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Ignoring Purpose, Context, and History: The Tenth Circuit Court in *American Atheists, Inc. v. Duncan*

I. INTRODUCTION

All Americans have or will encounter a public display including religious imagery during their lives. Many of our most recognized memorials use religious symbols as the primary or exclusive element in displays honoring heroes who made the ultimate sacrifice protecting everything we hold dear.¹ Such displays are scattered throughout American communities, which, due to aggressive challenges to the constitutionality of these displays, increasingly face a choice between removing the displays or fighting expensive legal battles brought by advocates of strict separation of church and state.²

In *American Atheists, Inc. v. Duncan*, the Tenth Circuit Court of Appeals faced such a challenge and held that thirteen memorials that used a white Latin cross to honor fallen Utah State Troopers unconstitutionally endorsed Christianity.³ Because the court misinterpreted and misapplied its own precedent⁴ in analyzing the history and context of the monuments and discounted the importance of the monuments' court-recognized secular purpose without explanation,⁵ *Duncan* was wrongly decided and should be reversed.

Part II of this Note reviews the context and history of Establishment Clause jurisprudence. Part III details the facts, procedural history, and holding of *Duncan*. Part IV analyzes *Duncan*; it discusses how the court misinterpreted and misapplied its own precedent by downplaying the secular context of the memorials at issue, erroneously discounting the weight of a recognized secular purpose in creating the memorials and giving too little weight to Utah's own religious treatment of the Latin cross. Part V concludes.

1. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1216 (S.D. Cal. 2008), *rev'd* 2011 U.S. App. LEXIS 53, at *77–78 (9th Cir. Jan. 4, 2011). The memorial at Arlington and Irish Brigade Monument at Gettysburg National Military Park are but two examples. *Id.*

2. Paul Forster, Note, *Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations*, 85 CHI.-KENT L. REV. 401, 402 (2010).

3. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1164 (10th Cir. 2010).

4. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030–31 (10th Cir. 2008).

5. *Duncan*, 616 F.3d at 1159–64.

II. CONTEXT AND HISTORY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

“Congress shall make no law respecting an establishment of religion”⁶ The Establishment Clause of the First Amendment was originally understood by some Founders and early courts merely to prohibit a federally established church—one funded and favored by the government with authority to coerce membership in and compliance with that religion’s practices and tenets.⁷ Modern Establishment Clause jurisprudence only started evolving in the 1940s, when the clause was made applicable to the states by *Cantwell v. Connecticut*.⁸ Seven years later the court decided *Everson v. Board of Education*, which held:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church[,] . . . pass laws which aid one religion, aid all religions, or prefer one religion over another[,] . . . force [or] influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”⁹

6. U.S. CONST. amend. I. While a detailed evolution of Establishment Clause jurisprudence is not provided in this article, it is available in Supreme Court decisions. *E.g.*, *Engel v. Vitale*, 370 U.S. 421, 425–30 (1962). Instead, this article will highlight various important decisions tracing Establishment Clause history. For a more complete history of the Establishment Clause, see generally Rodney K. Smith, *Getting off on the Wrong Foot and Back Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

7. *ACLU v. City of St. Charles*, 794 F.2d 265, 269–70 (7th Cir. 1986) (citing *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815)); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 20–21; Smith, *supra* note 6, at 575–634.

8. 310 U.S. 296, 303 (1940).

9. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

Everson laid the foundation for various later Establishment Clause rationales, including neutrality,¹⁰ coercion,¹¹ strict separation,¹² endorsement,¹³ and entanglement.¹⁴

Even with *Everson* as a foundation, the Court adopted no single framework to analyze Establishment Clause challenges until 1971 in *Lemon v. Kurtzman*.¹⁵ The “*Lemon* test,” as it is now commonly known, assessed whether the challenged government action: (1) had a secular purpose, (2) had the “principal or primary effect” of either “advanc[ing] [or] inhibit[ing] religion,” and whether it (3) “foster[s] an excessive government entanglement with religion.”¹⁶ Government action that fails any of the prongs is an unconstitutional establishment of religion.¹⁷ *Lemon* was almost immediately criticized, even by its author, Chief Justice Burger, and the Court abandoned *Lemon* until 1984—when it was reestablished as the primary Establishment Clause framework.¹⁸

Courts have continued to refine and clarify *Lemon*’s prongs since 1984. The purpose prong asks whether the government’s “actual purpose” is approval or disapproval of a religion and assesses whether the government’s intent in taking the action—in the eyes of a reasonable observer—was secular.¹⁹ It is not required that the purpose be exclusively secular; rather, it is simply required that the government show a “plausible secular purpose” behind its action.²⁰

