No. 08-4061

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN ATHEISTS, INC., *et al*.,
Plaintiffs-Appellants,

v.

COLONEL SCOTT T. DUNCAN, *et al*.,
Defendants-Appellees,

and UTAH HIGHWAY PATROL ASSOCIATION,
Intervenor-Appellee.

On Appeal from the United States District Court for the District of Utah

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BRIEF *AMICI CURIAE* OF THE STATES OF COLORADO, KANSAS, NEW MEXICO, AND OKLAHOMA AND THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* The Becket Fund for Religious Liberty states that it does not have a parent corporation and does not issue any stock.

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INTEREST OF *AMICI*

The State of Colorado, like Utah, allows private individuals to erect monuments, including crosses, on county roads. C.R.S. § 43-2-149. Colorado is concerned that a ruling in Plaintiffs' favor would jeopardize its current practice of allowing private speech on government property.

The State of New Mexico also allows private individuals to erect memorials, including crosses, on public roadsides. New Mexico law protects private "descansos," which are traditional roadside memorials often taking the form of a cross, by making it a crime to "knowingly or willfully deface or destroy" a *descanso*. N.M.S. § 30-15-7. New Mexico is concerned that a ruling in Plaintiffs' favor would jeopardize its practice of allowing private speech on government property.

Although the States of Kansas and Oklahoma do not have statutes specifically protecting roadside memorials, they are concerned that a ruling in Plaintiffs' favor would jeopardize their practice of allowing private speech on government property.

The Becket Fund for Religious Liberty, which has filed a motion for leave to file this brief, is a nonpartisan, interfaith public interest law firm dedicated to protecting the free expression of all religious traditions. The

Becket Fund opposes attempts to use the Establishment Clause to banish private religious speech from the public square.

SUMMARY OF ARGUMENT

This is a free speech case dressed up as an Establishment Clause challenge. The Utah Highway Patrol Association ("Patrol Association" or "Association")—a private, secular organization representing state troopers and their families—has controlled every aspect of the challenged cross memorials. It initiated, funded, and constructed the memorials; it designed and composed the message of the memorials without any government oversight; and it erected, maintains, and owns the memorials to this day. Even Plaintiffs acknowledge that the memorials constitute "the religious expression of [the Patrol Association]." Appellant's Br. ("Appt.Br.") 24. The memorials are therefore private, not government speech.

The fact that the memorials are private speech is important for two reasons. *First*, it means that this case involves not just the Establishment Clause, but also the Free Speech and Free Exercise Clauses. As the Supreme Court has said, "There 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 and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 765 (1995) (emphasis in original). The Free Speech Clause limits Utah's ability to restrict the Association's speech on the basis of its religious

content or viewpoint. But that is precisely what Plaintiffs seek: an order compelling Utah to remove the cross memorials solely because they are religious. Although Plaintiffs claim that such an order is justified by the Establishment Clause, "courts have consistently rejected the government's assertions that the Establishment Clause raises concerns outweighing plaintiffs' free speech rights." *Summum* v. *Callaghan*, 130 F.3d 906, 920-21 (10th Cir. 1997).

Second, the private nature of the Association's speech informs the proper Establishment Clause analysis. The question is not whether the Establishment Clause is violated when the *government* erects a cross, but whether it is violated when the government allows a *private party* to erect a cross on government property. In such a case—where the government allows private religious speech in a government forum—the Supreme Court's otherwise muddled Establishment Clause jurisprudence is considerably clearer. As long as (a) the government treats religious and non-religious speech neutrally, and (b) the government's actions do not have the primary effect of endorsing religion, the government does not violate the Establishment Clause. *Capitol Square*, 515 U.S. at 770; *id.* at 777 (O'Connor, J., concurring).

Utah has satisfied both elements of this test. Far from favoring reli-

gious speech, Utah has opened its property to a *secular* organization (the Patrol Association), and has exercised no control over the Association's speech. The Association has pledged to use whatever symbol the family of the deceased trooper requests, whether religious or secular. And Utah has passed a joint resolution expressing support not only for the use of a cross, but any "other appropriate symbols as requested by the family [of a fallen trooper]." Appellant's Appendix ("A.") 1095. Finally, there is no evidence that Utah has manipulated its property to give preferential access to a religious group or to promote a religious message. The Establishment Clause therefore does not require Utah to suppress the Association's speech.

Even assuming Utah somehow violated the Establishment Clause, the appropriate remedy is not, as Plaintiffs claim, to remove the crosses. Rather, Utah must use the "most 'narrowly drawn' alternative" available to avoid an Establishment Clause violation. *Capitol Square*, 515 U.S. at 793-794 (Souter, J., concurring). Here, that alternative consists of either (1) an order requiring Utah to treat religious and non-religious speech neutrally; or (2) an order requiring Utah to include with the memorials a statement disclaiming any endorsement of religion. Either alternative would adequately remedy any Establishment Clause violation while respecting the Association's right of free speech.

