in fighting the fire. ROBERT W. CERMAK: A HISTORY OF FOREST FIRE CONTROL ON THE NATIONAL FORESTS IN CALIFORNIA, 1898-1956 319-23 (USDA Forest Serv. 2005); JOHN N. MACLEAN, FIRE AND ASHES: ON THE FRONT LINES OF AMERICAN WILDFIRE 7-98 (Henry Holt & Co. 2003).

directions. Nine of the NTM members, the survivors, climbed up the canyon, barely escaping the fire as it crested the ridge. Most of the crew – including the only nonmember of NTM, a United States Forest Service ranger – went downhill. None of these men would be able to outrun the rushing wildfire over the treacherous canyon terrain, and all fifteen perished in the flames.

In its aftermath, the Rattlesnake Fire would be examined for decades to follow. Although the behavior of the Rattlesnake Fire still is not fully understood, the catastrophic deaths of fifteen men cautioned generations of firefighters to beware of contrary winds. Indeed, firefighters continue to return to the canyon and use the Rattlesnake Fire as a case study in fighting wildfires. The tragedy also caused the United States Forest Service to reexamine its management of millions of acres of brushland across the country.

In 1993, the Mendocino National Forest commemorated the fortieth anniversary of the Rattlesnake Fire, and the sacrifice of the fifteen men who were killed, with a memorial service overlooking the canyon. A large boulder bearing a plaque with the names of the fallen firefighters was dedicated, along with a kiosk describing the tragic loss at the Rattlesnake Fire that spurred the United States Forest Service to increase firefighter training and research on fire-hazard management. In 2005, a second memorial site was dedicated featuring additional interactive exhibits. Trails also were added that allow visitors to follow the paths taken by those firefighters who

survived and those who lost their lives. Finally, white crosses adorn the hillside of the canyon, marking the sites where each of the fifteen firefighters were overcome by the fire.

The significance of the Rattlesnake Fire memorial to the NTM cannot be overstated. Fourteen members of NTM died, leaving behind nine widows and twenty-seven children without fathers. For NTM and the families of the men, the memorial stands as a lasting monument to both the men who fought the Rattlesnake Fire and their legacy in averting similar tragedies. The crosses marking the sites of the firefighters' deaths are a particularly fitting tribute to the fourteen missionaries who died in service to their country, and whose faith played a defining role in their lives.

NTM has a strong interest in reversal of the ruling below because the Establishment Clause test used by the Tenth Circuit Court of Appeals evidences a hostility towards passive displays on public property that make use of symbols with religious connotations. If allowed to stand, the ruling has the potential to threaten NTM's Rattlesnake Memorial and similar roadside memorials in the Tenth Circuit and across the United States, despite assurances by this Court that the Establishment Clause does not require us to "purge from the public sphere all that in any way partakes in the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring). Indeed, earlier this year, the Ninth Circuit Court of Appeals cited approvingly language from the opinion below

placing a burden on government to "secularize the message" conveyed by a memorial display using a Latin cross. *Trunk v. City of San Diego*, 629 F.3d 1099, 1111 (9th Cir. 2011) (citing *Am. Atheists v. Davenport*, 616 F.3d at 1159-60 (10th Cir. 2010)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals reversed the United States District Court for the District of Utah and held that memorial Latin crosses commemorating the deaths of Utah Highway Patrol troopers killed in the line of duty had the "principal or primary effect" of advancing religion. Pet. App. at 21a (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).[3] Analyzing the first prong of the *Lemon* test, the Tenth Circuit found that Utah erected the memorials with a valid secular purpose: "to honor fallen troopers and to promote safety on the State's highways." *Id.* at 23a. But the Court held that the displays violated the second prong of the *Lemon* test, the so-called "effect" prong, while acknowledging that a reasonable observer "would recognize the memorial crosses as symbols of death." *Id.* at 32a. This conclusion was reached by imposing a presumption against the inclusion of symbols with religious connotations on public property –

[3] References to "Pet. App." are made to the appendix to the petition for a writ of certiorari in No. 10-1276.

effectively placing the burden on Petitioners to *nullify* the "religious sectarian content" of a memorial cross. *Id.* Such an approach reflects undue hostility to symbols with religious connotations and is at odds with this Court's policy of accommodation in Establishment Clause cases.

