

MAY 19 2011

No. 10-1297

In the Supreme Court of the United States

LANCE DAVENPORT, *et al.*,
Petitioners,

v.

AMERICAN ATHEISTS, INC., *et al.*,
Respondents.

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

**BRIEF OF THE AMERICAN LEGION
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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Arlington National Cemetery, Visitor Information,
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Historical Marker Database, Peace Cross,
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INTEREST OF *AMICUS CURIAE*¹

The American Legion, chartered by Congress in 1919, is a community service organization representing approximately 2.4 million members, plus an Auxiliary of nearly 1 million members. There are over 13,000 American Legion Posts throughout the United States, its territories, and 20 foreign countries, including England, Australia, Germany, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The American Legion helps military veterans survive economic hardship and secure government benefits. The American Legion drafted and obtained passage of the first GI Bill. The American Legion also works to promote social stability and well-being for those who have honorably served our Nation's common defense. And The American Legion strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials. The members of The American Legion were among the primary contributors to the Vietnam Veterans Memorial. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor those who have served and do serve in our Nation's armed forces.

¹ Pursuant to Rule 37.2 of this Court, all counsel of record were provided 10-days notice of *amicus*' intent to file this *amicus curiae* brief and consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, *amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A cross has, for hundreds of years, been used to memorialize fallen heroes. More recently, a cross has marked the locations of deaths along roadsides. The Utah Highway Patrol Association (“UHPA”), a private organization, began placing crosses as roadside memorials to fallen Utah Highway Patrol officers. UHPA chose that symbol because it was universally recognized as a memorial to fallen heroes and a recognizable warning to encourage highway safety.

As passive monuments, the UHPA’s roadside crosses should be analyzed under the test set forth in *Van Orden v. Perry* instead of the *Lemon* test used by the Tenth Circuit. The roadside crosses easily pass the *Van Orden* test. Crosses are historically used to memorialize fallen heroes, and the roadside crosses in this case were chosen for that very reason. The UHPA’s crosses were designed by persons who do not use the cross as a religious symbol, but chose it because of the cross’ intimate connection to memorials for fallen soldiers. The UHPA maintained ownership of the crosses, and privately funded them. Finally, the placement of the crosses was chosen not for religious purposes but to encourage highway safety.

If roadside memorial crosses suggest the establishment of a state religion as the Tenth Circuit’s opinion below suggests, then that reasoning would necessitate the elimination of all religious imagery from public land. That extreme of a viewpoint is a hostility to religion that is itself prohibited by the Establishment Clause.

ARGUMENT**I. The use of religious imagery to honor those heroes who have sacrificed their lives and done heroic acts is deeply entrenched in our culture.**

This Court recognized that “a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion).

Crosses are often used in the military to recognize the heroic acts of service for this Nation. The Navy and Marine Corps’ second-highest military honor is the Navy Cross. The Army’s second-highest military honor is the Distinguished Service Cross. The Air Force’s second-highest military honor is the Air Force Cross.

While crosses are often used to honor the heroic acts of our service men and women, they are more frequently used to memorialize those who gave their last full measure of devotion to this Nation. Cemeteries across the United States and the world use the cross to remember the sacrifice of fallen heroes.

In Aisne-Marne, St. Mihiel, and Meuse-Argonne—the largest American military cemetery on foreign soil—the white Latin cross is a ubiquitous sight. One of the most moving and well-known memorials to our fallen heroes is the American cemetery in Colleville-sur-Mer, Normandy, France, with its row upon row of white crosses and “main paths ... laid out

in the form of a Latin cross.”² The thousands of white Latin crosses that mark the graves of these fallen heroes are internationally recognized symbols memorializing and honoring those heroes who gave the ultimate sacrifice for the cause of freedom.

The use of a cross to memorialize fallen heroes can be found across America. The Cross of Sacrifice in Arlington National Cemetery memorializes those Americans who fought with the Canadian army in World War I, World War II, and Korea.³ The Argonne Cross in Arlington National Cemetery is a thirteen-foot high white, Latin cross memorializing American soldiers who died in France in World War I.⁴ There is also the twelve-foot French Cross monument in Cypress Hill National Cemetery in New York,⁵ the Unknown Soldiers Monument in Prescott National

² American Battle Monuments Commission, Normandy American Cemetery and Memorial at 6–7, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited May 17, 2011).

³ See Arlington National Cemetery, Visitor Information, Monument and Memorials, Canadian Cross, http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited May 17, 2011).

⁴ See Arlington National Cemetery, Visitor Information, Monument and Memorials, Argonne Cross, http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited May 17, 2011).

⁵ See United States Department of Veteran Affairs, Burial & Memorials, Cypress Hills National Cemetery, <http://www.cem.va.gov/cems/nchp/cypresshills.asp> (last visited May 17, 2011).

Cemetery in Arizona,⁶ the Memorial Peace Cross in Maryland,⁷ and countless other crosses used to memorialize this Nation's fallen heroes.

The existence of these crosses—on government land and often maintained by the government—does not establish any particular faith as a state religion or show the government's endorsement of a particular faith. Instead, these memorials use the cross—an internationally recognized symbol of death and sacrifice—to honor and remember those heroes who have given everything for this Nation. They are memorials, not statements of faith. As this Court said about roadside crosses, “[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.” *Salazar*, 130 S. Ct. at 1818.

If allowed to stand, the Tenth Circuit's opinion will prohibit the very government that our fallen soldiers and law enforcement officers have died protecting from memorializing their sacrifice with the one symbol that immediately brings to mind death, sacrifice, and honor and that has been used to memorialize and honor the deaths of those fallen heroes for generations.

⁶ See United States Department of Veteran Affairs, Burial & Memorials, Prescott National Cemetery, <http://www.cem.va.gov/cems/nchp/prescott.asp> (last visited May 17, 2011).