Finally, a ruling in Plaintiffs' favor would have significant adverse consequences on the laws of other states and on free speech generally. Other states, including Colorado and New Mexico, allow private individuals to display roadside memorials, including crosses, on government property. A ruling against Utah would jeopardize the laws of those states. And many states, faced with the threat of an Establishment Clause challenge for allowing religious symbols, and a free speech challenge for suppressing them, will simply prohibit private speech on government property altogether—a result contrary to what the Supreme Court's free speech cases have encouraged.

ARGUMENT

I. Removing the cross memorials because of their religious viewpoint would violate the Patrol Association's right of free speech.

As explained below, the Patrol Association's cross memorials are private speech. The Association conceived of, designed, funded, built, and erected the memorials without government oversight; the Association continues to own and maintain the memorials to this day; and Utah has expressly disclaimed responsibility for the memorials' content.

Because the memorials are private speech, the First Amendment prohibits Utah from discriminating against them because of their religious (or allegedly religious) viewpoint. Plaintiffs' lawsuit, however, would do just that: Plaintiffs attempt to require Utah to suppress the Association's speech solely because of its religious viewpoint. Such a result is not only unsupported by the Establishment Clause, but is also forbidden by a long line of cases governing private religious speech.

A. The cross memorials are private, not government speech.

This Court examines four factors to determine whether a monument is government or private speech: "(1) whether the central purpose of the [monument] was to promote the views of the [government]; (2) whether the [government] exercised editorial control over the content of the [monument]; (3) whether the literal speaker was an employee of the [government]; and

(4) whether ultimate responsibility for the content of the [monument] rested with the [government]." *Summum* v. *City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002).

All four factors confirm that the cross memorials are private speech. First, the fact that the Association has been the driving force behind the memorials demonstrates that the central purpose of the memorials is to express the views of the Association. The Association not only proposed, designed, funded, and built the memorials, it initially installed them on private, not government, property. A.2992-94 (Dist.Ct.Op.2-4). And even after the Association received permission to erect the memorials on government property, the Association—not the government—selected the locations where the memorials would be placed. *Id.* The monuments thus express the views of the Association. *Cf. City of Ogden*, 279 F.3d at 1004 (monument expressed the views of the Eagles because "[t]he Eagles designed, produced, and donated the [monument]").

Second, Utah exercised no "editorial control over the content of the [memorials]." *City of Ogden*, 297 F.3d at 1004. The Association, with the concurrence of the families of deceased troopers, selected and arranged each element of the memorials without any oversight by the State, and erected the memorials as finished products. A.2994 (Dist.Ct.Op.4); *cf. City of Ogden*,

297 F.3d at 1004 (monument was private because "the Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product").

Third, as in *City of Ogden*, the Association "is properly considered the 'literal speaker' of the speech contained on the [memorials]…based upon recognition of the fact that the [Association], free from any [State] control, composed the speech contained on the [memorials]." *Id.* at 1004-05; A.2994 (Dist.Ct.Op.4).

Fourth, the Association retains "ultimate responsibility" for the content of the memorials because it both maintains and owns the memorials. A.2303. *Cf. Wells* v. *City & County of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001) (city was ultimately responsible because it "provid[ed] security for the display"); *City of Ogden*, 297 F.3d at 1005 (city was ultimately responsible because it "acquired title to the Monument").

Finally, unlike the government in either *Wells* or *City of Ogden*, the Utah Department of Transportation (UDOT) has expressly disclaimed responsibility for the content of the memorials. As a condition of allowing the Association to erect the memorials, UDOT required the Association to enter an indemnification agreement, which provided that the Association would be responsible for "all costs and expenses, including attorneys' fees connected

in any way with the [memorials]," and that UDOT "neither approves or disproves [sic] the memorial marker." A.2303 (emphasis added). UDOT's disassociating itself from the memorials confirms that the memorials are private speech.

B. Because the cross memorials are private speech, this case implicates the Patrol Association's free speech rights.

Because this case involves private speech, it implicates not only the Establishment Clause but also the Free Speech and Free Exercise Clauses. Invoking the Establishment Clause, Plaintiffs ask the government to restrict the Association's speech because of its allegedly religious viewpoint. The Free Speech and Free Exercise Clauses, however, limit Utah's ability to restrict that speech. In fact, if Utah were to "exclu[de] [private speech] on the basis of its religious perspective," such action would "constitute[] unconstitutional viewpoint discrimination." *Good News Club* v. *Milford Central School*, 533 U.S. 98, 107 n.2 (2001). Plaintiffs' suit thus improperly attempts to place Utah "in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other"—a result the Supreme Court has forbidden. *Capitol Square*, 515 U.S. at 768.

