No. 10-_____

In The Supreme Court of the United States

LANCE DAVENPORT, JOHN NJORD, AND F. KEITH STEPAN,

Petitioners,

v.

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

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

Since this Court decided *Van Orden* v. *Perry*, 545 U.S. 677 (2005), a three-way circuit split has developed over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause. The Sixth and Tenth Circuits have held that the "endorsement test" applies. The Fourth and Eighth Circuits have held that Justice Breyer's "legal judgment test" applies. And the Ninth Circuit has held that *both* tests apply.

This petition for certiorari presents three questions:

1. Whether the Court should resolve the 2-2-1 circuit split over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause.

2. Whether this Court should set aside the "endorsement test"—as five Justices have urged over the past three decades—and adopt instead the "coercion test."

3. Whether a memorial cross placed on state land by the Utah Highway Patrol Association, a private organization, to commemorate fallen state troopers is an unconstitutional establishment of religion.

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this petition contains all parties to the proceeding, with the exception of the Utah Highway Patrol Association. The Association was a defendant-intervenor below and filed a separate petition for a writ of certiorari.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lance Davenport, John Njord, and F. Keith Stepan respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals granting rehearing in part and denying *en banc* review (App., *infra*, 1-65) has been designated for publication but is not yet reported. That opinion superseded the prior opinion, which is reported at 616 F.3d 1145.[1] The memorandum decision and order of the district court (App., *infra*, 66-103) is reported at 528 F. Supp. 2d 1245.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion on December 20, 2010. Petitioners were granted an extension of time in which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The first panel opinion is omitted from the Appendix because, with the exception of one word, it is identical to the second panel opinion.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion * * * *" U.S. CONST. amend. I.

STATEMENT

This case presents an ideal vehicle for resolving a three-way circuit split on an important question of constitutional law. The circuit courts are divided 2-2-1 on whether the "endorsement test" articulated by Justice O'Connor's concurrence in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), or the "legal judgment test" presented by Justice Breyer's concurrence in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), supplies the proper framework for evaluating Establishment Clause challenges to passive displays with religious imagery.

This Court's review is needed to resolve the conflict among the lower courts (not to mention the confusion among local, state, and federal officials) regarding when a public display that has an unquestionably secular purpose nonetheless violates the Establishment Clause.

Moreover, the Tenth Circuit's decision, if left undisturbed, will effectively render unconstitutional roadside crosses to memorialize the dead in Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and

Utah—while they remain entirely permissible by highways across the rest of the Nation. This, despite the Court's express admonition just last Term that religious symbols, such as:

> [*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 v. *Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality) (emphases added).

1. The Utah Highway Patrol Association ("the Association") is a private organization that supports Utah Highway Patrol troopers and their families. In 1998, the Association began a project to honor troopers who have died in the line of duty. Memorials were to be placed near the spots where the troopers fell both to remind onlookers of the sacrifice made by the troopers for the State of Utah, and also to encourage highway safety. App. 32. The Association 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." *Ibid*. The family of each fallen trooper chose the cross, and the Association represented that it would provide another memorial symbol if requested by the family. App. 33.[2]

[2] Although the panel stated that the State of Utah would prevent the Association from erecting another memorial symbol,

(Continued on following page)

The memorial 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). App. 21, 31. 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 death appears (also in dark, eight-inch letters), and below that is a plaque with the fallen trooper's picture and biographical information. App. 31-32. The memorials are all privately funded, and they are owned and maintained by the Association with assistance from local businesses and Boy Scout troops. App. 34.

The first memorial was erected in 1998 on private property about fifty feet from a state highway. App. 34. A dozen more were subsequently erected on public property, including rights-of-way adjacent to state roads, roadside rest areas, and the lawn outside a Utah Highway Patrol office in Salt Lake County. *Ibid*. Each was placed where it would be visible to the public, safe to stop and view, and as close to the actual site where the trooper died as possible. App. 33. The State of Utah permitted the Association to erect their memorials on the state-owned property,

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if another symbol were requested, App. 33 n.2, the record reveals no instance of any other memorial symbol being requested. So any issues that might be raised by that hypothetical situation are not presented in the instant case.

but stressed that the government "neither approves or [sic] disapproves the memorial markers." App. 6.

