No. 10-1276

IN THE

Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,
Petitioner,

v.

AMERICAN ATHEISTS, et al.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. Establishment Clause Jurisprudence Concerning Passive Displays Is in Complete Disarray.

Respondents do not dispute that this case is an optimal vehicle for ending confusion over the proper test for evaluating passive displays under the Establishment Clause. Instead, they devote the bulk of their opposition to the task of arguing that there is no confusion in the first place. *See* Opp. 6-17. Yet that task is hopeless, particularly in the wake of this Court's fractured decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU*, 545 U.S. 844 (2005).

The circuits corroborate the confusion following *Van Orden* and *McCreary*, and disagree with Respondents' take on a jurisprudence that even members of this Court have described as "Januslike." *Van Orden*, 545 U.S. at 683 (plurality). The Second Circuit, for instance, acknowledged the "challenge" of finding direction amidst the "frequently splintered" decisions of this Court "on the constitutionality of public displays involving religious symbols." *Skoros v. City of New York*, 437 F.3d 1, 13 (2d Cir. 2006). The Ninth Circuit likewise observed that this Court's "ten individual opinions" in *McCreary* and *Van Orden* have "confounded" lower courts and left them in "[l]imbo." *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008). The Sixth Circuit similarly described the lower courts' post-*Van Orden* plight as "Establishment Clause purgatory." *ACLU of Ky. v. Mercer County*, 432 F.3d

624, 636 (6th Cir. 2005). Even the Tenth Circuit panel here remarked on "the confusion generated by th[is] Court's decision in *Van Orden*." Pet. App. 20a. And as if that were not enough, the views of legal commentators provide additional objective indicia of doctrinal uncertainty in this area.[1]

Respondents' own discussion also reinforces the lack of coherence in post-*Van Orden* lower-court decisions. Respondents expressly admit "differences in the subsequent lower-court cases" following *Van Orden*, Opp. 10, recognizing, for example, that the circuits treat Ten Commandments displays differently from all other passive displays with religious components, Opp. 8. Respondents, it must be noted, do not provide a logical reason why courts should use one test for evaluating Ten Commandments displays and a completely different test for other passive displays. But even if a justification existed (which it does not), variances in analysis and outcome still abound in the particular context of cases analyzing Ten Commandments displays. *Compare Mercer*, 432 F.3d at 635-40

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[1] Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 Nw. U. L. Rev. Colloquy 60, 60-61 (2010) (describing "passive-display cases" as particularly "incoherent and unprincipled" and "almost comical"); Douglas G. Smith, *The Constitutionality of Religious Symbolism after* McCreary *and* Van Orden, 12 Tex. Rev. L. & Pol. 93, 106-07 (2007) ("[*McCreary* and *Van Orden*] have led to debate among the lower courts regarding exactly what principles should guide their analysis of the constitutionality of public displays that include religious symbolism. . . . [T]he lower courts have largely ignored [the *Lemon* test]. Rather, . . . courts have placed significant reliance upon the historical analysis of *Van Orden*.").

(upholding a Commandments display under the *Lemon*/Endorsement test),[2] *with ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776-78 (8th Cir. 2005) (en banc) (upholding a Commandments display under the *Van Orden* plurality's analysis), *with Card*, 520 F.3d at 1016 (upholding a Commandments display under the analysis of Justice Breyer's *Van Orden* concurrence), *with Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 796-810 (10th Cir. 2009) (invalidating a Commandments display under the *Lemon*/Endorsement test).