Several Supreme Court cases highlight the free speech interests at issue here. In *Capitol Square*, the State of Ohio allowed private parties, on a limited basis, to erect unattended displays on the statehouse lawn. *Id.* at

757-58. But when the Ku Klux Klan sought permission to erect a freestanding cross at Christmas time, the state declined on the ground that the cross—unaccompanied by any secular symbols and located just steps from the statehouse—would violate the Establishment Clause. *Id.* at 758.

The Court began its analysis not with the Establishment Clause but with the Free Speech Clause. *Id.* at 760-61. First, the Court examined whether excluding the cross violated the Klan's free speech rights (it did); next, the Court examined whether the free speech violation was justified by the Establishment Clause (it was not). As the Court explained: "There 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." *Id.* at 765 (emphasis in original). Because the cross was private religious speech, the state's "content-based regulation" violated the Free Speech Clause. *Id.* at 762.

The Court has reached the same result in at least four other cases involving private religious speech in a government forum. In each case, the Court concluded that restricting private speech would violate the Free Speech Clause and was not justified by the Establishment Clause.[1]

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[1] *See*:

- *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (First Amendment violated where a public university made its facilities generally available for use

This case presents the same legal issue, but instead of discriminating against the crosses on the basis of their religious viewpoint, Utah has permitted them. That is precisely what the Supreme Court's jurisprudence requires. But if Plaintiffs' suit is successful, Utah will be forced to remove the crosses solely because of their religious viewpoint. Such a result would not only silence the Association's private speech and discourage Utah from creating a public forum, but would run counter to controlling Supreme Court precedent.

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by student groups, but, citing the Establishment Clause, prohibited use by a religious student group);

- *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (First Amendment violated where a school district made its facilities available for a variety of civic, social, and recreational purposes, but, citing the Establishment Clause, denied use by a religious group);
- *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (First Amendment violated where a public university permitted student organizations to receive money from a student activities fund, but, citing the Establishment Clause, excluded a student organization that published a religious newspaper);
- *Good News Club*, 533 U.S. at 98 (First Amendment violated where a public school made its facilities available for social, civic, recreational, and entertainment uses, but, citing the Establishment Clause, denied use for religious instruction).

C. Restricting the Patrol Association's speech because of its religious viewpoint would violate the First Amendment.

This Court employs "a three-step framework" for analyzing restrictions on private speech on government property. *Callaghan*, 130 F.3d at 913. First, the Court determines whether the case involves protected speech. *Id.* Second, the court determines what type of forum the government has provided—a traditional public forum, a limited public forum, or a non-public forum. *Id.* The type of forum determines the extent to which the government may restrict speech. *Id.* Finally, the Court determines whether the government's justifications for restricting speech satisfy the standards applicable to the given forum. *Id.*

The first step is "easily disposed of" when "the speech in question is private religious speech." *Id.* Such speech is just as "fully protected under the Free Speech Clause as secular private expression." *Capitol Square*, 515 U.S. at 760. The memorials are therefore protected speech.

Second, the parties correctly agree that, by allowing the Association to erect the cross memorials, Utah has created a non-public forum. *See* Appt.Br.27; Patrol Association Br. at 44. A non-public forum consists of government property that is "not by tradition or designation a forum for public communication," but which the government makes available for a limited number of speakers or for certain types of speech. *Callaghan*, 130 F.3d at

916. Although Utah generally prohibits private parties from erecting unattended roadside memorials, Appt.Br.10, it has created a non-public forum by allowing a single speaker (the Association) to erect memorials for a limited purpose (commemorating fallen troopers). *Cf. Callaghan*, 130 F.3d at 916 (lawn of a county courthouse containing a single monument erected by a private party constituted a non-public forum).

In a non-public forum, although the government may restrict speech based on the identity of the speaker or subject matter of the speech, any such restriction must be "reasonable in light of the purpose served by the forum and…viewpoint neutral." *Cornelius* v. *NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). "[S]peech discussing otherwise permissible subjects cannot be excluded…on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 112.