The effect prong asks whether a reasonable observer would believe that the effect of the action advances or inhibits religion or endorses a religious message. The reasonable observer is deemed to have knowledge of the purpose, history, and context of the action in

10. McConnell, *supra* note 7, at 8 (citing Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985)).

11. See *Engel*, 370 U.S. at 430–31 (holding that allowing school prayers is coercive in nature).

12. McConnell, *supra* note 7, at 13 (citing *Everson*, 330 U.S. at 11).

13. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592–94 (1989).

14. *Lee v. Wiseman*, 505 U.S. 577, 587–93, 599 (1992) (detailing the government’s involvement in a graduation prayer).

15. 403 U.S. 602 (1971).

16. *Id.* at 612–613.

17. *Id.*

18. McConnell, *supra* note 7, at 1–3.

19. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1157 (10th Cir. 2010) (citing *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030–31 (10th Cir. 2008)).

20. *Bauchman v. Wi. High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) (citing *Wallace v. Jaffree*, 472 U.S. 38, 74–75 (1985) (O’Connor, J., concurring)).

question, and assesses the action in light of that knowledge.²¹ In this sense, the reasonable observer is similar to tort law's reasonable person, and is presumed to know far more than most actual members of a community,²² although he or she is not presumed to be omniscient.²³

Finally, entanglement is generally only found if the government "involves itself with a recognized religious activity or institution,"²⁴ or provides financial aid to sectarian institutions.²⁵

Despite *Lemon*'s visibility among the Establishment Clause tests, the current Supreme Court applies no single test and Justice Breyer declared in a recent case that there is "no single mechanical formula that can accurately draw the constitutional line in every [Establishment Clause] case."²⁶ Indeed, the court has declined to apply *Lemon* in at least one recent high-profile case.²⁷ Some on the court have criticized *Lemon*'s prongs as being no more helpful than "signposts" in identifying Establishment Clause violations.²⁸ In spite of, or perhaps because of, the current uncertainty surrounding the appropriate analytical framework for Establishment Clause contests, at least two circuit courts of appeals have explicitly held that *Lemon* is binding precedent and appear to be committed to using the test until the Supreme Court clearly establishes an alternative.²⁹

III. AMERICAN ATHEISTS, INC. V. DUNCAN

In *Duncan*, the Tenth Circuit held that thirteen twelve-foot tall crosses honoring fallen Utah State Troopers violated the effect prong of the *Lemon* test and thus were an unconstitutional establishment of

21. *Weinbaum*, 541 F.3d at 1031 (internal citation omitted).

22. *Id.*

23. *Duncan*, 616 F.3d at 1158–59 (internal citation omitted).

24. *Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1260 (D. Utah 2007) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971)).

25. *Id.* (citing *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1318 (8th Cir. 1980)).

26. *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

27. *Id.* (noting several recent decisions in which the Court declined to apply *Lemon* at all or applied it only after reaching a holding using other tests).

28. *Id.* at 686 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

29. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156 (10th Cir. 2010) (holding that *Lemon* still controls all Establishment Clause cases in the Tenth Circuit); *Card v. Everett*, 520 F.3d 1009 (9th Cir. 2008) (holding that *Lemon* remained the general test for Establishment Clause violations, but that *Van Orden* controlled some cases involving long-standing religious displays conveying historical messages in a non-secular context).

religion.³⁰ This section reviews *Duncan*'s facts, procedural history, and holding.

A. Facts and Procedural History

On December 8, 1974,³¹ Utah Highway Trooper Anthony J. Antoniewicz was ambushed and killed while on patrol near the Utah-Wyoming border.³² Lee Perry, then president of the Utah Highway Patrol Association (“UHPA”)—a nonprofit and nonreligious organization—learned that no memorial program existed to honor fallen state troopers,³³ and with his friend Robert Kirby conceived of a memorial to honor the trooper.³⁴ The memorial consisted of a twelve-foot high white Latin cross with Trooper Antoniewicz's name, rank, and badge number in large black lettering across the six-foot long cross-bar; a twelve-inch by sixteen-inch depiction of the Utah Highway Patrol's (“UHP”) official insignia; and a plaque containing a picture of the trooper with biographical information placed below.³⁵ After the initial memorial was in place, “families of other fallen troopers contacted the UHPA” requesting similar monuments for their fallen loved ones.³⁶ Eventually, thirteen memorials were constructed (some on private land, some on public), including two placed on public land outside a UHP office.³⁷

Perry and Kirby were inspired to use a white Latin cross by the white crosses used in military cemeteries to honor fallen soldiers.³⁸ They believed that “only the white [Latin] cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety” they intended. The designers expected viewers to recognize the cross as a memorial honoring those who had “given their lives to ensure the safety and protection

30. *Duncan*, 616 F.3d at 1158, 1164.