2. Plaintiffs sued the state employees who authorized the use of the Utah Highway Patrol symbol and placement of the memorials on state land. Plaintiffs alleged that the memorials violated the Establishment Clause of the First Amendment to the U.S. Constitution. The district court permitted the Association, owner of the memorials, to intervene as a party-defendant. The district court granted summary judgment for Defendants, holding that there was no violation of the state or federal constitutions. App. 66-103.

3. The U.S. Court of Appeals for the Tenth Circuit reversed, holding that the memorials violated the Establishment Clause. The panel, while noting that this Court is "sharply divided on the standard governing Establishment Clause cases," App. 45, applied the three-part test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id*. at 612-13 (citations omitted).

Under the first component of the *Lemon* test, the Tenth Circuit panel had no difficulty holding that the purpose of the memorials was secular. The record evidence showed that the memorial program was created

for secular reasons, and there was no evidence whatsoever of any sectarian motive. App. 47-50.

But despite the program's secular purpose, the panel held that the memorials failed the *Lemon* test's "effect" prong as articulated by Justice O'Connor's concurrence in *Lynch*, and subsequently employed by the Court in several Establishment Clause cases. See *Cnty. of Allegheny* v. *ACLU*, 492 U.S. 573, 592-94 & n.44 (1989) (collecting cases). This analysis, typically referred to as the "endorsement test," asks whether the challenged governmental action or practice, as viewed by the reasonable, objective observer, has "the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Under the endorsement test, the Tenth Circuit was required to view the memorials through the eyes of a reasonable, objective observer fully aware of their particular purpose, context, and history, and not just of the information gleaned from viewing the memorials themselves. See *ibid.* (O'Connor, J., concurring).

To Justice O'Connor's "endorsement test," the Tenth Circuit added an additional gloss: because a cross is a religious symbol, the court in effect established a presumption that its display on government land is unconstitutional, unless context or history "served to secularize the message." App. 54.

Although the panel recognized that crosses have historically been used to commemorate the deaths of servicemen or public servants, that was not enough to

"secularize"—to remove all religious content from—the displays. Accordingly, the court concluded "that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity." App. 54, 57.

In the panel's judgment, a reasonable observer driving past the memorials at over 55 miles per hour would see only the Utah Highway Patrol's beehive emblem affixed to the cross, and not the information about the fallen state trooper. App. 55. Accordingly, he or she may "fear that Christians are likely to receive preferential treatment from the [Utah Highway Patrol]—both in their [sic] hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways." *Ibid*. Rejecting Defendants' focus on the secular purpose, history, and context of the crosses as part of the memorials to fallen troopers, the panel concluded: "[W]e think that these displays nonetheless have the impermissible effect of conveying to the reasonable observer that the State prefers or otherwise endorses Christianity." App. 57.

4. Defendants moved for panel rehearing and rehearing *en banc*. The Tenth Circuit awaited this Court's resolution of *Buono* before issuing its decision on Defendants' petitions for rehearing. App. 36 n.5. Defendants' petitions for rehearing were granted insofar as a single word was changed in the panel's

decision, but were otherwise denied.[3] App. 3. The request for rehearing *en banc* was denied by a vote of five-to-four, with two judges authoring vigorous dissents. App. 1-25.

Judge Kelly's dissent (joined by Judges O'Brien, Tymkovich, and Gorsuch) identified three errors in the panel's approach. First, it explained that the panel had created an unwarranted "presumption" of unconstitutionality, by initially viewing the cross as a religious symbol, and then looking at context—such as the officer's name and badge number, the photograph of the officer, the plaque containing biographical information, and the secular purpose of the memorials—as elements that may (or may not) overcome that presumption. App. 7. In the dissent's view, this reversed the correct analysis, which ordinarily requires the court to fully evaluate the relevant context and history *before* deciding the constitutional question. App. 8. The dissent noted that in *Allegheny* and *Lynch*, both of which involved symbols with considerable religious significance (the crèche and menorah), the Court had thoroughly considered the relevant context to determine whether

[3] The court replaced the word "universally" with "widely" in the following sentence: "The parties agree that a cross was traditionally a Christian symbol of death and, despite Defendants' assertions to the contrary, 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." Compare *Am. Atheists, Inc.* v. *Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010), with App. 57.

the displays convey a message of endorsement, "not to 'save' them from presumptive unconstitutionality." App. 8.