Plaintiffs' requested relief—an order restricting the Association's speech because it is religious—contradicts this standard. Plaintiffs do not complain that the cross memorials address the wrong subject matter or somehow fail to serve the purposes of the forum. Rather, they complain that the crosses memorialize fallen troopers from a viewpoint "exclusive to Christianity." Appt.Br.15. According to Plaintiffs, if the Association had communicated the same basic message with a "non-religious symbol" such

as a flag or obelisk, "[t]his lawsuit would not have been filed." *Id.* at 26 n.6. But because the memorials reflect "the philosophical underpinnings and beliefs of Christianity," they are offensive. *Id.* 16. This is quintessential viewpoint discrimination. *Good News Club*, 533 U.S. at 109-112.

Nor is it any answer to claim that an order removing the crosses would restrict only religious content, not a religious viewpoint. This Court has rejected a similar argument in *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1277 (10th Cir. 1996). There, the city allowed senior centers to be used for instruction on a wide variety of subjects "of interest to senior citizens," but not "for sectarian instruction or as a place of religious worship." *Id.* When a local congregation sought permission to show a film about the life of Jesus Christ, the city refused.

On appeal, the city defended its policy on the ground that it was merely "a restriction based upon content, not viewpoint, because it disallows all sectarian instruction and religious worship…regardless of the particular religion involved." *Id.* at 1279. This Court, however, concluded that the city's policy was "properly analyzed as a viewpoint-based restriction." *Id*. As the Court explained, "[a]ny prohibition of sectarian instruction where other instruction is permitted…intrinsically favors secularism at the expense of religion," thus amounting to viewpoint discrimination. *Id.*

Here, similarly, Plaintiffs might argue that a prohibition on religious symbols merely restricts religious content, not viewpoint, because it prevents the expression of any religious message, regardless of the particular religion involved. But, like the restriction in *Church on the Rock*, a policy permitting secular symbols but excluding religious symbols "intrinsically favors secularism at the expense of religion," thus discriminating against religious viewpoints. *Id.*; *see also Good News Club*, 533 U.S. at 109-112 (rejecting attempt to recast impermissible viewpoint discrimination as permissible content regulation). Such a policy is presumptively unconstitutional. *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) ("[D]iscrimination 'on the basis of religious views or religious status,'…is subject to heightened constitutional scrutiny.").

Finally, even assuming that removing the crosses would be a content-based restriction, it would fail the requirement that any content-based restriction be "reasonable in light of the purpose served by the forum." *City of Ogden*, 297 F.3d at 1003. Nothing in the purpose of this roadside forum (*i.e.*, commemorating fallen troopers) requires the exclusion of religious content. A cross can serve that purpose just as easily as an obelisk. Plaintiffs therefore cannot argue that a restriction on religious content is necessary to "preserve[] the purpose of the forum." *Callaghan*, 130 F.3d at 917; *Good*

News Club, 533 U.S. at 122 (Scalia, J., concurring) (excluding speech "because it's religious" is not "reasonable in light of the purpose served by the forum").

* * *

In sum, Plaintiffs seek an order removing the cross memorials based on their allegedly religious viewpoint. This would require the government to engage in presumptively unconstitutional viewpoint discrimination. Such discrimination is permissible, if at all, only if it is justified under the strictest scrutiny. Viewpoint-based restrictions not only must be "narrowly drawn to effectuate a compelling state interest," but also must be examined "with an especially critical review of the government's asserted justifications for those restrictions." *Church on the Rock*, 84 F.3d at 1279-80. Here, the only justification Plaintiffs offer for viewpoint discrimination is that it is necessary to comply with the Establishment Clause. But as demonstrated below, that is no justification at all.

II. The Establishment Clause does not compel Utah to restrict the Patrol Association's speech.

Attempts to justify religion-based viewpoint discrimination under the Establishment Clause have not fared well. As this Court has noted: "In the context of [private religious speech in a government forum], courts have ***consistently rejected*** the government's assertions that the Establishment

Clause raises concerns outweighing plaintiffs' free speech rights." *Callaghan*, 130 F.3d at 920-21 (emphasis added). In fact, the Supreme Court has suggested that "a State's interest in avoiding an Establishment Clause violation" might never "justify viewpoint discrimination." *Good News Club*, 533 U.S. at 113. This case is no exception.

A. The primary question under the Establishment Clause is whether Utah has treated religious and non-religious speech neutrally.

Although this Court has lamented the Supreme Court's "morass of inconsistent Establishment Clause decisions," *Bauchman* v. *West High School*, 132 F.3d 542, 551 (10th Cir. 1997), the Court has followed a more consistent approach in cases involving private religious speech in a government forum. The primary inquiry in such cases is whether the government, in operating the relevant forum, has treated religious and non-religious speech neutrally. *Capitol Square*, 515 U.S. at 770. If so, the Establishment Clause does not justify the suppression of private religious speech. *Id.* A secondary inquiry (when it is conducted at all) is whether the government's operation of the forum has the primary effect of endorsing religion. *Id.* at 777 (O'Connor, J., concurring).

