

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.

On Appeal From the United States
District Court for the District of Utah
No. 02:05-CV-00994 (Hon. David Sam)

**Brief Of Americans United For Separation Of Church And State,
The Anti-Defamation League, The Hindu American Foundation,
The Interfaith Alliance, The Union For Reform Judaism, And Dr.
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INTEREST OF THE *AMICI CURIAE*

Amici, who have filed a motion for leave to file this brief, are Americans United for Separation of Church and State, the Anti-Defamation League, the Hindu American Foundation, the Union for Reform Judaism, the Interfaith Alliance, and Dr. Eugene J. Fisher (Associate Director, Secretariat of Ecumenical and Interreligious Affairs of the United States Conference of Catholic Bishops, retired). Descriptions of the *amici* appear in the appendix to this brief.

Although *amici* represent diverse religious and secular perspectives, they are united in the view that the state-sponsored cross displays at issue here violate fundamental Establishment Clause principles that have long served both government and religion well. *Amici* believe that there is nothing antireligious about demanding that the state refrain from displaying sectarian emblems and from justifying these displays by trying to secularize, and thereby demeaning, cherished religious symbols.

SUMMARY OF THE ARGUMENT

In upholding the display of roadside crosses on public land throughout Utah, the district court embraced the State's characterization of the cross—the clearest and most universally recognized marker

of Christianity—as nothing more than a “secular symbol of death.” This conclusion is historically inaccurate, blind to contemporary realities, and offensive to believers and nonbelievers alike. It also undermines the animating values of the Establishment Clause, which protects religion from government just as it protects government from religion.

Amici submit this brief to make three central points. First, we explain the history of the cross—in particular, the history of its use as a burial marker. A review of that history leaves no doubt that the cross is a uniquely religious symbol—one synonymous with Christianity. Second, we describe how, in light of this history and the continued prominence of the cross as a religious emblem, the effort to justify its public display by branding it as secular offends Christians who cherish the cross and its central place in the tradition and iconography of their faith. Third, we explain that once the cross is understood for what it is—an unmistakable symbol of a particular religious tradition—its state-sponsored public display sends a message of exclusion and disfavor to those who do not share that tradition.

These concerns go to the core of what the Establishment Clause forbids. Just as it is impermissible for the government to tell nonbe-

lievers that they are unwelcome by giving pride of place to religious imagery, it is equally improper for the government to tell believers that their sacred symbols are fit for public display because they have been officially purged of religious content and transformed into secular objects. Under the First Amendment, religious adherents, not government bureaucrats, get to determine the meaning of religious symbols. And the State may not (and should not attempt to) save a clear endorsement of religion by denying, or attempting to mute, the essential nature of the Christian cross.

Amici understand the impulse to uphold a program honoring state troopers who have given their lives in the line of duty. Yet that impulse, however noble, does not justify sacrificing the Establishment Clause and its animating principle—that the political and the religious are both better served when kept separate. That principle has allowed religion to flourish in the United States for over two centuries; any attempt to alter it now can have only unhappy results for the religious and the secular, as well as for the polity as a whole.

ARGUMENT

I. The Cross Has Long Been, And Remains Today, The Pre-eminent Symbol Of Christianity.

The decision below was predicated on the district court's conclusion that the cross is, or has somehow morphed into, a "secular symbol of death." *Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007). This proposition founders on the long history of the cross and the unbroken traditions associated with its use in Christian rituals of death and burial. That history makes clear that the cross is a religious symbol that for nearly two thousand years has been synonymous with Christianity.

That the cross frequently serves as a burial marker in no way makes it secular. Quite the contrary; the cross has been used almost exclusively for Christian burials and, as such, has always been intended to convey a sectarian message—that the deceased lived and died as a member of a particular religious community. The claim made by the State of Utah and accepted by the district court that the cross is secular is wildly out of line with how the cross has been used and understood for nearly two thousand years—and how it continues to be used and understood today.

A. For nearly two thousand years, the cross has been a readily identifiable Christian symbol.

For nearly two thousand years, the cross has been inexorably linked with Christian religious practice. The reason for that linkage is obvious: Few historical events are more familiar than that of Jesus's crucifixion. GEORGE WILLARD BENSON, *THE CROSS: ITS HISTORY AND SYMBOLISM* 24 (1934) (hereinafter *THE CROSS*).

Nevertheless, the cross was an uneasy emblem for the early Christians. On the one hand, as Paul told the Corinthians, “we preach Christ crucified.” 1 Cor. 1:23. At the same time, Christians were often persecuted in the decades immediately following Jesus's crucifixion, and any symbol that made worshippers easily distinguishable could mean harassment or even death. *See THE CROSS* 28.