As Judge Kelly noted in his dissent from the *en banc* denial, governments can erect or maintain memorials containing symbols with religious connotations that do not convey a message of endorsement. Pet. App. at 86a (Kelly, J., dissenting from denial of rehearing *en banc*); *see also Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1034 (10th Cir. 2008). Accordingly, Petitioners were not required to "secularize the message" of the roadside memorials absent Respondents meeting their initial burden of proof that the memorials convey a message of government endorsement of religion to a reasonable observer. To assume that the use of "the preeminent symbol of Christianity" is presumptively invalid – particularly after finding a valid secular purpose for using the symbol – shows a hostility towards the use of religious symbols in passive public displays unwarranted by the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

This Court should grant review to settle two important questions of federal law raised by the underlying Tenth Circuit decision. First, review is necessary to settle whether – contrary to Justice

Kennedy's plurality opinion last term – the goal of avoiding government endorsement requires nullifying the religious sectarian content of all religious symbols in the public realm. *Cf. Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (Kennedy, J., plurality) (observing that the Establishment Clause "does not require eradication of all religious symbols in the public realm"). The Tenth Circuit's decision is one of a number of recent appellate-court rulings holding that passive public displays containing symbols with religious significance violate the Establishment Clause, here deciding that a government may not accommodate use of symbols that carry a religious connotation unless they first "nullif[y] their religious sectarian content." Pet. App. at 86a. Such an approach reflects not neutrality, but a hostility "bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring).

Second, review is necessary to decide the appropriate test lower courts should apply when evaluating Establishment Clause challenges to passive, public-memorial displays. Petitioners in this case urge this Court to embrace the "coercion test" found in Justice Kennedy's *Allegheny* dissent. Petition for Writ of Certiorari at 17-18, *UHPA*, ___ S. Ct. ___ (No. 10-1276); Petition for Writ of Certiorari at 19, *Davenport*, ___ S. Ct. ___ (No. 10-1297). NTM, on the other hand, proposes that this Court adopt a two-step analysis when evaluating memorials on public land: first analyzing a modified version of the "purpose" prong of the

Lemon test[4] to evaluate whether the display has a valid secular purpose, and then applying the "coercion test" embraced in Justice Kennedy's *Allegheny* dissent. For this reason too, the Court should grant the petitions for writs of certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO SETTLE WHETHER THE *LEMON* TEST REQUIRES GOVERNMENT TO NULLIFY SECTARIAN RELIGIOUS CONTENT IN PASSIVE PUBLIC DISPLAYS.

The Court should grant review to settle whether the "effect" prong of the *Lemon* test requires government to *nullify* sectarian religious content in passive public displays. The use of Latin crosses, in particular, is widely understood to convey the message of "death at this location" and an implicit message of honoring the fallen. Pet. App. at 23a, 32a, 34a-35a, 45a-46a. Like many symbols, the Latin cross is capable of carrying multiple meanings, even simultaneously, depending on a number of factors, including the historical context and the personal experiences of

[4] Specifically, we suggest modifying the "purpose" prong under *Lemon* to prohibit acts lacking a secular purpose and which instead seek to coerce individuals – as opposed to the current formulation of the test which asks "whether government's actual purpose is to endorse or disapprove of religion." *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

those interpreting the symbol in question. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (Establishment Clause challenges turn largely on judicial predilections which, for the most part, "would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry").

The use of symbols with religious connotations in passive public displays, including, but not limited to, the Latin cross, should not be presumed to violate the Establishment Clause if the sectarian religious content of the symbol has not first been canceled out or rendered null. This is particularly true when the symbol appropriately represents the individual or individuals being honored or remembered. Granting certiorari presents an ideal case to decide that government need not cancel out all sectarian religious content of a symbol prior to including the symbol in a passive, public-memorial display.

Both on the record before this Court and with respect to the Rattlesnake Memorial, the government defending a memorial should not be required to show that a Latin cross operates purely as a generic symbol for death and honoring the fallen, rather than a symbol appropriate to the memorialized individuals.[5]

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[5] Although not necessary to reverse the Tenth Circuit Court of Appeals in this case, NTM notes that Justice Kennedy has indicated that a memorial Latin cross "evokes far more than religion" and may, in certain contexts, serve as a generic symbol

(Continued on following page)

Key to any workable accommodation jurisprudence is that public displays are not presumptively unconstitutional by virtue of sectarian religious content. A display using Latin crosses to honor the deaths of Christians, for example, is a particularly appropriate memorial to commemorate their deaths and sacrifice. Likewise, a memorial containing a Star of David to commemorate the death and sacrifice of Jewish individuals, or a nine-pointed star to commemorate the death and sacrifice of members of the Bahai faith, may be a particularly appropriate means of honoring those fallen individuals. What should not be required, in any case, is that the religious connotations of the symbol used in the display be emptied of all sectarian religious content – a polite way of saying that a memorial may not use religious symbols without first rendering any religious connotations of the symbol meaningless.