The second error the dissent identified was the panel's inconsistent "reasonable observer" standard. App. 10. The dissent noted that in the court's past decisions, the reasonable observer was deemed to be fully informed about the context of the challenged display. *Ibid*. For instance, the observer was aware of the display's factual history, the motives of its creator, the history of the community, and the physical setting. App. 11. The reasonable observer the panel used, however, was able to see only the cross and the beehive image, and was presumed ignorant of all of the relevant facts that support its secular message of remembrance and sacrifice:

(1) each cross includes the name and badge number of the fallen trooper;

(2) each cross stands near the place where the officer fell;

(3) a private organization sponsors the program to memorialize the fallen troopers;

(4) the families of the troopers selected the crosses; and

(5) Utah explicitly declined to endorse the symbols.

App. 11-13. In addition, the dissent noted that the panel's reasonable observer reached unreasonable conclusions. App. 13. That a memorial cross to a

fallen officer somehow coveys that the Utah Highway Patrol is a "Christian police" that discriminates against non-Christians, is, in the dissent's view, "unfounded and somewhat paranoid." App. 13.

Third, the dissent rejected the panel's implied position that "memorial crosses cannot simultaneously be religious symbols and survive challenge under the Establishment Clause." App. 16. Citing Justice Kennedy's plurality opinion in *Buono*, 130 S. Ct. at 1818, the dissent emphasized that crosses have "secular meaning" that can be "divorced" from their religious significance. App. 18. In the dissent's view, the record demonstrates that the message conveyed by the cross—"to memorialize troopers who were killed in the line of duty"—is clear and "fully consistent" with the Establishment Clause. App. 18.

Judge Gorsuch's dissent (joined by Judge Kelly) stressed that this case was not merely a "one off" misapplication of the reasonable observer standard. App. 19, 22. Rather, it was part of an ongoing pattern. In an earlier case, the Tenth Circuit had similarly employed a reasonable observer "full of foibles and misinformation" to strike down a Ten Commandments monument that was erected without religious purpose and part of a larger secular historical display—becoming the only Circuit in the Nation to do so since *Van Orden* was decided. App. 22. In his view,

the Tenth Circuit will continue to misapply *Van Orden* unless and until reversed by this Court. App. 19.[4]

Judge Gorsuch's dissent also questioned whether the endorsement test remains the appropriate framework for analyzing Establishment Clause challenges in light of *Van Orden* and *Buono*. App. 24. Specifically, *Van Orden* declined to apply the endorsement test, see 545 U.S. at 700 (Breyer, J., concurring), and the *Buono* plurality questioned whether the reasonable observer framework is always appropriate in Establishment Clause cases, see 130 S. Ct. at 1819. App. 24. The dissent identified three Circuits (the Fourth, Eighth, and Ninth) that have declined to apply the endorsement test since *Van Orden*, and by denying *en banc* review, the Tenth Circuit "perpetuate[d] a circuit split without giving due consideration to, or even acknowledging, the competing views of other courts or recent direction from the High Court." App. 24.

In Judge Gorsuch's view, this circuit split implicates a "pressing concern"—whether a federal court can "invalidate not only duly enacted laws and policies that *actually* respect the establishment of religion, but also laws and policies a reasonable hypothetical observer could *think* do so." *Ibid*.

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[4] As explained more fully below, *Van Orden* held that a very similar display did not violate the Establishment Clause. See *infra* 12-13.

(citation and internal quotation marks omitted) (emphases in original).