31. *1970 - 1979 / Trooper William J. Antoniewicz*, UTAH DEPARTMENT OF PUBLIC SAFETY: HIGHWAY PATROL, http://publicsafety.utah.gov/highwaypatrol/history_1979/antoniewicz.html (last visited January 17, 2011).

32. *Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1247 (D. Utah 2007).

33. *Id.* at 1248.

34. *Duncan*, 616 F.3d at 1148.

35. *Id.* at 1150. Images of the memorials are attached to the opinion. *Id.* at 1165–67.

36. *Duncan*, 528 F. Supp. 2d at 1248. The UHPA stated that it would use any symbol the family requested, although no family had objected to the use of a cross, *Duncan*, 616 F.3d at 1151, despite the State's disagreement on that point, *id.* at 1151 n.2.

37. *Duncan*, 616 F.3d at 1151.

38. *Id.* at 1157.

of others.”³⁹ According to the UHPA, the memorials’ purposes are to: (1) remind UHPA families and UHP troopers “that a fellow trooper gave his life in service of [the] state”; (2) “remind . . . drivers that a trooper died in order to make the state safe for all citizens”; (3) “honor the trooper and the sacrifice he and his family made for the State of Utah”; and (4) “encourage safe conduct on the highways.”⁴⁰ In order to convey the messages to passers-by, the memorials were placed in visible locations that were both close to the spot of the trooper’s death and “safe to stop and view.”⁴¹

American Atheists, Inc., along with three individual Utah residents who were also members of the group, brought suit challenging the legality of the monuments. On cross-motions for summary judgment, Judge David Sam held the memorials constitutional under the Tenth Circuit’s revised three-prong *Lemon* test.⁴² He ruled that the “undisputed material facts allow the court to discern a plausible secular purpose . . . of honoring UHP troopers who died during their term of service,”⁴³ that the “reasonable observer” with knowledge of the context and history of the memorials and the demographics of Utah would not perceive an effect of religious endorsement,⁴⁴ and that the use of the cross as a memorial was not excessive entanglement.⁴⁵ The plaintiffs timely appealed.

B. Holding

The Tenth Circuit reversed the district court. While it agreed that the memorials had a secular purpose, it found that they had the impermissible effect of conveying a religious message, and therefore failed *Lemon*’s effect prong.⁴⁶

39. *Id.* at 1151.

40. *Id.* at 1150.

41. *Id.* at 1151.

42. *Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1254, 1260–61 (D. Utah 2007).

43. *Id.* at 1254.

44. *Id.* at 1258 (referencing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring)).

45. *Id.* at 1260–61.

46. *Duncan*, 616 F.3d at 1158–59, 1164. The court did not analyze whether there was excessive entanglement.

The court initially noted that “[a]lthough the Supreme Court is sharply divided on the [governing] standard . . . the touchstone for Establishment Clause analysis [in the Tenth Circuit] remains the tripartite test set out in *Lemon*.”⁴⁷ Under the purpose prong, the court “asks whether government’s actual purpose is to endorse or disapprove of religion”⁴⁸—i.e., “whether the government conduct was motivated by an intent to endorse religion.”⁴⁹ The court reviews the government’s conduct under this prong through the eyes of an “objective observer,”⁵⁰ but does not “lightly attribute unconstitutional motives to the government, particularly where [it] can discern a plausible secular purpose,”⁵¹ unless the purported motive appears to be merely a sham.⁵²

The court held that Utah’s action did not violate the purpose prong. The “consistently asserted” purpose of the State throughout the project had been one of “honor[ing] fallen state troopers and . . . promot[ing] safety on its highways.”⁵³ Further, UHPA’s claim of a secular motive was bolstered by the fact that the design of the memorials was inspired by military memorials that also used a white Latin cross, and also by the fact that both designers were members of the Mormon faith, which “does not use the cross as a religious symbol.”⁵⁴ Finally, there was no evidence that the purported motive was a sham.⁵⁵

Next, under the effect prong, the court “asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval”⁵⁶ in “the eyes of an objective observer who is aware of

47. *Id.* at 1156 (citations omitted) (quoting *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 796 (10th Cir. 2009)) (internal quotation marks omitted). For a brief summary of the *Lemon* test’s prongs, see *supra* notes 15–25 and accompanying text.