The roadside memorials struck down below were designed by a member of Utah Highway Patrol Association (the "Association"), a private organization that supports Utah Highway Patrol troopers and their families, to commemorate the deaths of troopers killed in the line of duty.[6] Pet. App. at 42a. The Association

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of death and sacrifice. *Buono*, 130 S. Ct. at 1820 (Kennedy, J., plurality).

[6] For the purposes of this brief, NTM assumes that the Association's actions constitute government speech, but supports granting review to decide the proper scope of the government-speech doctrine. *See* Petition for Writ of Certiorari at 13, *UHPA*, ___ S. Ct. ___ (No. 10-1276).

member who designed the memorials believed that "only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety." *Id.* at 7a-8a. The memorial Latin crosses are twelve feet high, with six-foot crossbars. The dead trooper's name, rank, and badge number are printed in dark, eight-inch high letters on the crossbars (the same size used to print the words "SPEED LIMIT" on interstate highway signs). *Id.* at 6a, 44a, 98a. Below the crossbar is a beehive, the official symbol of the Utah Highway Patrol, that is approximately twelve inches by sixteen inches. Under the beehive, the year of the trooper's death appears (also in dark, eight-inch letters), and below that is a plaque with the fallen trooper's picture and biographical information. *Id.* at 44a-46a. The memorial crosses are placed on or by public property near the site where each trooper was mortally injured, in each case in a location visible to passing motorists. *Id.*

The Tenth Circuit Court of Appeals wrongly concluded that those memorial crosses violated the "effect" prong of the *Lemon* test. A reasonable observer, aware of both the physical characteristics of and facts surrounding the memorial crosses, would not find that these memorials have the impermissible effect

of conveying that Utah prefers or otherwise endorses a certain religion.[7]

Regarding the specific Latin crosses used in this case, two facts from the record deserve particular note. First, the Association obtained the consent of each fallen trooper's family for the specific memorial in question. Pet. App. at 43a. Second, the Association member who designed the memorial believed that "only a white cross" could effectively convey the Association's valid secular purpose. Pet. App. at 45a. Yet the Court below dismissed this evidence out of hand, reasoning that the Latin cross is nevertheless "not a generic symbol of death; it is a Christian symbol of death." Pet. App. at 32a. In support of this claim, the Court relies on the acknowledgement by the Association that it would honor the request made by a Jewish state trooper's family to memorialize him with a Star of David rather than a Latin cross. *Id.* The Court goes on to distinguish the memorial display at issue from (apparently constitutional) American military cemeteries by noting that the military "provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers." *Id.*

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[7] NTM agrees with the dissenters' criticisms of the unreasonable "reasonable observer" used by the Tenth Circuit Court of Appeals and will not repeat those arguments here. *See* Pet. App. at 87a-88a, 96a-99a.

Yet how and why adding more religious symbols to passive, public-memorial displays would "nullif[y] their religious sectarian content" so as not to convey a message of religious endorsement is left unanswered. *Compare Greater Houston Chapter of the ACLU v. Eckels*, 589 F. Supp. 222, 235 (S.D. Tex. 1984) (primary effect of crosses and Stars of David used as war memorials "is to give the impression that only Christians and Jews are being honored by the country"), *with Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part) (holiday displays containing "purely passive symbols" of crèche and menorah not "an effort to proselytize or are otherwise the first step down the road to an establishment of religion"). The analysis set forth in this case shows the absurd reasoning used when courts zealously seek to enforce governmental neutrality "between religion and non-religion." *Cf. Weinbaum*, 541 F.3d at 1029 n.13.

This reasoning is highly suspect, and underscores the Hobson's choice awaiting any memorials that include religious symbols in the Tenth Circuit. Use of religious symbols is categorically prohibited, unless the symbols are devoid of any religious connotations because they are either (1) truly universal or secular symbols, or (2) have been stripped of any sectarian content associated with the symbols. *Cf. Van Orden*, 545 U.S. at 694 (Thomas, J., concurring) ("Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or

the nonadherent's beliefs, and provides no principled way to choose between them."). For this reason alone, review should be granted.

II. THE COURT SHOULD GRANT REVIEW AND DECIDE TO ADOPT A MODIFIED VERSION OF THE COERCION TEST.

Review is also needed to provide guidance to lower courts regarding which test to apply when evaluating Establishment Clause challenges to passive, public-memorial displays. Last year, in *Buono*, the Court noted in a plurality opinion that "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Buono*, 130 S. Ct. at 1818 (Kennedy, J., plurality). The Tenth Circuit disagreed. Using its own form of the reasonable observer – one who strikes down laws "whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion" – the Tenth Circuit determined that the memorial Latin crosses constituted a statement of governmental support for sectarian beliefs. Pet. App. at 99a. Adopting a modified version of the coercion test embraced in Justice Kennedy's *Allegheny* dissent, or any test applicable to Establishment Clause challenges to passive, public-memorial displays, would provide much needed guidance to lower courts and reduce aberrant outcomes such as the decision below.