The leading case is *Capitol Square*. There, the State of Ohio generally allowed private parties to erect unattended displays in a park surround-

ing the statehouse, but, citing Establishment Clause concerns, denied permission for the Ku Klux Klan to erect a Roman Cross. In a 7-2 decision, the Supreme Court held that the State's denial violated the Klan's free speech rights and was not justified by the Establishment Clause. 515 U.S. at 763.

The majority divided over the proper Establishment Clause analysis. A four-justice plurality applied a bright-line rule, concluding that the Establishment Clause was not violated because the government, in its operation of the relevant forum, treated religious and non-religious speech neutrally. According to the plurality, as long as the government forum is open to religious and non-religious speech "on equal terms," purely private religious speech on government property "cannot violate the Establishment Clause." *Id.* at 770.

Three concurring justices agreed that neutrality was an important element of the Establishment Clause analysis, but asserted that the Court should also apply the "endorsement" test, asking whether the government's "operation of [the] forum" had the primary effect of endorsing religion. *Id.* at 777 (O'Connor, J., concurring). That test was satisfied, the justices found, because a reasonable observer would "recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers," and because

the government could, "if necessary," require the cross to be accompanied by "an appropriate disclaimer." *Id.* at 782. No Justice in *Capitol Square* discussed the *Lemon* test or "excessive entanglement."

Subsequent cases involving private religious speech on government property have followed the same analysis. While the Court has always held that neutrality between religious and non-religious speech is "a significant factor" in upholding religious speech in a government forum, *Good News Club*, 533 U.S. at 114, some justices have argued that the endorsement inquiry is also required, *id.* at 127-28 (Breyer, J., concurring).

This Court has predominantly applied the neutrality test, not the endorsement test. In *Church on the Rock*, where a city tried to justify religion-based viewpoint discrimination under the Establishment Clause, this Court explained that the touchstone of the Establishment Clause analysis was neutrality: "The Supreme Court has made it abundantly clear that providing ***equal access*** to a designated public forum…does not violate the Establishment Clause. ***The government need only remain neutral, preferring neither religious nor secular expression over the other***." 84 F.3d at 1280 (emphasis added). Because the city could have allowed the religious speech without violating the principle of neutrality, the Court struck down the city's restriction. *Id.* The Court did not discuss the endorsement test. *See also*

Callaghan, 130 F.3d at 921 (applying neutrality test without discussing endorsement).[2]

In sum, the primary Establishment Clause question in this context is whether the government has treated religious and non-religious speech neutrally; the secondary question, if relevant at all, is whether the government's operation of the forum has had the primary effect of endorsing religion. As explained below, both tests are satisfied here.

B. Utah has treated religious and non-religious speech neutrally.

Here, Utah has operated the roadside forum in a religion-neutral manner. Utah has exercised no control over the content or viewpoint expressed in the memorials. A.2994 (Dist.Ct.Op.4). And there is no evidence that Utah has ever denied a request to erect a "more secular" symbol, such as an obelisk, or a symbol from a different religion, such as a Star of David.

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[2] *Amici* are aware of only one government forum case in which this Court has discussed the endorsement inquiry; even there, the Court gave the neutrality inquiry "[p]articular[]" weight. *City of Ogden*, 297 F.3d at 1010. Given the fact that none of the Supreme Court's recent government forum cases has applied the *Lemon* test (which is the basis for the endorsement inquiry), and two of this Court's earlier cases declined to discuss endorsement (*see Church on the Rock* and *Callaghan*, *supra*), *amici* believe the endorsement inquiry is unnecessary. And to the extent that *City of Ogden*'s endorsement inquiry conflicts with *Church on the Rock* and *Callaghan*, "[this] panel should follow earlier, settled precedent over a subsequent deviation therefrom." *United States* v. *Zuniga-Soto*, 527 F.3d 1110, 1121 (10th Cir. 2008).

Rather, Utah has left the Association free to adopt whatever religious or non-religious symbol it chooses.

Nor has Utah violated the principle of neutrality by limiting access to the forum to the Association. It is not uncommon for a government to limit access to a non-public forum to a few speakers or a single speaker. *E.g.*, *Callaghan*, 130 F.3d 906 (government created a non-public forum by allowing a single group to erect a monument); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (government excluded all unions except "the recognized bargaining representative" from a non-public forum). The question is whether the government has "giv[en] *sectarian religious speech* preferential access to [the] forum" or "manipulate[d]" the forum "in such a manner that *only certain religious groups* take advantage of it." *Capitol Square*, 515 U.S. at 766 (emphasis added).