Notably, though, the disagreement among the circuits is more fundamental and relates to whether, and in what contexts, the *Lemon*/Endorsement test survives *Van Orden*. For instance, the Ninth Circuit, while admitting that it did not know "how to determine" what test to use when evaluating a memorial cross, held that the analysis set forth in Justice Breyer's *Van Orden* concurrence applies to "religious displays that convey a historical or secular message in a non-religious context," and that the *Lemon*/Endorsement test applies to all other

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[2] Contrary to Respondents' assertion, *McCreary* and *Van Orden* did not create two clear categories of cases into which the circuits' decisions neatly divide. Opp. 11-12. Respondents support their claim by incorrectly characterizing *Mercer* as following *McCreary* by applying the *Lemon*/Endorsement test to an identical factual context. *Id.* In fact, the *Mercer* court stressed that *McCreary* "did not settle the issue" whether the *Lemon*/Endorsement test applied there, and although the *Mercer* court applied that test, it did so *despite* its observation that *McCreary* "never explicitly reaffirm[ed] *Lemon*." 432 F.3d at 635-36. Thus, notwithstanding Respondents' quixotic efforts to suggest otherwise, *Mercer* reinforces the uncertainty and confusion following *McCreary* and *Van Orden*.

displays. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011). By contrast, the Eighth Circuit refused to apply the *Lemon*/Endorsement test to its only display case since *Van Orden*, *see City of Plattsmouth*, 419 F.3d at 776-78, and has since signaled its intent not to apply that test in future display cases. *See Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 n.4 (8th Cir. 2009) (remarking that the *Lemon* test is not well-suited for cases opposing "specific government actions").

And as noted by the four judges who dissented from the denial of rehearing en banc, the Tenth Circuit's own decisions have been a portrait of inconsistency. *See* Pet. App. 89a, 99a. That court, for example, is the only federal appellate court to invalidate a Ten Commandments display since *Van Orden*. *See Green*, 568 F.3d at 810. Furthermore, although the Tenth Circuit declared unconstitutional the twelve-foot-tall memorial crosses at issue here, it has paradoxically upheld a nearly nine-foot-tall sculpture in the shape of three crosses mounted at a public school's sports complex. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1036-37 (10th Cir. 2008).[3]

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[3] Not only has the Tenth Circuit upheld a nearly nine-foot-tall cross sculpture (and a city symbol depicting three crosses) in *Weinberg*, the Fifth Circuit has similarly approved the City of Austin's use of a Latin cross as the centerpiece of its municipal insignia. *See Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991). Respondents therefore incorrectly suggest that circuit precedent has uniformly struck down "displays of Latin crosses on public land." Opp. 14-15.

There is thus no reason to fear, as Respondents argue, that granting certiorari in this case might "leave Establishment Clause doctrine in disarray." Opp. 28. This area of the law has long since won that infamous distinction. Further review in this case can only bring clarity to this unsettled area.

II. The Tenth Circuit's Decision Finds No Basis in this Court's Establishment Clause Jurisprudence and Threatens to Invalidate Other Memorial Displays.

Even assuming that the *Lemon*/Endorsement test applies here, the Tenth Circuit's opinion remains deeply flawed.

Context is critical under the *Lemon* analysis, and here context dispels any suggestion of religious endorsement. By failing to fully consider and assess the context of the Association's memorials, the Tenth Circuit departed from this Court's precedent in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), a case upon which Respondents extensively rely. *See* Opp. 22-24. There, the Court did not fixate solely on the religious symbolism of the crèche, but rather considered the entirety of the display, including the words on the crèche and their effect on the display's perceived meaning. *See Allegheny*, 492 U.S. at 598. The Tenth Circuit, in contrast, improperly disregarded key features of the physical design of the Association's memorials—namely, the prominent display of the fallen trooper's name, picture, and other biographical information. *See* Pet. App. 30a. The Tenth Circuit also ignored crucial contextual factors,

including that the roadside cross, unlike other markers, uniquely accomplishes the Association's commemorative and public-safety purposes, Pet. App. 45a ¶ 20, that all the memorials were selected by the Association and approved by surviving family members, Pet. App. 8a, and that the Governor and the Legislature have twice agreed that the Association may use "white crosses[] *or other appropriate symbols as requested by the family*," Pet. App. 111a (emphasis added); H.C.R. 16, 2011 Leg., Gen. Sess. (Utah 2011).[4]

Also troubling is the Tenth Circuit's admonition that displays portraying Latin crosses cannot survive constitutional scrutiny unless their overall