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision exacerbates a 2-2-1 circuit split and decrees a result that is literally unprecedented—no other court in the Nation has ever before held unconstitutional roadside crosses memorializing the dead. This Court has repeatedly observed:

> The Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Van Orden, 545 U.S. at 699 (Breyer, J., concurring) (citations omitted).

I. THERE IS A 2-2-1 SPLIT AMONG THE CIRCUITS ON WHETHER TO APPLY THE ENDORSEMENT TEST TO PASSIVE DISPLAYS WITH RELIGIOUS IMAGERY.

In *Van Orden*, the Court held that the display of a granite monument of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. *Id.* at 681 (plurality). In doing

so, the Court expressly declined to apply the endorsement test. See *id.* at 686 (plurality); *id*. at 700 (Breyer, J., concurring). Instead, Justice Breyer's controlling concurrence instructed that, in such "difficult borderline cases," there is "no test-related substitute for the exercise of legal judgment" to balance the goals of the Establishment Clause. *Id.* at 700; see also *Card* v. *City of Everett*, 520 F.3d 1009, 1017 n.10 (9th Cir. 2008) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)) (determining that Justice Breyer's concurrence in *Van Orden* is controlling as it was the narrowest opinion); *Staley* v. *Harris Cnty.*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (*en banc*) (same).

Exercising such legal judgment, Justice Breyer concluded that the display of the Ten Commandments did not violate the Establishment Clause. Justice Breyer first recognized that although the Ten Commandments send a religious message, they can also convey a secular moral message. See *id*. at 701. To determine whether one predominates, courts must consider context. *Ibid*. Several factors demonstrated that the Ten Commandments monument primarily conveyed a secular message: its placement in a park along with several secular monuments indicated "little or nothing of the sacred," its donation by a private organization "further distance[d]" the State from the religious message, and the physical setting, which did not lend itself to religious activity. *Id*. at 701-02.

Since *Van Orden*, the circuits have sharply divided on the proper test for passive displays that contain religious imagery.

Both the Fourth and Eighth Circuits have declined to apply the endorsement test, relying instead on Justice Breyer's legal judgment test. See *ACLU Neb. Found.* v. *City of Plattsmouth, Neb.*, 419 F.3d 772, 777-78, 778 n.8 (8th Cir. 2005) (*en banc*) (holding that a public display of a Ten Commandments monument is constitutional); *Myers* v. *Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005) (holding that the daily, voluntary recitation of the Pledge of Allegiance in public schools is constitutional).

In contrast, both the Sixth and Tenth Circuits have continued to apply the endorsement test despite *Van Orden*. See *ACLU* v. *Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005); App. 47. *Mercer*, the Sixth Circuit case, involved the display of the Ten Commandments in a courthouse. 432 F.3d at 626. The court acknowledged that *Van Orden* did not apply the endorsement test. See 432 F.3d at 636 n.11. Nonetheless, the Sixth Circuit felt bound to apply that test because *Van Orden* did not specifically instruct it to do otherwise. See *id*. at 636. Applying the endorsement test, the court held that the display was constitutional because the reasonable observer "appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences,

even in the form of sacred texts, in honoring American legal traditions." *Mercer*, 432 F.3d at 639-40.[5]

The Tenth Circuit's decision to rely on the endorsement test to strike down the highway memorials drew a strong rebuke from Judge Gorsuch: "It is a rare thing for this court to perpetuate a circuit split without giving due consideration to, or even acknowledging, the competing views of other courts or recent direction from the High Court. But that's the path we have taken." App. 24.