That is not the case here. The Association is a *secular* group that has promised to use other symbols, including secular ones, if requested by the family of the deceased trooper. A.2992-93 (Dist.Ct.Op.2-3). Nor is there any evidence of a tacit understanding that the Association would erect only crosses, or that Utah had a hidden purpose of promoting religious speech. Indeed, Plaintiffs *concede* that Utah created the forum for "the worthy, constitutional and *secular purpose* of honoring deceased troopers." Appt.Br.26

n.6 (emphasis added). Thus, the mere fact that Utah limited the forum to the group best able to represent fallen troopers—a secular group at that—does not constitute a preference for religious speech.

Finally, Plaintiffs claim that Utah does not treat religious and non-religious speech neutrally because, while Utah has allowed a cross, Utah "would not allow a memorial in the shape of a clearly religious symbol [such as] the Star of David." Appt.Br.52. The source of this argument is a "motion to clarify," which Utah filed after the district court issued its decision. A.3029. According to the motion, Utah has allowed the cross because it is a purely "secular symbol of death," but would not approve a Star of David in the same manner because the Star of David would be "the symbol of the religion of the fallen trooper." A.3031. According to Plaintiffs, the "motion to clarify" demonstrates that Utah prefers certain types of religious speech over other types of religious or non-religious speech.

There are several problems with this argument. First, it is unclear whether the "motion to clarify" represents Utah's final position on the approval of trooper memorials. The motion is in tension with a joint resolution of the Utah legislature and Governor stating that Utah supports the "use of white crosses, ***or other appropriate symbols as requested by the family*** [of a fallen trooper], as roadside memorials." A.1095 (Joint Resolution) (empha-

sis added). The motion is also in tension with an earlier motion for summary judgment, in which Utah maintained that, because the memorials are private speech, Utah is "limited in [its] ability to restrict…particular views or use of symbols or language by the [Association]." A.911-12. These statements strongly suggest that Utah does not have a policy of discriminating between religious and non-religious speech.

Second, even assuming the "motion to clarify" represents such a policy, that policy has never been implemented. The Association has never requested a symbol other than the cross, and Utah has never rejected one. In fact, Utah has never even purported to exercise editorial control over the content of the Association's speech. Until that occurs, Plaintiffs' claims of favoritism are purely speculative and not yet ripe. *See Utah* v. *United States Dept. of Interior*, 535 F.3d 1184 (10th Cir. 2008) (challenge to unimplemented settlement agreement was unripe).

Finally, even assuming Utah implemented the policy set forth in its "motion to clarify," that policy reflects (at worst) discrimination *against* religious speech, not in favor of it. As Utah has repeatedly explained, it permits the cross only because it views the cross in this context as a "*secular* shape recognized as a symbol of death." Utah Br. at 14 (emphasis added). And while the "motion to clarify" suggests that Utah might exclude symbols

it deems "religio[us]," it says nothing about excluding other symbols, as long as they are both "recognized" and "secular." A.3030-31. Thus, far from favoring *religious* speech, the "motion to clarify" suggests, if anything, that Utah is attempting to keep the forum secular. Such a policy might raise free speech or free exercise concerns if used to restrain the speech of the Association. *See supra* Part I.C. But it does not raise the religious-favoritism concerns asserted by Plaintiffs.

In sum, Utah has allowed a *secular* group to erect memorials to fallen troopers. That group has pledged to erect whatever symbols its members choose, whether religious or secular. And Utah has exercised no control over the group's choice of symbols. That is more than enough to establish that Utah has treated religious and non-religious speech neutrally.

C. Utah has not endorsed religion by allowing the Patrol Association to speak.

To the extent that the endorsement test is relevant here, Utah has satisfied that test as well. The endorsement test asks whether a "reasonable observer" would perceive the government's operation of the forum as having the primary effect of "endorsing religion." *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring). The "reasonable observer" is "not to be identified with any ordinary individual,…but is rather a personification of a community ideal of reasonable behavior." *Id.* at 779-80 (internal quotations

omitted). Thus, the reasonable observer must not be "limited to the information gleaned simply from viewing the challenged display," but must "be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780. In short, the reasonable observer "is presumed to know far more than most actual members of a given community." *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017, 1031 n.16 (10th Cir. 2008).

Capitol Square provides the closest analogue for the endorsement analysis. The wooden cross at issue there was "large" and "unadorned," "standing alone and unexplained." 515 U.S. at 797, 800, 817. It was displayed "immediately in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statutes close at hand." *Id.* at 792 (Souter, J., concurring). And the cross was, at the time, "the only private display on the public plot." *Id.* "There was nothing else on the statehouse lawn that would have suggested a forum open to any and all private, unattended religious displays." 515 U.S. at 792-93.