In addition, because the Romans typically reserved crucifixion for the most despised criminals, the death of Jesus on the cross was thought to be humiliating by his first followers (see *id.* at 28–29)—although some, like Paul, encouraged the early Christians to see a profound religious message in that humiliation. *See Phil. 2:8* (“Being found in appearance as a man, He humbled Himself by becoming obedient to the point of death, even death on a cross. For this reason also, God

highly exalted Him, and bestowed on Him the name which is above every name.”).

Evidence of the significance that the early Christians assigned to the cross includes the writings of Justin Martyr. In the mid-second century, he argued that Moses had been the first to imbue “this apparent curse of Christ” with figurative meaning. JUSTIN MARTYR, *DIALOGUE WITH TRYPHO (SELECTIONS FROM THE EARLY FATHERS OF THE CHURCH)*, ch. 90 (Thomas B. Falls trans., Michael Slusser ed. 2003). He pointed to the passage in Exodus describing the Israelites’ battle with the Amalekites as prefiguring the symbolic power of the cross:

Moses himself, stretching out both hands, prayed to God for help. Now Hur with Aaron held up his hands all day long, lest he should become tired and let them drop to his sides. For, if Moses relaxed from that figure *which was a figure of the cross*, the people were defeated (as Moses himself testifies); but as long as he remained in this position, Amalek was defeated, *and the people drew their strength from the cross*. In truth it was not because Moses prayed that his people were victorious, but because, while the name of Jesus was at the battle front, *Moses formed the sign of the cross*.

Id. (emphases added). Interpreting this evidence, theologian and scholar Philip Cunningham has argued that the idea of the cross in Christian thought “was pivotal from the beginning.” Philip A. Cunningham, *Review of James Carroll, Constantine’s Sword: The Church and*

the Jews: A History, 34 SIDIC REV. 28 (2001), available at http://www.bc.edu/research/cjl/metaelements/texts/cjrelations/resources/reviews/Constantines_Sword.htm (last visited Aug. 5, 2008).

Some three hundred years after the crucifixion, under the Roman Emperor Constantine, the cross fully evolved into the central emblem of Christianity. Constantine was the first Roman Emperor to become a Christian, and was responsible both for putting an end to the official persecution of Christians in the Empire and for convening the Council of Nicaea, which promulgated the first uniform Christian doctrine.

The story of Constantine's embrace of Christianity, a pivotal event in the history of the West, is directly linked to the symbolic power of the cross. See DOUGLAS KEISTER, *STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY* 173 (2004). In the version of the story related by the early Church historian Eusebius, Constantine, while praying at midday, "saw with his own eyes the trophy of a cross of light in the heavens, above the sun, and bearing the inscription, 'Conquer by this.'" EUSEBIUS, *LIFE OF CONSTANTINE* 1:28 (Avril Cameron & Stuart G. Hall, trans. 1999). That night, Jesus appeared to Constantine in a dream with the same sign of the cross and commanded him to

make and use a likeness of that sign as a safeguard against his enemies. *Id.* 1:29. Eusebius reports that the “emperor constantly made use of this sign of salvation as a safeguard against every adverse and hostile power, and commanded that others similar to it should be carried at the head of all his armies.” *Id.* 1:31.

After Constantine adopted the cross, it became readily identifiable with Christianity, and particularly with certain Christian denominations.¹ See THE CROSS 29–30; STORIES IN STONE 173–74. The cross was the primary Christian symbol used during the Crusades. See THE CROSS 51, 56. One historian described its introduction as a “stroke of genius” because it made crusaders readily distinguishable from those they were fighting. JONATHAN RILEY-SMITH, THE CRUSADES: A HISTORY 15–16 (2005). It was thought that those who bore the cross were true crusaders, easily identifiable by other Christians wanting to join the cause. *Id.* at 16. To Pope Urban II, the Crusades were “the way of the cross” be-

¹ The Lutheran church, for instance, gives pride of place to the cross. Martin Luther himself described his theology as “the theology of the cross.” ALISTER E. MCGRATH, THE THEOLOGY OF THE CROSS (1985); see also GUNTHER GRASSMANN, HISTORICAL DICTIONARY OF LUTHERANISM 85–86 (2001) (referring to “the central saving significance of the cross of Jesus Christ”). For Lutherans, the “word of the cross” is “the decisive message of Christ’s reconciliation of humans with God.” *Id.*

cause they allowed laymen to play a role akin to that of the monastic. *Id.*

The cross was also vitally important to religious artwork in the Medieval and Renaissance periods, when “the painted picture was invaluable as an interpreter and exponent of religious truths.” *Id.* at 121. Most obviously, portrayals of Jesus’ crucifixion necessitated inclusion of the cross. *Id.* at 122–25. Religious artists also frequently depicted Jesus bearing the cross on the march to Calvary or Jesus’ body being taken down from the cross; and they often represented Jesus as a child “holding a globe surmounted by a cross.” *Id.* at 125–26.