The Ninth Circuit has taken yet a third approach. In *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1106-07 (9th Cir. 2011) (petitions for rehearing *en banc* filed Mar. 18, 2011), the court considered the constitutionality of a war memorial that includes a cross. The war memorial includes, along with the cross, numerous secular symbols: more than two thousand plaques, bollards, and paving stones honoring veterans, and a large American flag flying atop a 30-foot flagpole. *Id*. at 1103. In light of *Van Orden*, the court did not know what test to employ, and so it applied *both* the endorsement test and the legal judgment test in holding that the memorial violates

[5] In February of this year, the Sixth Circuit reaffirmed that it was bound to apply the endorsement test in a decision holding that displaying a poster of the Ten Commandments in a courtroom violates the Establishment Clause. See *ACLU* v. *DeWeese*, 633 F.3d 424, 431, 434-35 (6th Cir. 2011).

the Establishment Clause. See *id*. at 1107, 1122, 1124.[6]

Thus, as it presently stands, in the Fourth and Eighth Circuits, courts apply the legal judgment test; in the Sixth and Tenth Circuits, courts apply the endorsement test; and in the Ninth Circuit, courts apply both. And, as a result, the outcomes are different across the Nation.

II. THE CIRCUIT SPLIT HAS IMPORTANT NATIONAL CONSEQUENCES.

This circuit conflict creates significant practical problems across the Nation. Memorials that are legal in one State are now illegal in adjoining States. Thus, a driver traveling an interstate through several circuits might observe roadside memorials containing crosses in one State, but a mile down the road, the very same memorials would be deemed unconstitutional. As Judge Gorsuch observed, the Tenth Circuit "will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might *confuse* them for an endorsement of religion." App. 22 (emphasis in original).

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[6] In *Card*, 520 F.3d at 1018, the Ninth Circuit applied *Van Orden* when confronted with a nearly identical Ten Commandments monument on government property. But in doing so, the court emphasized, "[w]e cannot say how narrow or broad the [*Van Orden*] exception may ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer." *Ibid.*

Similarly, religious symbols may be permitted on tombstones in Arlington National Cemetery in Virginia, but not in veterans' cemeteries in Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah.[7]

A litigant in one circuit will have to satisfy one test, and a litigant in another circuit, another. And in the Ninth Circuit, both. Moreover, litigants in the other circuits will not know which test will apply to them.

Additionally, the chilling effect of the split is considerable. Because of the deep confusion in the law, it is difficult to predict ex ante which displays will be held constitutional and which unconstitutional. To avoid the substantial costs and trouble of litigation, many officials likely will simply deny requests to erect memorials that have any possible sectarian interpretation. As the four *en banc* dissenters warned:

> Confronted with the court's decision, governments face a Hobson's choice: foregoing memorial crosses or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto. Some might greet that result

[7] Indeed, the Tenth Circuit's decision prohibits a display that is selected by an individual trooper's family to honor that trooper. Under that reasoning, the private choice of families to include religious imagery on the headstones of their loved ones in public cemeteries would likewise be in jeopardy.

> with enthusiasm—but it is certainly not required by the constitution.

App. 15.

As the *amici* States demonstrated below, all six States within the Tenth Circuit permit roadside memorials, many of which include crosses. These are now all at risk, along with any other monuments or memorials on public land that include any imagery that *some* observer *might* interpret as a government endorsement of religion.

For example, there are fourteen granite crosses on Bureau of Land Management property in Colorado. Each honors a firefighter who died fighting the South Canyon Fire on Storm King Mountain near Colorado Springs in July 1994. Though erected and maintained by family and friends to mark the spots where the firefighters perished—not to send any sectarian message—they are all now at risk of being held unconstitutional.

Across the Nation, well-known memorial crosses that symbolize sacrifice and remembrance are also in danger—the Argonne Cross and the Canadian Cross of Sacrifice that sit among the graves in Arlington National Cemetery, just to name a few. Rather than endure the cost of litigation, government entities may now require that any memorial that has a cross as any component of the memorial be removed.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO SET ASIDE THE ENDORSEMENT TEST AND ADOPT THE COERCION TEST INSTEAD.

A. Five Justices Have Rightly Called For The Endorsement Test To Be Rejected.

The endorsement test has had a long and troubled history. Over the past three decades, five Justices—Justices Kennedy, Scalia, Thomas, and White, and Chief Justice Rehnquist—have expressly called for rejecting the endorsement test as "flawed in its fundamentals and unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.) ("The uncritical adoption of [the endorsement test] is every bit as troubling as the bizarre result it produces in the cases before us."); *Van Orden*, 545 U.S. at 692-93 (Thomas, J., concurring) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges [(including the endorsement test)], and return to the original meaning of the Clause."); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion, Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("[The endorsement test] supplies no standard whatsoever * * * * It is irresponsible to make the Nation's legislators walk this minefield.").