Nevertheless, a 7-2 majority concluded that the government did not endorse religion by permitting the display. As noted above, four justices concluded that the endorsement test was unnecessary because the government had treated religious and non-religious speech neutrally. Three justices

concluded that the endorsement test was satisfied for several reasons: (1) the display "was erected by a private group," (2) "[t]he State did not sponsor" the display, (3) the private group requested "permission…on the same terms" as other private groups, and (4) the state could have required "a sign…disclaiming any government sponsorship" of the display. *Id.* at 775-76, 784 (O'Connor, J., concurring).

Here, for several reasons, the risk of endorsement is even smaller. First, in *Capitol Square*, the cross was "unadorned" and "unexplained"; even the concurring justices agreed that it "could not reasonably be taken to have any secular point." *Id.* at 791 (Souter, J., concurring). Here, by contrast, the crosses prominently display the trooper's name, rank, badge number, and date of death in large, black letters. They also include a plaque with a picture of the fallen trooper and a brief biography. Thus, unlike the cross in *Capitol Square*, the crosses here have an obvious "secular point": commemorating fallen troopers.

Second, the cross in *Capitol Square* stood "immediately in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statues close at hand." *Id.* at 792. The Justices found this location so significant that they mentioned the cross's "proximity" or "close[ness]" to the Statehouse no fewer than nine times. *Id.* at 763, 766, 768, 776, 781, 806

n.13, 817. Here, by contrast, most of the crosses appear along isolated stretches of highway or at rest stops "with naught but Utah wilderness in either direction." A.3013 (Dist.Ct.Op.23). Although two crosses appear in front of a parking lot at the Highway Patrol headquarters, that is a far cry from the Ohio Statehouse lawn. And, unlike *Capitol Square*, there are a dozen other crosses that are *not* located near any state office building. Thus, as the district court rightly concluded, a reasonable observer would "be aware of the existence of other [Association] cross memorials around the state" and would not associate those memorials with the authority of the state. A.3014.

Third, as in *Capitol Square*, the reasonable observer would be aware of the "history and context" of the forum (515 U.S. at 780): *i.e.*, that the cross memorials were initiated, funded, erected, maintained, and owned by a private secular group; that the memorials were originally erected on private property; that Utah has exercised no control over the content of the memorials; and that the Association has pledged to use whatever symbol the family of the deceased trooper requests, whether religious or secular. As even Plaintiffs concede, a reasonable observer "would know…the history of the [Association] crosses" and "what [the Association] is." Appt.Br.37. A reasonable observer, therefore, would conclude that Utah has simply allowed

the Association to memorialize fallen troopers in the manner chosen by the troopers' families and the Association—not that Utah has somehow endorsed Christianity. *Cf. Weinbaum*, 541 F.3d at 1033-35 (reasonable observer would be familiar with history of the city's name and secular purpose and therefore would not conclude that a seal depicting three crosses endorsed Christianity).

Fourth, as the Court explained in *McCreary County* v. *ACLU*, a reasonable observer "takes account of…the text, legislative history, and implementation of [any] statute…or comparable official act" authorizing the memorials. 545 U.S. 844, 862 (2005). Here, the Utah legislature and Governor passed a joint resolution expressly disclaiming any intent to endorse religion. A.1093-95. As the resolution explained, the cross "was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers." A.1094-95. Moreover, the resolution expressed support not only for crosses, but for any "other appropriate symbols as requested by the family [of a fallen trooper]." A.1095. The joint resolution thus performs the same function as the hypothetical disclaimer in *Capitol Square*: because a reasonable observer would be familiar with the joint resolution and "would certainly be able to read and understand an adequate disclaimer," a reasonable observer "would not interpret the State's tolerance of the [Associa-

tion's] private religious display…as an endorsement of religion." 515 U.S. at 782.

Finally, Plaintiffs emphasize that the crosses include a Utah Highway Patrol logo. Appt.Br.42. The logo, however, is sandwiched between letters more than twice as large stating the trooper's name, rank, badge number, and date of death. *E.g.*, Appt.Br.Ex.E. A reasonable observer, therefore, would be far more likely to conclude that the logo is used to identify the deceased as a member of the Utah Highway Patrol, than to conclude that the logo is an official endorsement of Christianity. In any event, use of the logo is far less obtrusive than placing an unadorned, unexplained cross "immediately in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statutes close at hand." *Capitol Square*, 515 U.S. at 792. If the cross in *Capitol Square* did not impermissibly endorse religion, neither do the crosses at issue here.[3]

[3] Of course, Utah could not prevent the Patrol Association from erecting the same memorials on *private* property—even if the memorials included a Bible verse and expressly stated that Utah endorses Christianity. *See* UTAH CODE ANN. § 67-1a-7 (prohibiting the illegal use of "the Great Seal of this state," but not the Highway Patrol logo).