The cross’s shape has long been essential to church architecture as well, with many churches designed using either the Greek or the Latin cross as a floor plan.² See PETER MURRAY, *THE ARCHITECTURE OF THE ITALIAN RENAISSANCE* 58-59 (1986). Crosses have also long adorned the insides of churches as a worship symbol and decoration. See RICHARD TAYLOR, *HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN*

² Unlike the Latin cross, which has an extended arm at the bottom (†), the Greek cross has four arms of equal length and looks like a ‘plus’ sign (+).

CHURCHES AND CATHEDRALS 46–47 (2003) (describing the various types of crosses found in churches).

And, of course, the cross plays an important role in Christian burials. For example, a Catholic funeral begins with a procession led by a cleric carrying a cross. 3 THE CATHOLIC ENCYCLOPEDIA 73 (Charles G. Herbermann et al. eds., Encyclopedia Press 1913). The deceased has a small cross placed in his or her hands, or has his or her arms arranged to form a cross. *Id.* at 72–73. And, as discussed below, once the ceremony is complete, a cross is often used as a burial marker. STORIES IN STONE 174–79.

These symbolic traditions extend across a wide range of Christian denominations. As one scholar has explained:

It has been the belief and the teaching of the Christian Church of all ages and of all Confessions, that Jesus, the Son of God, in His sacrificial death on the cross wrought the reconciliation of men with God, and by His resurrection begot anew those who believe in Him unto a living hope of eternal life. . . . The symbol of this belief greets us in the form of the Cross from the tower of every church, from every Christian grave-stone and in the thousands of forms in which the Cross finds employment in daily life; this belief meets us in the gospel of the great Christian festivals and in the two sacraments of the church

Benjamin B. Warfield, *The Essence of Christianity and the Cross of Christ*, 7 HARV. THEOL. REV. 592 (1914) (quoting PAUL FEINE, THEOLOGIE DES NEUEN TESTAMENTS 190 (1910)); see also NIGEL BARLEY, GRAVE MATTERS 209 (1997) (“The whole of Christianity, after all, functions beneath the symbol of the cross.”).

What has been true since the time of Constantine remains true today: The cross is not merely *a* symbol of Christianity; it is *the* symbol of Christianity. Contemporary Christian authorities make clear that the cross continues to be a deeply religious emblem, symbolizing the doctrinal message of resurrection and redemption. In describing the crucifix, for example, the National Conference on Catholic Bishops has said that “the image of Christ crucified is a reminder of Christ’s paschal mystery. It draws us into the mystery of suffering and makes tangible our belief that our suffering when united with the passion and death of Christ leads to redemption.” National Conference on Catholic Bishops, *Built of Living Stones: Art, Architecture, and Worship* § 91, available at <http://www.usccb.org/liturgy/livingstones.shtml> (last visited July 10, 2008). Indeed, it is “hard to think of a symbol more closely associated with a religion than the cross is with Christianity.” STORIES IN STONE

10; see also Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1023-24 (2005) (describing the cross as a “pure religious object”).³

Courts, including the Supreme Court, have recognized as much. Justice Souter described the Latin cross as “the principal symbol of Christianity around the world,” and declared that “display of the cross alone could not reasonably be taken to have any secular point.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment); see also, e.g., *ACLU v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986) (describing the cross as “the unmistakable symbol of Christianity”); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 13 (D.D.C. 1988) (“the Latin cross . . . is a readily identifiable symbol of Christianity”). And in

³ This point is reinforced by contemporary reference materials. Merriam-Webster’s Dictionary, for example, lists 14 definitions for the word “cross.” Three of the first four refer specifically to Jesus or Christianity, and none gives any indication that the cross is a secular symbol of death. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 308 (1988) (defining cross as “a device composed of an upright bar traversed by a horizontal one; *specif*: one used as a Christian symbol”); see also *Encyclopedia Britannica Online*, available at <http://www.britannica.com/EBchecked/topic/144028/cross> (last visited July 31, 2008) (describing the cross as “a sign both of Christ himself and of the faith of Christians”).

rejecting the argument that putting flowers around a crèche eliminated its religious content, the Supreme Court cited the cross as the paradigmatic example of an overtly religious symbol:

It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would *negate the endorsement of Christianity conveyed by the cross* on the Grand Staircase.