Moreover, three additional Justices—Chief Justice Roberts and Justices Breyer and Alito—have

expressed doubts about whether it is the proper test to apply. See *Buono*, 130 S. Ct. at 1819 (Kennedy, J., joined by Roberts, C.J., and Alito, J.) ("Even if [the endorsement test] were the appropriate one, but see [Justice Kennedy's dissent in *Allegheny* and Justice Scalia's plurality opinion in *Pinette*] * * * *"); see also *id.* at 1824 (Alito, J., concurring in part and concurring in the judgment) ("Assuming that it is appropriate to apply the so-called 'endorsement test,' * * * *"); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment) (discussing, inter alia, the endorsement test and then observing, in "difficult borderline cases, * * * I see no test-related substitute for the exercise of legal judgment").

Although this Court has yet to explicitly overrule the endorsement test, it has declined to apply it in its recent cases. For example, in *Van Orden* a majority of this Court declined to apply the endorsement test. Likewise, in *Buono*, a majority did not embrace the endorsement test.

Commentators have also strongly criticized the endorsement test before and since its adoption in *Allegheny*. See, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 331 (1987); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510-21 (2002) (concluding the endorsement test provides "neither a workable nor a wise judicial standard"); PATRICK M. GARRY, WRESTLING WITH GOD: THE COURT'S TORTUOUS TREATMENT OF RELIGION 68

(2006); Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123 (2010).

The Court should now set aside the endorsement test. As Justice Kennedy observed in his seminal dissent in *Allegheny*, the endorsement test "reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents * * * * " 492 U.S. at 655. Justice Kennedy elaborated:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multi-faceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

Id. at 657 (citations omitted).

In its place, the Court should adopt the "coercion test" embraced in Justice Kennedy's *Allegheny* dissent:

> The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: *government may not coerce anyone to support or participate*

> *in any religion or its exercise*; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Lynch* v. *Donnelly*, 465 U.S. at 678. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion * * * * It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government.

Id. at 659-60 (emphasis added).

For three decades, the courts have struggled to apply the endorsement test. As the court below observed, "'many believe the Court's modern Establishment Clause jurisprudence is in hopeless disarray.'" App. 45 (quoting *Bauchman ex rel. Bauchman* v. *W. High School*, 132 F.3d 542, 551 (10th Cir. 1997)). Adopting the coercion test will do much to resolve that disarray. See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1987).

B. This Case Presents The Ideal Vehicle To Reexamine The Endorsement Test.

This case has no vehicle problems. The facts are not in dispute. The case was decided on summary judgment, and the appeal presents pure issues of law.

Moreover, the only issue on appeal is the viability and application of the endorsement test. Prongs one and three of *Lemon* (itself a test that has generated enormous criticism) are not seriously in dispute. Purpose is not an issue. Indeed, as the court below observed:

> Plaintiffs are unable to point to *any evidence* suggesting that [the Association's] motive is other than secular * * * * [And] [p]laintiffs have failed to present *any evidence* that * * * the State Defendants' motivation was different than that expressed by [the Association].

App. 48-49 (emphases added).

And further percolation will not improve the situation. If the endorsement test is to be rejected, only this Court can do so. Thus, even though subsequent cases have called the test into serious question, lower courts are not at liberty to decide that a more recent decision of the Court, such as *Van Orden*, has "by implication, overruled an earlier precedent." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). Rather, they must "leav[e] to this Court the prerogative of overruling its own decisions." *Ibid*. (citing *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

Thus, under *Agostini*, review by the Court is the only way to replace the endorsement test (or at least to modify it) so that lower courts have a framework that is consistent with the goals of the Establishment Clause and capable of consistent application.