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[4] Respondents wrongly assert—based on letters from state employees filed with the State's motion to amend the district court's decision—that if a surviving family member requested a memorial in a shape other than that of a Latin cross, the State would not permit it. Opp. 3-4. But the letters do not set forth a definitive position; rather, they equivocate on that contingency, indicating that the officials "would not be able to approve the new memorial *in the same manner* that they had for the prior memorials" because it would no longer take a form "that is recognized as someone having died near that spot." Opp. App. 9a (emphasis added); *accord id.* at 10a-15a. Notably, the district court acknowledged that such "hypothetical" speculation is "not part of the controversy properly before the court." 2/28/08 D. Ct. Order 2. And contrary to the equivocal conjecture of subordinate executive-branch employees on which Respondents rely, the State's highest executive official—the Governor—and the Legislature have twice (most recently in March of this year) confirmed their support for the use of "other appropriate symbols as requested by the family." Pet. App. 111a; H.C.R. 16, 2011 Leg., Gen. Sess. (Utah 2011). This Court, therefore, should not credit Respondents' efforts to distort the State's position.

contexts "nullif[y]" any potentially religious content by rendering the cross a purely "secular symbol." Pet. App. 32a. On this point, the panel reasoned that it was impossible to "nullif[y]" the cross's "religious sectarian content" because "a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death." *Id.* This sweeping position directly conflicts with the acknowledgment of the plurality in *Salazar v. Buono* that the cross is a symbol "used to honor and respect . . . heroic acts," 130 S. Ct. 1803, 1820 (2010), and thus it may be used to commemorate "the place where a state trooper perished," *id.* at 1818.

Despite Respondents' contrary assertion, it is difficult to read the Tenth Circuit's opinion as anything but a "general pronouncement against . . . displays that include crosses." Opp. 20. That is how the Ninth Circuit read the opinion when it quoted the Tenth Circuit's reasoning to invalidate the memorial cross at issue in *Trunk*. 629 F.3d at 1112 (quoting Pet. App. 32a). If allowed to spread even further, the Tenth Circuit's misplaced legal analysis will necessarily condemn memorial crosses throughout the nation. Worse yet, because this case involves individualized memorials approved by surviving family members, the panel's decision threatens similarly individualized headstones and memorials in government cemeteries.

Respondents' suggestion that this case does not involve an important "issue that is likely to recur in other cases" is belied by the many already-decided memorial-cross cases, *see* Pet. 21-22; Opp. 14-15, 17; the *amicus* briefs discussing memorial crosses on

public land honoring fallen heroes in Colorado and California, *see* Brief of New Tribes Mission 3-4; Brief of Robert E. Mackey 1-2; and the large number of states that allow private individuals or organizations to place memorial crosses near the side of the road, *see, e.g.*, W. Va. Code St. R. § 157-6-9; 43 Tex. Admin. Code § 22.17; Colo. Rev. Stat. § 43-2-149; *see also* Brief of the States of Louisiana *et al.* 6-7. Moreover, Respondent American Atheists undermined its credibility on this point by asserting that there is no threat to other memorials while almost simultaneously filing a legal challenge to a memorial cross that will be displayed at the World Trade Center Memorial opening next month. *See* Complaint, *American Atheists, Inc. v. Port Authority of New York and New Jersey,* No. 108670-2011 (N.Y. Sup. Ct. July 27, 2011).

III. This Court Should Grant Review on the Government-Speech Question as well as the Establishment Clause Question.

The Establishment Clause issues in this case are inextricably intertwined with the threshold question whether the Association's memorials are private or government speech. As members of this Court have repeatedly stressed, "[t]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765-66 (1995) (plurality); *accord Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality). Thus, the Court will surely need to address the government-speech

question presented in the Association's petition (but not in the companion petition in *Davenport v. American Atheists, Inc.*, No. 10-1297) before it can meaningfully address the Establishment Clause question.