Allegheny County v. ACLU, 492 U.S. 573, 599 (1989) (emphasis added).

B. The use of the cross as a burial marker does not transform it into a secular symbol, but instead preserves and employs its religious meaning.

In holding that the cross has been transformed into a “secular symbol of death,” the district court pointed to the use of crosses as burial markers at cemeteries. *Duncan*, 528 F. Supp. 2d at 1257. The conclusion that the court drew could not be more wrong. In fact, the appearance of crosses in cemeteries offers a prime example of religious, rather than secular, symbolism. When used as a burial marker, the cross does not signify death in the abstract; instead, it connotes the deceased’s Christian faith.

The Christian practice of marking graves with the cross to denote the faith of the deceased is longstanding and consistent. *See* STORIES IN STONE 10. One leading scholar, Dr. John McGuckin, Professor of Early Church History at Columbia University, has explained that it is an “ancient” and “fundamental part of Christian religious practice” to mark graves with the cross. WINIFRED F. SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 62–65 (2005) (quoting expert report of Dr. McGuckin in *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999)). According to Dr. McGuckin, the epigraphic evidence makes clear that engraving the sign of the cross on Christian graves “was a custom that was almost as ancient as the Christian religion itself.” *Id.* at 197.

As this practice evolved over time, the common custom became for “the sacred Cross to be lifted up over the grave site to mark the place of the body and to signify that this was a holy place, *the resting place of a Christian.*” *Id.* (emphasis added). The symbolic power of the custom of standing crosses on gravesites traces to the early Christian belief that the “elevation” reflects “the victory over death won by the crucified Savior.” *Id.* Marking a gravesite with a cross thus is a profound theological act: It is intended to proclaim the belief that the deceased has been

saved and resurrected in the life of Jesus Christ. See Philip A. Cunningham, Professor of Catholic-Jewish Relations, Saint Joseph's University (interview conducted August 4, 2008).

For these reasons, as Keister explained in his recent book studying cemetery symbolism and iconography, the cross is far more readily identifiable with Christianity than any other symbol is with any other religion. See *STORIES IN STONE* 172.

Although the district court purported to rely on the practice of American military cemeteries in marking graves with crosses to support its conclusion that the cross has become secularized, see *Duncan*, 528 F. Supp. 2d at 1257, the court misunderstood the practice that it invoked. The Department of Veterans Affairs does provide memorial markers (in the form of simple rectangular stones) for the graves of deceased servicemembers, and it does permit crosses to appear on those stones. But the VA does so *only* at the request of a deceased servicemember's next of kin. Nor is the Department's marking of graves with "emblems of belief" limited to crosses: Families are permitted to choose from a list of emblems that currently includes 39 options—including, among other sym-

bols, some 15 versions of the Christian cross,⁴ the Jewish Star of David, two Muslim symbols (the 5-pointed star and the Crescent and Star), the Mormon Angel Moroni, the Wiccan pentacle, and the Atheist atom. Or they may request a new religious symbol if the emblem of their loved one's faith is not already on the list. *See* United States Dep't of Veterans Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers, *available at* <http://www.cem.va.gov/cem/hm/hmemb.asp> (last visited July 30, 2008).

So at military cemeteries, Christian graves are marked with a cross; Jewish graves with a Star of David, Muslim graves with a star or crescent and star; Sikh graves with a Khanda; and Eckankar graves with a stylized *EK*. The VA's description of these symbols as "emblems of belief" just underscores the federal government's recognition that elements like the cross, when used in connection with burial rituals, are

⁴ These variants include, for example, the standard, unadorned "Christian Cross" (a Latin cross), the Greek Cross, and a Russian Orthodox Cross (with three crossbars). As this multiplicity of different crosses illustrates, not all Christian denominations that use the cross use the *same* cross. Even for many Christians, therefore, the availability only of a standard Latin cross as a memorial marker would be inadequate.

not neutral symbols of death but families' way of signifying the religious beliefs of their deceased loved ones.

In invoking the image of American military cemeteries displaying “row upon row of crosses” (*Duncan*, 528 F. Supp. 2d at 1257), the district court seems to have been thinking of the Normandy American Cemetery and Memorial in France, where U.S. soldiers killed in the Normandy landing are buried. But while that cemetery does have long rows of Latin crosses, those crosses mark only the graves of the *Christian* soldiers buried there. The graves of Jewish soldiers are marked instead with the Star of David. See American Battle Monuments Commission, Normandy American Cemetery and Memorial (pamphlet at 18–19), available at http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited July 30, 2008).