IV. THE JUDGMENT OF THE TENTH CIRCUIT CONFLICTS WITH THE PRECEDENT OF THIS COURT.

Under any standard, the crosses memorializing fallen troopers do not violate the Establishment Clause. Under the coercion test, which the Court should adopt, the analysis is straightforward—the passive roadside memorials coerce no one to do anything. They commemorate fallen officers who gave their lives protecting the public.

But even under the endorsement test, this Court's precedent makes clear that the State of Utah did not endorse religion by allowing a private group to commemorate these fallen officers. Accordingly, because the circuit split is significant and the impact of the decision substantial, the Court should grant certiorari and reverse the judgment below.

A. The Court Of Appeals' Decision Is Irreconcilable With This Court's Standards For The Reasonable Observer.

This is the second time since *Van Orden* that the Tenth Circuit has misapplied the endorsement test in conflict with decisions of this Court. In *Green* v. *Haskell County Board of Commissioners*, 574 F.3d 1235 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010), the Tenth Circuit, on a vote of six to six, decided not to consider *en banc* a panel's decision that the Establishment Clause prohibited a display of the Ten Commandments, alongside secular displays, on

the grounds of a public building. *Green* was the first case in any circuit to hold unconstitutional a display of the Ten Commandments since *Van Orden*.[8]

Green, like this case, dealt with the misapplication of the endorsement test's reasonable observer standard. The reasonable observer standard is not "whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring) (quoting *Ams. United for Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992)) (alteration in *Pinette*). Under this Court's teachings, the reasonable observer not only embodies the community ideals of reasonable behavior, but is also fully knowledgeable of the history of the display and the context in which it appears. *Ibid*.

According to this Court, "[n]or can the knowledge attributed to the reasonable observer be limited to

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[8] That certiorari was denied in *Green* does not counsel against granting certiorari in this case. *Green* focused narrowly on the constitutionality of Ten Commandment displays, whereas the issue here involves a much broader question and a much cleaner circuit split: which test applies to Establishment Clause challenges. There is now a clear 2-2-1 split on the issue raised, whereas in *Green*, there had not been adequate time since *Van Orden* was decided for the circuit split to crystallize. Furthermore, given its breadth, the ruling in the instant case (if permitted to stand) will affect vast numbers of pre-existing monuments, memorials, and grave markers.

the information gleaned simply from viewing the challenged display." *Ibid*. But in this case and in *Green*, the Tenth Circuit held that its reasonable observer would possess far less knowledge than this Court has held that he should have.

In some cases in the Tenth Circuit, the reasonable observer is quite well informed, knowing everything from the history of the monument to the reason for a sign's design. See App. 10-11 (Kelly, J., dissenting from denial of rehearing *en banc*) (collecting cases). But in this case, the Tenth Circuit held that the reasonable observer does not even know what is written on the memorial, including the trooper's name and date of death. *Id*. at 11. In addition to this artificial ignorance of large eight-inch lettering, the Tenth Circuit's observer is also selectively ignorant of any contextual information that establishes its secular meaning. For example, the Tenth Circuit's reasonable observer does not know that:

> [T]he crosses were erected near the location of the officer's death, the crosses were erected by a private organization for the purpose of memorializing the fallen trooper, the crosses were chosen by the trooper's family, and that Utah expressly declined to endorse the memorials.

Id. at 12. See also *id.* at 20 (Gorsuch, J., dissenting from the denial of rehearing *en banc*) ("[O]ur observer has no problem seeing the Utah highway patrol insignia and using it to assume some nefarious state endorsement of religion is going on; yet, mysteriously,

he claims the inability to see the fallen trooper's name posted directly above the insignia."). Because the Tenth Circuit's reasonable observer is inattentive and selectively ignorant of the memorials' context and history, the court held the memorials unconstitutional.