NTM proposes adopting a two-pronged test: (1) whether the statute or activity has a valid secular purpose, and (2) whether the statute or activity coerces anyone to support or participate in any religion or its exercise, or gives direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring in judgment in part and dissenting in part) (alteration in original) (quoting *Lynch*, 465 U.S. at 678).

First, this Court should inquire whether the government is acting with a valid secular purpose.[8] Similar to the first prong of the *Lemon* test, this inquiry would find a statute unconstitutional if it was "not motivated by any clearly secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (striking down statute with "no secular purpose"); *id.* at 64 (Powell, J., concurring) ("We have not interpreted the first prong of *Lemon* . . . , however, as requiring that a statute have 'exclusively secular' objectives.") (citing *Lynch*, 465 U.S. at 681 n.6 (1984)). This Court's cases also confirm that "when the *Lemon* court referred to 'a secular . . . purpose,' . . . it meant '*a* secular purpose.' The author of *Lemon*, writing for the Court, has said that invalidation under the purpose prong is

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[8] The purpose prong looks to the government's purpose – and does not "attribute to a neutrally behaving government *private* religious expression, [which] would better be called a 'transferred endorsement' test." *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (plurality).

appropriate when 'there [is] *no question* that the statute or activity was motivated *wholly* by religious considerations.'" *Edwards v. Aguillard*, 482 U.S. 578, 614 (1987) (Scalia, J., dissenting).

Unlike the purpose prong under *Lemon*, the prohibited governmental purpose under the modified coercion test would not be "whether government's actual purpose is to endorse or disapprove of religion," *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), but rather whether the statute or activity wholly seeks to coerce support for or participation in any religion or its exercise.[9] Applying the first prong of the modified coercion test to this case, the memorial crosses were erected with the secular purpose of "honoring UHP troopers who died during their term of service." Pet. App. at 58a-59a.

Second, the endorsement test under *Lemon* "reflects an undue hostility towards religion" and should be abandoned in favor of the coercion test. *See Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in judgment in part and dissenting in part). Assuming the statute or activity has a valid secular purpose, a

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[9] The modified purpose prong would serve an important goal, even though it is unlikely a statute or activity would lack a valid secular purpose. *Cf., e.g., Edwards*, 482 U.S. at 613 (Scalia, J., dissenting) ("Almost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause"); *McCreary County v. ACLU*, 545 U.S. 844, 859-60 (2005) (Souter, J.) ("secular purpose requirement may rarely be determinative . . . it nevertheless serves an important function.") (citation omitted) (collecting cases).

court's analysis should permit government to "recognize and accommodate religion in a society with a pervasive public sector." *Id.* at 659-60. Accordingly, the second prong of the modified coercion test would focus on whether the statute or activity results in actual legal coercion. *See Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (citations omitted).

Using this analytical framework, a passive display on public property violates the Establishment Clause under the second prong of the modified coercion test 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 (Rehnquist, C.J., plurality) (upholding Ten Commandments display having political and legal, as well as religious, significance). One criticism of adopting coercion as the touchstone for Establishment Clause challenges is that such an approach "make[s] the Free Exercise Clause a redundancy." *Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring). We disagree.

Under the modified coercion test, a number of statutes or government activities *would not* violate the Establishment Clause, yet, as applied, *would* violate the Free Exercise Clause. For example, in *Sherbert v. Verner*, this Court held that, absent a compelling government interest, states could not deny unemployment benefits to a person for turning down

a job because it required her to work on the Sabbath. *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1993). Requiring a person to abandon their religious convictions in order to receive benefits was a violation of the Free Exercise Clause. *Id.* at 404. Yet such a policy would not violate the Establishment Clause – as the policy did not coerce support for or participation in any religion or its exercise. *Id.* at 409; *see also id.* at 413 (Douglas, J., concurring) ("[C]ase does not involve the problems of direct or indirect state assistance to a religious organization – matters relevant to the Establishment Clause, not in issue here.").

Accordingly, NTM submits that adopting the two-pronged modified coercion test set forth above would provide much needed clarity to lower courts – in a manner consistent with the Establishment Clause as understood by the Founders. Because this case presents an ideal vehicle to adopt a uniform test for Establishment Clause challenges and resolve whether passive, public-memorial displays must *nullify* the sectarian content of religious symbols, the petitions for writs of certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant both petitions for writs of certiorari.

Respectfully submitted,

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