D. Even assuming Utah violated the Establishment Clause, the appropriate remedy would be to require neutrality or post a disclaimer—not to discriminate against religious speech by removing the crosses.

Even assuming the cross memorials violate the Establishment Clause, the appropriate remedy is not, as Plaintiffs claim, to order removal of the crosses. Because the crosses are private speech, strict scrutiny requires the government to use the "most 'narrowly drawn' alternative" to avoid an Establishment Clause violation. *Id.* at 793-794. And as the Court explained in *Good News Club*, a flat ban on private religious speech is rarely the narrowest remedy; rather, "if [religious speech] were excluded from the [government] forum," a reasonable observer "would perceive a hostility toward the religious viewpoint." 533 U.S. at 118.

Here, there are at least two alternatives to banning crosses entirely. First, if the Court finds that Utah has not treated religious and non-religious speech neutrally, it can order the State to do so. That is, the Court can require Utah to give equal access to memorials that include religious or non-religious symbols.

Second, if the Court finds that permitting the memorials impermissibly endorses religion, it can order Utah to require a disclaimer. As Justice Souter explained in *Capitol Square*, "[a] flat denial of the Klan's application was not the [State's] only option to protect against an appearance of en-

dorsement…. The [State]…could have [allowed the cross] subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference [of endorsement]." 515 U.S. at 793-794. Here, too, if the legislature's joint resolution were an insufficient disclaimer for the well-informed reasonable observer, Utah could require the Association to attach a sign to the crosses indicating that the crosses are not intended to convey state endorsement of religion. Such measures would fully remedy any Establishment Clause violation while protecting free speech.

III. Ordering Utah to remove the cross memorials would jeopardize the laws of other states and discourage states from creating forums for private speech.

Finally, ordering Utah to remove the memorials would have significant adverse effects on the laws of other states and on free speech generally. At least two other Tenth Circuit states, Colorado and New Mexico, allow private individuals to display crosses on government property. Colorado allows individuals to erect "a plaque, monument, or similar object…on a county road to commemorate one or more people who died on that county road." C.R.S. § 43-2-149(1), (3). The individual is "exclusively responsible for the type, location, and design of the county memorial." *Id.* § 43-2-149(3).

Similarly, New Mexico highways are dotted with "descansos," traditional roadside memorials often taking the form of a cross. Alessi, Joan E., *Descansos: The Sacred Landscape of New Mexico* 22 (Fresco Fine Art Publications 2007). New Mexico law protects *descansos* by making it a crime to "knowingly or willfully deface or destroy" such memorials. N.M.S. § 30-15-7.

If, as Plaintiffs claim, a state violates the Establishment Clause by allowing a private group to erect roadside crosses, then the policies of Colorado and New Mexico are also at risk. As Plaintiffs argue, *all* "roadside cross memorials…are religious in nature and history." Appt.Br.36. Moreover, many roadside crosses include overt religious messages and, unlike the crosses at issue here, are not stamped with an individual's name and date of death. If this Court ignores the distinction between private and government speech, these private memorials will certainly be subject to attack.

Moreover, by punishing Utah for allowing private speech on government property, a ruling in Plaintiffs favor would discourage governments from creating forums for private speech. As explained above, Plaintiffs' suit places Utah "in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other." *Capitol Square*, 515 U.S. at 768. If Utah allows the Association to erect crosses, Utah violates

the Establishment Clause (according to Plaintiffs); if Utah discriminates against the Association's religious speech, it violates the Free Speech and Free Exercise Clauses. Faced with such a dilemma, many governments will simply ban unattended displays entirely—a content-neutral restriction that, while permissible (*id.* at 761), "would result in less speech, not more." *Arkansas Educ. Television Com'n* v. *Forbes*, 523 U.S. 666, 680 (1998). Such a result is the opposite of what the Supreme Court's public forum cases are designed to produce. Those cases seek to "encourage the government to open its property to some expressive activity where, if faced with an all-or-nothing choice, it might not open the property at all." *Id.* This Court should, accordingly, reject Plaintiffs' attempt to force Utah into such an all-or-nothing choice.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Brief *Amici Curiae* complies with the type-volume limitations of FED. R. APP. P. 29(d) and 32(a)(7)(B) because it contains 6,926 words, excluding the portions of the brief excluded under FED. R. APP. P. 32(a)(7)(A)(iii). This count is based on the word count feature of Microsoft Word.

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