Similarly, in *Green*, the reasonable observer there was aware that the private citizen paying for the monument had religious motives, but this same observer was ignorant of "the fact that the commissioners discussed the historic importance of the display and stated that the monument should be permitted based on the county's policy of neutrality in accepting displays." 574 F.3d at 1240 (Kelly, J., dissenting from the denial of rehearing *en banc*). And curiously, the reasonable observer somehow interprets the risk of establishment as greater in small towns than in large towns. *Id.* at 1241-42. In analyzing the selective history of which he is aware, the reasonable observer makes mistakes of fact (he interprets a statement from a county commissioner speaking in the first person as the official policy statement of the county) and of logic (imputing the motives of the donor to the government). *Id.* at 1246-47 (Gorsuch, J., dissenting from the denial of rehearing *en banc*).[9]

[9] Like the Tenth Circuit's reasonable observer, the panel made a mistake of fact in attempting to distinguish *Van Orden* by saying "[t]he display at issue in *Van Orden* was part of a historical presentation of various legal and cultural texts." App. 59. The panel is incorrect. There were (and are) no other "legal

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The Tenth Circuit has now enshrined into law a reasonable observer who, directly contrary to this Court's teachings, is inattentive and has selective knowledge of the pertinent facts. This has already led to bizarre outcomes—and if left uncorrected, the Tenth Circuit's Establishment Clause jurisprudence will continue to diverge from that of this Court and the other circuits.

Last year, in *Buono*, the Court specifically noted 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." 130 S. Ct. at 1818. This is exactly the situation that the Tenth Circuit faced in this case. Yet applying its own form of the reasonable observer test, the Tenth Circuit came to the opposite conclusion.

At the same time, because of the standardless application of an inattentive and selectively informed reasonable observer, the Tenth Circuit permits a New Mexico city to use a three-cross symbol in its ubiquitous official seal—on municipal land, signs, flags, buildings, uniforms, vehicles, and documents. *Weinbaum* v. *City of Las Cruces, N.M.*, 541 F.3d 1017, 1033-36 (10th Cir. 2008). No aspect of Establishment Clause jurisprudence can explain how crosses as part

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and cultural texts" surrounding the Ten Commandments monument on the Texas Capitol grounds, and this Court did not suggest that there were. See 545 U.S. at 681, 691-92.

of an official seal are less of an "establishment of religion" than a highway memorial, selected by the trooper's family, in the shape of a cross.

To the extent this Court wishes to retain the endorsement test, it should grant review to correct what is now a line of cases from the Tenth Circuit that apply a reasonable observer standard that is only a distant cousin to the reasonable observer in this Court and in every other court of appeals.

B. The Opinion Conflicts With Decisions Of This Court Requiring That A Challenged Symbol Must Be Analyzed In Context.

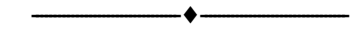
As recognized in Judge Kelly's dissent, the decision also conflicts with decisions of this Court that hold that a challenged symbol must first be analyzed in context before determining its message. App. 8; see *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). On a number of occasions, this Court has explained how the context of a display can give drastically different meanings to the cross—many of which are entirely secular. In *Pinette*, 515 U.S. at 770, Justice Thomas explained that, as used by the Ku Klux Klan, the cross becomes "a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities * * * and any other groups hated by the Klan." (Thomas, J., concurring). In *Buono*, Justice Kennedy stressed that when displayed in war

memorials, crosses convey a secular message of military service and remembrance:

> [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. Here, one Latin Cross in the desert evokes far more than religion. It evokes thousands of small Crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

130 S. Ct. at 1820. And a cross that marks the place of a fallen trooper on the side of a public highway "need not be taken as a statement of governmental support for sectarian beliefs." *Id*. at 1818.

Contrary to the Supreme Court's repeated instructions to begin Establishment Clause analysis by looking at the symbol in context, the Tenth Circuit here did the exact opposite: it began with the conclusion that, standing alone, the crosses conveyed religious messages. App. 7. The court then turned to context and history to determine whether they could "secularize the message" of the memorial crosses. App. 9. This approach is fundamentally inconsistent with *Van Orden*, *Buono*, and *Pinette*. And as the dissent concluded, this creates an "unwarranted" and "unprecedented" "presumption of unconstitutionality." App. 8-9.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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