48. *Id.* at 1157 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

49. *Id.* (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008)).

50. *Id.* (quoting *Weinbaum*, 541 F.3d at 1031).

51. *Id.* (quoting *Weinbaum*, 541 F.3d at 1031).

52. *See id.* at 1158.

53. *Id.* at 1157.

54. *Id.* The court noted that the Establishment Clause only applies to state actors, which the UHPA is not. However, it deemed the memorials “state action” and imputed UHPA’s motives to the State because the State had allowed the use of UHP insignia and had located several memorials on public land. *Id.* at 1157–58.

55. *Id.* at 1158.

56. *Id.* at 1157 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J.,

the *purpose, context, and history* of the symbol.”⁵⁷ This observer is presumed to be aware of contextual and historical information beyond what is “gleaned simply from viewing the challenged display,”⁵⁸ but is not presumed to be omniscient.⁵⁹ The court considers the purpose, context, and history of the action to determine whether the action would have the effect of “communicating a message of governmental endorsement or disapproval” of religion,⁶⁰ or of “mak[ing] adherence to a religion relevant . . . to a person’s standing in the political community.”⁶¹

In reversing the district court, the Tenth Circuit held that Utah’s use of the cross as a memorial conveyed a message of religious endorsement.⁶² While the State’s purpose in allowing the use of the UHP insignia and public land was secular, it was outweighed by the effect of the memorial’s context and history.⁶³ The cross—“the preeminent symbol of Christianity,”⁶⁴ and one that, in the context of the monument, “[stood] alone (as opposed to . . . being part of some sort of display involving other symbols)”⁶⁵—sent a message not merely of death, but of the death of a Christian.⁶⁶ Thus, the court reasoned, the reasonable observer would likely experience “fear of unequal treatment” by UHP troopers,⁶⁷ and “could reasonably assume that the officers were Christian police”⁶⁸ because the cross bore the official UHP insignia—the state’s “imprimatur”—and was on public land.⁶⁹

concurring)) (internal quotation mark omitted).

57. *Id.* at 1158 (emphasis added) (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008)) (internal quotation marks omitted). The Court noted that this observer “is kin to the fictitious ‘reasonably prudent person’ of tort law.” *Id.* (quoting *Weinbaum*, 541 F.3d at 1031).

58. *Id.* (quoting *Weinbaum*, 541 F.3d at 1031) (internal quotation marks omitted).

59. *Id.* at 1159.

60. *Id.* at 1158 (quoting *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 799 (10th Cir. 2009)) (internal quotation marks omitted).

61. *Id.* (quoting *Green*, 568 F.3d at 799).

62. *Id.* at 1164.

63. *Id.* at 1159. The court analyzed the context and history together because there was no history separate from the context in this case. *Id.* at 1159 n.11.

64. *Id.* at 1160 (quoting *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004)).

65. *Id.*

66. *Id.* at 1161.

67. *Id.* at 1160.

68. *Id.* at 1161 (quoting *Friedman v. Bd. of Cnty. Comm’rs*, 781 F.2d 777, 782 (10th Cir. 1985)).

69. *Id.* at 1160.

The court went on to dismiss four secular contextual factors raised by the State. First, it rejected the contention that the crosses' use as memorials nullified their religious message because the cross was a "Christian symbol of death"⁷⁰ and had not obtained a secular meaning apart from its religious meaning.⁷¹ Second, it rejected the contention that because crosses are common roadside memorials, the UHPA memorials conveyed the secular message of honoring the death of one fallen near the area.⁷² It also noted the use of the UHP insignia and the size of the cross was unique among roadside memorials.⁷³ Third, the fact that the designers did not revere the cross was inconsequential because the State adopted the memorials as its own, thus engaging in expressive activity likely altering the effect on the observer.⁷⁴ Finally, the court noted that the fact that the majority of Utahns belong to the Mormon religion, which does not revere the cross, and that only a small minority belonged to religions revering the cross, did not mitigate the endorsement effect, because it is not inconceivable the State could endorse a minority religion.⁷⁵

IV. ANALYSIS

This Part analyzes the *Duncan* holding and determines that the Tenth Circuit incorrectly found an impermissible effect of religious endorsement under *Lemon*. First, it misinterpreted and misapplied its own precedent⁷⁶ and ignored a likely Supreme Court majority⁷⁷ in

70. *Id.* at 1161.