Properly understood, the practice of American military cemeteries—and indeed of virtually all cemeteries—provides powerful evidence of the sectarian nature of the cross as a memorial. Given that practice—and the far longer tradition it embodies—it is simply wrong to suggest that the cross is nothing more than a neutral symbol of death, which

could just as readily mark the graves of Jews as Baptists, Muslims as Catholics.

C. Although some Christian denominations do not use the cross as a religious symbol, the reasons are theological and in no way evidence a secular understanding of the cross.

It is true, of course, that certain Christian denominations do not use the cross. But that does not mean that those denominations understand the cross as secular, or that the cross has taken on some secular connotation for the general public. Rather, the reasons that these denominations do not use the cross are deeply theological and further support the conclusion that the cross is an unmistakably religious symbol.

The Church of Jesus Christ of Latter-Day Saints—commonly known as the Mormon Church—believes in Jesus and the crucifixion. See Gordon B. Hinckley, First Presidency Message, *The Symbol of Our Faith*, ENSIGN, Apr. 2005, at 3, 4. But Mormons further believe that having been resurrected, Jesus still lives (*id.* at 4), and hence that the Mormon church should not use the cross—a symbol of Jesus’s death—as a symbol of faith. *Id.* at 6. Accordingly, the decision not to employ the cross shows not that Mormons view the cross as secular, but that they

understand it to be a religious symbol with a distinct sectarian meaning not their own. The Mormon Church, in other words, does not use the cross precisely *because* of its theological importance: Just as Jews and Muslims decline to use the cross because they do not believe that Jesus is the savior, Mormons eschew it because they believe that it represents the wrong way to think about Jesus as their savior.

Jehovah's Witnesses similarly decline to use the cross as a symbol of their Christian faith because of theological objections to that symbol. Jehovah's Witnesses believe that the instrument of Jesus's death should not be revered. In addition, they view the cross as an idol, the worship of which is prohibited by their religious tenets. *See* Jehovah's Witnesses Official Web Site, *Did Jesus Really Die on a Cross?*, available at http://www.watchtower.org/e/200604a/article_01.htm (last visited July 30, 2008). What is more, in the biblical translation favored by Jehovah's Witnesses, Jesus died on an upright pole or stake, not a cross. *See* Religion & Ethics—Jehovah's Witnesses, *BBC Online*, available at <http://www.bbc.co.uk/religion/religions/witnesses/beliefs/beliefs.shtml> (last visited July 30, 2008). So using the cross as a symbol invokes what Jehovah's Witnesses would regard as a distortion of Holy Scriptures.

Thus, the decision of the Jehovah's Witnesses to avoid the cross is again a distinctly theological one that belies the suggestion that the cross has become secularized.

* * *

In short, the cross has been, and still is, the dominant symbol of Christianity—one that has lost none of its religious potency. When used in connection with death and burial rituals, the cross does not become secular but instead remains a particularly Christian symbol that connotes a distinctly sectarian understanding of death and proclaims that the deceased lived and died as a Christian. The district court cited no authority—scholarly, legal, religious, or sociological—to support its unprecedented conclusion that the cross has somehow become a “secular symbol of death.” That conclusion is historically inaccurate and out of step with the meaning that both Christians and non-Christians ascribe to the symbol. It should be decisively rejected by this Court.

II. Upholding Cross Displays By Labeling The Cross As Secular Is Offensive To Christians And Non-Christians Alike And Is Corrosive To The Values Underlying The Establishment Clause.

The district court's factual mistake about the meaning of the cross had significant legal consequences. Transforming the cross into a secu-

lar symbol of death is antithetical to the values of the Establishment Clause in at least two distinct ways.

First, treating the cross as secular is deeply offensive to those religious adherents who hold the cross sacred as the most important symbol of their faith. Indeed, the officially sanctioned secularization of religious iconography is corrosive to genuine religious practice. The constitutional scheme separating church and state, which has long allowed private religious practice to flourish in this country, is threatened when the government makes public-policy and legal decisions by decreeing that sacred symbols are sacred no more.

Second, once the cross is recognized for what it is, government-backed displays of it on public land are offensive to non-Christians (and to non-cross-using Christians), who perceive the cross's religious meaning and see governmental endorsement of it as exclusionary.