⁷ See Historical Marker Database, Peace Cross, <http://www.hmdb.org/marker.asp?marker=5187> (last visited May 17, 2011).

II. The presence of the roadside memorial crosses on government land is permissible under *Van Orden*.

The Tenth Circuit analyzed the constitutionality of the roadside crosses using the *Lemon* test. *American Atheists, Inc. v. Duncan*, No. 08–4061, 2010 U.S. App. LEXIS 26936, at *23 (10th Cir. Dec. 20, 2010) (“the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*”). In *Van Orden v. Perry*, however, a plurality of this Court rejected the *Lemon* test for the analysis of passive monuments. *Van Orden*, 545 U.S. at 686 (“Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”). Instead, this Court adopted a context-specific, fact-driven analysis for assessing claims, like the one in this case, that a passive monument violates the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Likewise, Justice Breyer’s opinion concurring in the judgment in *Van Orden* agreed that in Establishment Clause cases involving passive monuments, there is “no ... substitute for the exercise of legal judgment.” *Id.* at 700 (Breyer, J., concurring in the judgment).

In this case, the presence of roadside memorial crosses on government land is permissible when evaluated in light of the monument’s nature, history, and context, as *Van Orden* requires. Any other result would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704 (Breyer, J., concurring in the judgment).

First, the only two purposes of the roadside crosses are to memorialize fallen Utah Highway Patrol officers and to promote highway safety.⁸ As Part I, *supra*, illustrated, countless crosses memorialize fallen soldiers, law enforcement officers, and traffic victims across the United States and the world. As this Court explained,⁹ the historical context of a monument is important, and in this case, that context includes the use of crosses to honor other fallen heroes, our veterans, who wear a uniform and seek to protect and serve the Nation.

Second, the roadside crosses were developed by two Mormons, members of the Church of Jesus Christ of Latter-Day Saints, who do not use the cross as a religious symbol. *American Atheists, Inc.*, 2010 U.S. App. LEXIS 26936, at *8. The persons who developed the UHPA memorials “were inspired to use the Latin cross for the fallen trooper memorials because of the presence of such crosses in military cemeteries, which honor fallen service members for their sacrifice, and roadside memorials found where traffic fatalities have occurred.” *Id.* at *27.

⁸ Additionally, the particular crosses at issue in this case were put up by a private organization, the non-profit Utah Highway Patrol Association (“UHPA”), which is dedicated to supporting the officers of the Utah Highway Patrol and their families. All of the roadside crosses are privately funded, and the UHPA retains ownership of and maintains the crosses. *American Atheists, Inc.*, 2010 U.S. App. LEXIS 26936 at *8.

⁹ *Van Orden*, 545 U.S. at 686–88; *see also Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

Finally, the “circumstances surrounding the display’s placement ... and its physical setting” beside Utah’s highways suggest little of the sacred or the sectarian. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). Although a passerby, uneducated about the history and nature of the roadside crosses, might perceive the crosses as religious symbols, the question under *Van Orden* is not whether the monument has facially religious content, but “how the [content] is used.” *Id.* (Breyer, J., concurring in the judgment). The context and history of the Ten Commandments monument in *Van Orden* suggested that the State “intended the ... nonreligious aspects of the tablets’ message to predominate” by conveying “an illustrative message reflecting the historical ‘ideals’ of Texans.” *Id.* at 701–02 (Breyer, J., concurring in the judgment). Here, it is even clearer that the crosses’ predominate message—to commemorate the fallen Utah Highway Patrol officers and to encourage highway safety—is secular because similar memorials are used for similar purposes throughout the world.

By any measure, the Ten Commandments monument upheld in *Van Orden* was more closely tied to religion than the UHPA’s roadside crosses. The *Van Orden* monument is covered with indisputably religious text, including “I AM THE LORD THY GOD” as its pinnacle. In contrast, the UHPA’s roadside crosses bear the names and biographic information of fallen Utah Highway Patrol officers.

A cross is an indisputably religious image, but not nearly to the degree that is a direct physical representation of the baby Jesus, upheld by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Furthermore, a lone cross, without more, is not as closely connected to

religion as the Ten Commandments, a text sacred to billions and believed by many to be written by the hand of God Himself. Moreover, the cross has a far more marked secular significance than those displays, given its ubiquity in commemorating fallen soldiers throughout the world.

Just as the Ten Commandments, while unquestionably religious, made a significant secular impact on law and culture, so also the image of a cross, while unquestionably religious, has fulfilled for centuries a prominent role in commemorating fallen soldiers. The image of the Ten Commandments, carved into the very courtroom of this Court, reflected that dual history, just as do the many crosses throughout the world, commemorating veterans and law enforcement officers who have given their lives in service.

If, as the Tenth Circuit argues, the possible appearance of a religious message renders even roadside memorial crosses—owned and maintained by private entities, developed by persons who do not use the cross as a religious symbol, and chosen because of the widespread, secular connotation that the cross has—an impermissible religious message tantamount to the establishment of a religion, then no public display of any symbol that is also used as a religious symbol could ever be tolerated. When a cross, adorned with the name and information of a fallen Utah Highway Patrol officer, is seen by the side of a road, the mind leaps to fallen heroes and memorials, not to an impression of a state religion—no more than an immigrant, first setting eyes on the Statute of Liberty, wonders in fear whether the cult of the Roman goddess Libertas is the state religion.

Symbols have many meanings. These meanings are often ascertained by looking at the context, the surroundings, of the symbols. This Court, as shown in *Van Orden*, understands that context is important. The Tenth Circuit's opinion below does not accept that truth. Instead, the Tenth Circuit would impose an analysis that would ban any symbol that is also used for a religious purpose from government land.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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