71. *Id.* at 1161–62.

72. *Id.* at 1162.

73. *Id.*

74. *Id.* at 1163.

75. *Id.* at 1163–64 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 616 n.64 (1989)).

76. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033–34 (10th Cir. 2008) (holding that the city's name, derived from its history as the location of a "forest of crosses" used to memorialize those massacred in the area, "militate[d] against the argument that the symbol's effect is to endorse Christianity").

77. *See Salazar v. Buono*, 130 S. Ct. 1803, 1818, 1820 (2010) (plurality opinion). In *Salazar*, Justice Kennedy, joined by Justice Alito, and Chief Justice Roberts, found that a cross used as a symbol in a memorial "evokes far more than religion" and was not "an attempt to set the imprimatur of the state on a particular creed." *Id.* at 1816, 1820. While Justices Scalia and Thomas joined the judgment while deciding the case on other grounds, it is almost certain they would join the Chief Justice, and Justices Kennedy and Alito in this finding, considering their stance in *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Scalia, J. and Thomas, J.,

holding that the cross, even when used as a memorial to honor fallen troopers, would convey a message of state imprimatur of Christianity. Second, it downplayed the importance of the contextual factors that secularized the message sent by the UPHA memorials.⁷⁸ Third, it discounted, without explanation, the weight of the State's secular purpose contrary to the approach generally taken by the Supreme Court.⁷⁹ Finally, it gave insufficient weight to the secularizing effect of Utah's demographics,⁸⁰ especially in light of the strong secular message conveyed by the use of the cross as a memorial.

A. The Memorial as an Imprimatur of the State

The Court insisted that despite the context of the crosses as memorials for fallen state troopers, the cross stands alone without secularizing features, and by bearing the UHP symbol, would cause "fear of unequal treatment" on a religious basis in the mind of a reasonable observer.⁸¹ However, in light of its own decision in *Weinbaum v. City of Las Cruces*, which *Duncan* cites approvingly, the memorials are clearly secular in nature and cannot conceivably create greater risk of imprimatur than the cross-bearing city seal used by Las Cruces in *Weinbaum*, because the symbols share a context and history that makes the message of the cross "not religious at all."⁸²

In *Weinbaum*, the City of Las Cruces, New Mexico chose as its seal the symbol of three crosses, the middle one raised above the others, with all three surrounded by a sunburst.⁸³ The symbol was used on city buildings, fire trucks and police cars, fire and police uniforms, maintenance vehicles, and embodied in a sculpture on the exterior of the city sports complex and in a mural in an elementary school.⁸⁴ Despite its recognition that the cross is "unequivocally"

concurring separately).

78. See *Duncan*, 616 F.3d at 1162.

79. See, e.g., *Allegheny*, 492 U.S. at 592-94 (finding an eighteen-foot tall menorah displayed just outside the city-county building did not have the primary effect of advancing religion).

80. See *Duncan*, 616 F.3d at 1163.

81. *Id.* at 1160.

82. *Id.* at 1159 (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008)).

83. *Weinbaum*, 541 F.3d at 1025 n.7.

84. *Id.* at 1025-26.

Christian, and that the three cross symbol represented the crucifixion of Christ, the central figure of Christianity,⁸⁵ the *Weinbaum* court held that there was no religious effect because the symbol “was not religious at all,” being derived from “secular events” surrounding the city’s founding.⁸⁶

The Tenth Circuit in *Duncan* attempted to distinguish *Weinbaum* on the basis of the “secular” context and history of the Las Cruces cross.⁸⁷ What it failed to mention, however, was that the “secular” events from which Las Cruces derived its name—and thus from which the seal derives its history and context—was the construction of a rough cross to memorialize the massacre of Mexican soldiers in 1847, as well as a “forest of crosses” later left to mark the graves of fallen travelers in the area.⁸⁸ *Weinbaum* distinguished the Las Cruces seal from a similar seal used by another city in *Friedman v. Board of County Commissioners*, in which the Tenth Circuit held that a city seal violated the Establishment Clause by creating a state imprimatur of religion because including the cross on the seal was an attempt to honor the city’s Christian history.⁸⁹

It becomes apparent in analyzing *Weinbaum* and *Friedman* that what distinguishes the two cases—and made Las Cruces’s use secular—was that in *Weinbaum* the cross’s context derived from its history *as a memorial*. *Friedman* clarifies that celebrating history by itself is not necessarily secular, but that the history celebrated must be secular. Thus, in holding that Las Cruces’s cross-bearing seal was secular, and “had no religious effect” because it was derived from “secular” events surrounding the city’s founding, *Weinbaum* at least implicitly recognized that memorializing fallen soldiers and travelers, even with an “unequivocally” Christian symbol, was secular.⁹⁰

85. *Id.* at 1022–23.