A. A governmental determination that brands the cross as secular is offensive to Christians.

Billions of Christians worldwide—and hundreds of millions in the United States alone—hold the cross sacred and recognize the deep symbolic place it holds for their faith. *See* Association of Religion Data Archives, *National Profiles (United States)* (hereinafter “ARDA, *U.S. Pro-*

file”), available at http://www.thearda.com/internationalData/countries/Country_234_1.asp (last visited July 30, 2008). To believers, the cross stands as a deeply spiritual object that represents the very foundation of Christian theology: Jesus died on the cross, and was resurrected.

But not according to the State of Utah. According to the State—and the court below—the cross no longer means what so many Christians think it means. Instead of being the sacred emblem of Christian identity and devotion, the cross has been officially repackaged as an object with no religious content that can be used to commemorate the death of any American, regardless of that person’s faith or religious identity. After centuries of using the cross to symbolize their faith and commemorate their dead, Christians have now been told by the State that their most central religious symbol is not in fact a religious symbol at all, but is instead entirely secular (at least when used in connection with rituals of death and remembrance).

That message is deeply offensive to those who do not agree that the cross has been so conclusively appropriated by secular culture. Such a cavalier approach to the re-branding of a central religious object ignores the fact that, for many believers, religious symbols are not merely

passive objects but instead are constitutive of the believer's identity and sense of moral worth. *See Ravitch, supra*, 40 WAKE FOREST L. REV. at 1023–24. Giving government the power to minimize the spiritual nature and power of an object like the cross thus has corrosive consequences: It denigrates the special status and importance that the symbol has for believers, and it suggests that the government's authority over religious matters trumps that of individual believers or religious denominations. *See id.* at 1067. In short, the decision below, by “viewing religious displays through the ‘lowest’ (secularized) common denominator[,] de-means the religious nature of the objects displayed,” and, in turn, de-means genuine religious adherents. *Id.* at 1259–61.

This forced secularization is not only offensive but also constitutionally impermissible. Under the Establishment Clause, it is not within the power of the state to cheapen the currency of cherished religious symbols or to second-guess the meaning that the faithful attach to them. *Cf. Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 447 (1969). The government may not treat religious symbols like trademarks, whose value can be diluted by supposedly generic us-

age.⁵ After all, one key aim of the First Amendment is to make individuals, not the government, the final arbiters of what is or is not religious. See *McCreary County v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (“Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.”). One distinguishing feature of an “established” church is that the state declares which objects are sacred and what religious significance is assigned to particular symbols. That system is precisely what the Founders rejected. The decision below comes far too close to reinstating that discarded approach.

⁵ That the district court sought to defend its decision by comparing the cross to a Christmas tree only highlights the problem. Religious leaders have often expressed dismay at the way that the Christmas holiday, and the tree in particular, have been appropriated as a banal celebration of materialism and consumerism. See LEIGH ERIC SCHMIDT, *CONSUMER RITES: THE BUYING AND SELLING OF AMERICAN HOLIDAYS* 175 (1995) (describing a 1992 proclamation by religious leaders condemning the commercialization of Christmas). But the concern about the secularization of Christmas trees pales in comparison to the forced secularization of the cross. The two symbols simply are not on anywhere near the same footing when it comes to their spiritual content and religious significance. For the court to attempt to “save” Utah’s cross displays by suggesting that a cross is no different than a Christmas tree is as offensive and wrongheaded as suggesting that an icon of Jesus has no more religious content than an advertisement depicting Santa Claus.

B. The Establishment Clause is predicated on the idea that religion does best when government is involved least.

Rejecting the cross displays at issue here implies no disrespect for religion or for religious symbols. It is not antireligious to say that religious function and interpretation should be left to those who practice the religion. *See Engel v. Vitale*, 370 U.S. 421, 435 (1962). Instead, it is the artificial secularization of genuinely religious symbols that evinces disrespect for freedom of conscience and poses the truest threat to religion.

That, at least, is one of the pillars on which the Establishment Clause is based. The Clause is designed to protect government from religion, to be sure; but it is equally intended to protect religion from government. As the Supreme Court has explained, the Establishment Clause is based on the “belief that a union of government and religion tends to destroy government and to degrade religion.” *Engel*, 370 U.S. at 431; *see also Illinois ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948) (“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve

their lofty aims if each is left free from the other within its respective sphere.”).