The question whether a permanent display that is owned by a private person or entity but located on public property should be classified as government speech is substantial in its own right and a source of discord among the circuits. The circuits have adopted divergent tests for dealing with this issue. *Compare ACLU v. Bredesen*, 441 F.3d 370, 375-76 (6th Cir. 2006) (adopting a test that considers whether "the government determines an overarching message and retains power to approve every word disseminated," and concluding that specialty license plates are government speech), *with Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 965-68 (9th Cir. 2008) (relying on *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), to adopt a four-factor test analyzing purpose, editorial control, original source, and ultimate responsibility, and concluding that specialty license plates are private speech), *with Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (adopting a test that asks whether "a reasonable person [would] consider the speaker to be the government or a private party," and concluding that specialty license plates are private speech), *and Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (same). Although this disagreement has manifested itself chiefly in the context of "specialty" license plates, those license plates and the Association's roadside memorials are similar in one critical respect—both involve displays

that are located on government property but intimately associated with a particular private person. This case therefore presents an opportunity for this Court to provide much-needed guidance on a frequently recurring question.

In any event, the Court should not allow the Tenth Circuit's erroneous analysis of *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), to stand. Like the Tenth Circuit's decision, Respondents' opposition fails to confront the significant distinguishing factors between *Summum* and this case. *See* Opp. 31-33. Critically, both the Tenth Circuit and Respondents wrongly suggest that *Summum* involved a situation where, as here, the government expressly disclaimed a privately owned monument, while overlooking the cases (cited in the Association's petition) in which this Court has classified expression disclaimed by the government as private speech. *See* Pet. 33-34.[5] In place of a meaningful response to the Association's arguments, Respondents focus on the State's "control" over the memorials. *See* Opp. 31-32. But they ignore that, unlike the government in *Summum*, the State here does not own the Association's memorials, may not alter them at its whim, and thus exercises far less control over the memorials than the government did in *Summum*. *Compare* Pet. App. 128a-129a, *with Summum*, 129 S. Ct. at 1134. These distinguishing

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[5] Respondents assert that the State's disclaimer applies only to one of the memorials. Opp. 3 n.3, 31. But that claim is baseless, for the State issued that disclaimer when it first started to permit the memorials on public property, CA10 App. 2300-03, and the three previously erected memorials (which Respondents refer to) were all on private property, Pet. 5.

factors reinforce that the State here is accommodating private expression on public land, rather than presenting the Association's private message as its own. *Summum* thus does not govern here, and this case can readily be resolved on this threshold ground.

IV. This Court Should Grant the Association's Petition Because the Association Is the Real Party in Interest.

The Association urges the Court to grant the companion petition in *Davenport* with the petition in this case. But regardless of whether the Court grants the *Davenport* petition, it should grant the Association's petition, for three primary reasons.

First, only the Association's petition raises the government-speech question, which, as previously discussed, is a critical threshold question that the Court will likely need to address. Granting the Association's petition is thus the only way to ensure that the Court will have the ability to consider that issue at the merits stage if it so desires.

Second, the Association—which constructed, owns, maintains, and bears liability for the memorials—is effectively the real party in interest in the underlying litigation. If the Court upholds the Tenth Circuit's ruling, the Association, not the State, will presumably bear the costs and distress of removing or modifying the memorials. *See* Pet. App. 128a (noting that the Association is responsible for removing the memorials if they become "a liability"). Hence, the Association—which represents current,

retired, and deceased troopers—deserves to be heard, as the district court concluded when it granted the Association's contested motion to intervene as of right on the ground that it has "substantial legal interests" in this action. 3/2/06 D. Ct. Order 2.

Third, granting the Association's petition for certiorari is consistent with the approach the Court took in *County of Allegheny*. That case, like this one, involved a privately owned display—a menorah—placed on public property. There, the government and the private group that owned the menorah filed separate petitions, and the Court granted both of them. Here, too, the Court should allow the Association—which not only owns the challenged displays but also represents the interests of the deceased troopers—to continue defending its memorials against constitutional challenge.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Association respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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