86. *Id.* at 1035.

87. *Duncan*, 616 F.3d at 1159.

88. *Weinbaum*, 541 F.3d at 1024.

89. *Id.* at 1034 (citing *Friedman v. Bd. of Cnty. Comm’rs*, 781 F.2d 777, 779, 781 (10th Cir. 1985)). The area was conquered by Spanish conquistadors accompanied by Catholic priests. *Id.* (citing *Friedman*, 781 F.2d at 781). Although the court notes that the motto, “With This [the cross] We Overcome,” also suggested a state imprimatur of religion, it is apparent that the court would likely have held the seal unconstitutional even without the motto, because the purported secular purpose was in fact to honor its religious founding. *See id.*

90. The fact that the seal was derived from the city’s name, *id.* at 1035, and that crosses were used throughout the city in commercial and secular contexts, *id.* at 1034, is inconsequential. Those facts derive from the same secular history—the use of the cross as a

In so doing, the court is in good company, as a majority of the Supreme Court would almost certainly agree that use of a Latin cross to honor those giving their lives defending our liberties is secular in nature. Indeed, three justices, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, have spoken directly on point.⁹¹ Justice Kennedy, writing for the plurality in *Salazar v. Buono*, stated that “[p]lacement of [an eight-foot tall] cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”⁹² He further stated that “[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs.”⁹³ Instead, “a Latin cross is not merely a reaffirmation of Christian beliefs. . . . [O]ne Latin cross in the desert evokes . . . thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.”⁹⁴

While Justices Scalia and Thomas did not join the plurality opinion, both have made statements in prior opinions that support the assertion that they would join the other three justices in holding that use of a Latin cross to commemorate fallen heroes is not unconstitutional. In *Van Orden v. Perry*, the Court upheld the constitutionality of a stand-alone Ten Commandments monument that was part of a scattered display of historical monuments and markers spread over twenty-two acres surrounding the Texas State Capitol Building.⁹⁵ Justice Scalia, concurring in the judgment, wrote separately stating that “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”⁹⁶ Justice Thomas went further in his concurring opinion, arguing against incorporation of the

memorial. Had the court determined the memorials were religious in nature because of the use of the cross, there would have been no basis for distinguishing the case from *Friedman*.

91. See *Salazar v. Buono*, 130 S. Ct. 1803, 1816–17, 1820 (2010) (plurality opinion).

92. *Id.* at 1816–17.

93. *Id.* at 1818.

94. *Id.* at 1820.

95. *Van Orden v. Perry*, 545 U.S. 677, 681, 691–92 (2005).

96. *Id.* at 692 (Scalia, J., concurring).

Establishment Clause against the states, and arguing that even if it were incorporated, the Establishment Clause should be given its original meaning, which required “actual legal coercion”⁹⁷ such as “mandatory observance or mandatory payment of taxes supporting ministers,”⁹⁸ but “[t]he mere presence of the monument . . . involves no coercion and . . . does not violate the Establishment Clause.”⁹⁹ Taken together, these statements indicate that there is a likely five-justice majority that would support the proposition that use of the Latin cross as part of a memorial to honor fallen state troopers does not constitute an unconstitutional state *imprimatur* of religion.

Because the crosses used in *Duncan* share a secular pedigree with those used in *Weinbaum* based on their use as memorials, the *Duncan* court misapplied and misinterpreted *Weinbaum* in holding that the use of the cross as a memorial in *Duncan* was religious. It also becomes clear that if the cross’s use on the city seal did not create an effect of fear of imprimatur of religion or of unequal treatment by “Christian police” in *Weinbaum*—where the seal was emblazoned on police uniforms, displayed on public buildings, represented by a seven-and-one-half-foot tall sculpture at the city sports complex, and painted on the wall of an elementary school—because of its secular nature, it certainly could not create that effect in a reasonable observer in *Duncan* where a mere thirteen crosses scattered throughout the state carry the UHP insignia, as an integral and necessary part of a memorial to honor fallen UHP troopers. Indeed, in light of the shared context with *Weinbaum*, a reasonable observer, aware of the context of the UHPA crosses as memorials, would almost certainly consider the effect “not religious at all.”¹⁰⁰

B. The Context of the Crosses as Integral Parts of Memorials

Even if the Tenth Circuit finds that a Latin cross used as a memorial honoring the fallen retains some religious meaning, despite its implicit holding in *Weinbaum* to the contrary,¹⁰¹ the reasonable observer would almost certainly find that whatever incidental

97. *Id.* 693 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)).