Indeed, the idea that religion flourishes best when government is involved least has always been at the heart of the Establishment Clause. The Clause represents the result of years of philosophical and political thought based on religious toleration and liberty. Roger Williams, the Baptist theologian and founder of Rhode Island, whose views ultimately found expression in the First Amendment, preached that true religious belief comes from free will and thus that freedom of conscience flourishes when churches act without governmental support. See EDWIN S. GAUSTAD, *ROGER WILLIAMS*, 13, 59, 70 (2005); *BAPTISTS AND THE AMERICAN EXPERIENCE*, 16-17 (James E. Wood Jr. ed., 1976). So, for Williams, keeping religion and politics separate not only protects religious dissenters, but also safeguards religion against impurity and dilution. See Roger Williams, *The Bloudy Tenant of Persecution for the Cause of Conscience* (1644), reprinted in *3 COMPLETE WRITINGS OF ROGER WILLIAMS* (Samuel L. Caldwell ed., 1963).

The Framers of the Bill of Rights took Williams’s teachings to heart. James Madison, the principal architect of the First Amendment,

explained that “religion & Govt. will exist in greater purity, the less they are mixed together.” Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON, WRITINGS 786, 789 (Library of Am. 1999). Thomas Jefferson emphasized that government-sponsored religion “tends . . . to corrupt the principles of that very religion it is meant to encourage.” *Jefferson’s Act for Establishing Religious Freedom* (1786) *in* CHURCH AND STATE IN AMERICAN HISTORY 73 (John F. Wilson & Donald L. Drakeman, eds., 1987). The Establishment Clause thus “stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” *Engel*, 370 U.S. at 432.

And that constitutional scheme has worked: Religion *has* flourished in the United States. In 1963, the Supreme Court observed that it “can truly be said . . . that today, as in the beginning, our national life reflects a religious people.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963). The Court cited census data showing that 64 percent of Americans were members of a church. *See id.* (citing U.S. Census Bureau, *Statistical Abstract of the United States* (1962)). And data from

2000 show that church membership has increased to 70 percent (U.S. Census Bureau, *Statistical Abstract of the United States* (2000)), and that nearly 90 percent of Americans see themselves as religious (ARDA, *U.S. Profile, supra*). Americans almost universally believe in some god; and intensity of belief (as measured by attendance at services) has remained constant for at least the last fifty years. See Jeffery L. Sheler, *Spiritual America*, U.S. NEWS AND WORLD REPORT (Apr. 4, 1994).

It is no stretch to say that religion's success in the United States is attributable to the constitutional principle that affords individual congregations and worshippers the freedom to define for themselves the terms of religious practice, without dependence on, or interference from, civil authority. See, e.g., *McCreary County*, 545 U.S. at 882–83 (O'Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (“We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular.”).

The power of the cross to serve as “the Supreme emblem of Christianity, symbolic of sacrifice and redemption” (THE CROSS 11), will be lost if the State of Utah is permitted to secularize the cross in order to

display it. To hold otherwise would be to allow the government to dictate to the faithful what meaning their sacred symbols convey, and to strip those symbols, when convenient to the state, of their sacred content. To so insert the power of the state into such sensitive and profound matters of theological doctrine and religious identity would be to subvert a constitutional arrangement that has served religion well for so long. That game is not worth the candle.

C. Utah's cross displays send the exclusionary message that the State prefers one religion over others.

Once the impermissible gambit of re-branding the Christian cross as a secular object is understood for what it is, the displays at issue in this case clearly run afoul of the Establishment Clause as governmental endorsements of religion. In addition to protecting religions from meddling by the state, the Clause also protects citizens from governmental actions that favor one religion over another or that favor religion over nonreligion. Utah's roadside displays, which give pride of place to the unmistakably religious—indeed, distinctly sectarian—symbol of the cross, convey a message of preference for a particular religious tradition and for that reason are forbidden by the First Amendment.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982); see also *Colorado Christian University v. Weaver*, --- F.3d ----, 2008 WL 2815017, at *7 (10th Cir. July 23, 2008) (“From the beginning, this nation’s conception of religious liberty included, at a minimum, the equal treatment of all religious faiths without discrimination or preference.”). According to James Madison, government is “best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 8 (1785), in JAMES MADISON, WRITINGS 29, 33 (Library of Am. 1999). For similar reasons, Thomas Jefferson praised the passage of Virginia’s Bill for Religious Freedom, seeing it as “proof that [the people] meant to comprehend, within the mantle of [the law’s] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination.” THOMAS JEFFERSON, WRITINGS 40 (Merrill D. Peterson ed., 1984).

In applying the Establishment Clause, this Court should not be taken in by the State's posturing about the cross's secular nature; the religion clauses look beyond labels to focus on the substance of things. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980) (rejecting claim that an avowed secular purpose for a display of the Ten Commandments in schools avoids Establishment Clause issues). In reality, Utah's roadside crosses violate the strict prohibition against denominational preferences by endorsing a sectarian symbol of the Christian faith.

As discussed above, the history of the cross, the tradition of its use as a burial marker, and its present-day cultural associations all reinforce the cross's status as the preeminent emblem of Christianity generally and the central symbol of many, but not all, Christian denominations. Thus, the State's sponsorship of the display of a symbol so inexorably linked with Christianity flouts the Establishment Clause's requirement that the government may not promote one religion over others or favor religion over nonreligion. Indeed, Utah does not simply allow crosses to be prominently displayed on public land, but takes the position that the cross is the *only* symbol that may be displayed—even

if a deceased trooper's family requests the emblem of some other religion. Appellant's App. 3036.

Such a preference for one sect over others is antithetical to the constitutional scheme created by the First Amendment. Indeed, so abhorrent are denominational preferences in the constitutional order that they trigger strict scrutiny, *see Larson*, 456 U.S. at 246, and have the same disfavored status as race-based discrimination, *see Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). The standard is the same because the injury is the same; both kinds of prejudice “denigrate[] the dignity” of the disfavored group (*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994)), marking it with a badge of inferiority (see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 126–28 (2007)).

The State's preference for Christianity by displaying the cross markers also sends a clear message of exclusion to those who do not share Christian traditions—those for whom the cross is someone else's sacred symbol. It sends a comparable message of disrespect even to those Christian groups for whom the cross symbolizes aspects of their religious tradition that they seek to deemphasize. Utah, like the rest of

the nation, is a place of considerable religious diversity. See Association of Religion Data Archives, *State Report (Utah): Denominational Groups, 2000*, available at http://www.thearda.com/mapsReports/reports/state/49_2000.asp (last visited July 30, 2008) (listing fifty-seven different religious bodies in Utah). Many of its citizens, including Jews, Muslims, and Hindus, do not share the faith from which the cross's significance is derived. A large block, of course, are Mormons, who, though Christians, do not use the cross as a religious symbol. Others in Utah belong to no religion at all.

To many of these individuals, the State's favoritism toward the central symbol of Christianity is both insulting and exclusionary. As the Supreme Court has explained, "[state] sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Viewed in this light, the significance of the roadside

crosses is clear. The displays connote government-sponsored promotion of and support for Christianity that is offensive to non-Christians and violates the freedom of conscience protected by the First Amendment.

CONCLUSION

For these reasons, this Court should reverse the district court's ruling.

Respectfully submitted.

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APPENDIX: DESCRIPTIONS OF THE *AMICI*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the United States Supreme Court, this Court, and other federal and state courts nationwide.

The Anti-Defamation League (“ADL”) was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. It is today one of the leading civil rights and human relations organizations in the world. ADL believes that its stated goals, as well as the general stability of our democracy, are best served through strict separation of church and state and commensurately strict enforcement of the Free Exercise Clause.

The Hindu American Foundation (HAF) is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes and human rights. HAF has filed amicus curiae briefs in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

The Interfaith Alliance Foundation is a 501(c)(3) nonpartisan organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, the Interfaith Alliance has 185,000 members across the country from 75 faith traditions as well as those without a faith tradition. The Interfaith Alliance is committed to ensuring that the United States is a nation where religious belief and practice are free and voluntary, and that the government does not favor or discriminate against citizens based on

their religious beliefs or non-belief. The Interfaith Alliance believes that the longstanding prohibition against using public funds for sectarian purposes ensures religious autonomy.

The Union for Reform Judaism is the congregational arm of the Reform Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The Union has a longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The Union believes that religious freedom, and its necessary corollary the separation of church and state, has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history.

Dr. Eugene Fisher recently retired from his position as the Associate Director of the Secretariat of Ecumenical and Interreligious Affairs of the United States Conference of Catholic Bishops. For three decades, Dr. Fisher was in charge of Catholic-Jewish relations for the United States Conference of Catholic Bishops. A lay person, he was a central figure in the implementation of *Nostra Aetate*, the part of the

Second Vatican Council's reforms that forever changed the nature of the relationship between the Catholic Church and the Jewish community.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing *amicus curiae* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,870 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.

Pursuant to the General Order of this Court filed August 10, 2007, I further certify that the copy of this *amicus curiae* brief submitted in Digital Form is an exact copy of the written document filed with the Clerk. I further certify that the digital version of this brief has been scanned for viruses using Symantec Antivirus 10.1.4.4000 (with virus definitions dated 8/4/2008) and, according to that program, is free of viruses.

DATED: August 6, 2008

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CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2008, I caused to be mailed by UPS overnight delivery three copies of the foregoing *amicus curiae* brief, and also served electronic copies by email, upon each of the following:

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