98. *Id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring)).

99. *Id.* at 694.

100. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1159 (10th Cir. 2010).

101. *See supra* notes 81–90 and accompanying text.

religious effect remains is overcome by the secular context in which the cross is presented.¹⁰²

The *Duncan* court gave three reasons regarding the context in which the cross was presented that it claimed would purvey an impermissible effect of endorsement. First, it claimed the cross was a “stand alone” symbol, lacking any predominating secular message.¹⁰³ Second, it argued that the cross had not been accepted by other religions as a symbol of death and thus remained a Christian symbol of death.¹⁰⁴ Third, it expressed concern regarding the size and location of the symbols, especially those located near the UHP offices.¹⁰⁵

First, the *Duncan* court erroneously discounted the context in which the cross is found when claiming it “stands alone.”¹⁰⁶ As the images attached to the opinion illustrate,¹⁰⁷ the trooper’s name is prominently displayed, and the picture and biographical information are clearly visible (even if potentially merely a blur by those passing by at 55 miles per hour).¹⁰⁸ Further, the use of the UHP insignia adds to the secular context of the memorial rather than implying religious endorsement.¹⁰⁹ The crosses in the UHP memorials have never “stood alone” as a Christian symbol, nor been used in any way to suggest religious endorsement; rather, they have always been an integral part of a memorial honoring fallen UHP troopers.¹¹⁰ Use of the UHP insignia is almost necessary—and certainly fitting—on memorials honoring fallen state troopers. Rather than implying government imprimatur, the UHP symbol contributes to a

102. Indeed, the cross would almost certainly retain some religious meaning. *See Van Orden*, 545 U.S. at 690 (plurality opinion) (noting that a Ten Commandments monument retains a religious aspect, even though in the circumstances it could send a secular message as well). However, whatever meaning remains would likely be merely incidental, and merely incidental endorsement of religion where government action has a clearly secular effect does not violate the constitution. *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (“[N]ot every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone, constitutionally invalid.” (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) (internal quotation marks omitted))).

103. *Duncan*, 616 F.3d at 1162.

104. *Id.*

105. *See id.* at 1162 n.14.

106. *Id.*

107. *Id.* at 1165–67.

108. *Id.* at 1162 n.14.

109. *See id.*

110. *Id.*

predominant secular message by clearly identifying the honored fallen as UHP troopers.¹¹¹

This conclusion is bolstered by distinguishing a recently decided comparable case, *Trunk v. City of San Diego*, which held the use of a Latin cross at the center of a veteran's memorial an unconstitutional establishment of religion.¹¹² The forty-three-foot tall cross (when including the base) used in the *Trunk* WWI and WWII memorial sat alone atop Mount Soledad, just outside of San Diego, California from 1913 to 1954,¹¹³ and was originally an "emblem of faith."¹¹⁴ In 1954 the cross was dedicated as a war memorial, but it was not until 1989, after litigation surrounding the cross had started, that a plaque was added identifying the cross as a war memorial.¹¹⁵ During ongoing legal challenges, the organizers added several new features, including a bronze plaque, six large walls displaying the engraved names of fallen veterans, formal memorial plaques each containing biographies of fallen veterans, and an American flag among other items. Despite these secularizing additions, the use of the cross was held unconstitutional under the California Constitution in 1991.¹¹⁶ In order to avoid having to remove the memorial, it was eventually taken by the federal Congress in 2006.¹¹⁷ While the Ninth Circuit noted the primarily religious nature of the cross, it acknowledged that its nature did not preclude the cross from having a secular meaning, but instead stated that its holding was "driven by the history, setting, and appearance of [the Mount Soledad Cross] that . . . sharply distinguish the Cross from other war memorials containing religious symbols."¹¹⁸

Unlike the cross in *Trunk*, the crosses at issue in *Duncan* have never stood alone as emblems of faith or been used frequently as the site of religious services. Rather, the crosses at issue in *Duncan* have always contained secular features such as a bronze plaque (and insignia of the state), pictures and biographical information of the

111. As noted *supra* notes 91–99, it seems almost certain a Supreme Court majority would agree with this proposition.

112. 2011 U.S. App. LEXIS 53, at *77–78 (9th Cir. Jan. 4, 2011).

113. *Id.* at *2.

114. *Id.* at *56.

115. *Id.* at *56–57.

116. *Id.* at *8 (citing *Murphy v. Bilbray*, 782 F. Supp. 1420, 1424 (S.D. Cal. 1991)).

117. *Id.* at *11–12.

118. *Id.* at *43–44.

fallen, and a conspicuous display of the name of the fallen trooper.¹¹⁹ Further, as the reasonable observer would certainly be aware, the UHPA has clearly stated that any symbol requested by the fallen trooper's family would be used upon request, which could not have been the case in *Trunk* due to the permanent nature of the cross.¹²⁰ Thus, unlike the cross at issue in *Trunk*, the crosses at issue in *Duncan* have always been the centerpiece of a fully integrated memorial honoring fallen troopers, conveying a primarily secular message to a reasonable observer.

Second, while it may be true that the cross remains a “predominately Christian symbol,”¹²¹ it is “not exclusively so.”¹²² More importantly, a reasonable observer, even if not embracing the cross, would surely recognize its non-secular use as a symbol of death¹²³—especially when used to honor fallen heroes. Indeed, the Supreme Court has noted:

[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, [the Latin cross] evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.¹²⁴

The Court went on to state that “[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs.”¹²⁵ As noted earlier, the Tenth Circuit is in

119. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010).

120. *Id.* at 1151.

121. *Id.* at 1162.

122. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1023 n.2 (10th Cir. 2008) (“[T]he cross is an oft-used symbol in other cultures and religions as well.” (citing 5 *ENCYCLOPEDIA OF RELIGION* 3434 (Lindsay Jones ed., 2005))); *see also* 14 *ENCYCLOPEDIA OF RELIGION* 9339 (noting that the cross can be viewed as a symbol of the tree of life).

123. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1216 (S.D. Cal. 2008), *rev'd*, 2011 U.S. App. LEXIS 53, at *77–78 (9th Cir. Jan. 4, 2011). The district court also noted that when used as a monument, “the crosses . . . symbolize the cost of war, sacrifice and honor, and repose in death—specifically, military death.” *Id.* at 1213.

124. *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion). The statement was not central to the Court's holding.

125. *Id.* at 1818.

agreement with the Supreme Court, already having at least implicitly recognized that the cross, when used to memorialize fallen heroes, sends a primarily secular, not religious message.¹²⁶ Thus, contrary to the *Duncan* court's decision, it is likely that the reasonable observer would perceive a secular message of honoring sacrifice, not a religious one of a Christian death.

Finally, the court's concern about the size of the memorials and the placement of the two crosses in front of the UHP offices is unnecessary given that the cross is clearly a memorial to fallen state troopers. The twelve-foot high crosses at issue in this case are dwarfed by the forty-three-foot cross found unconstitutional in *Trunk*, and the vast majority of the crosses occupy no place nearly so prominent as the cross in *Trunk*.¹²⁷ Further, the crosses' size is not substantially larger than the seven-and-one-half-foot tall sculpture the Tenth Circuit found constitutional in *Weinbaum*, and the location cannot be problematic in view of the fact that the city seal in *Weinbaum* was not even across the street from the city buildings as it was in *Duncan*—it was on the government buildings, inside an elementary school, and on nearly all other city property.¹²⁸

C. The Purpose of the Memorials

The *Duncan* court discounted the importance of the government's purpose in analyzing effect—contrary to its own stated approach and that of the Supreme Court—without sufficient explanation. The court acknowledged that the State erected the UPHA memorials with a clearly secular purpose, but it did little more than note that the purpose was secular, that it was not dispositive, and that it had to be considered in light of other contextual and historical factors.¹²⁹ This approach stands in stark contrast to the importance the Tenth Circuit purported to attach to purpose in analyzing effects, noting that “[e]ffects are most often the manifestation of a motivating purpose.”¹³⁰

126. See discussion *supra* section IV.A.

127. *Trunk*, 2011 U.S. App. LEXIS 53, at *69, *71–72 (noting that the cross “dominated” the physical setting of the memorial, and occupied the “highest point” in a “place of particular prominence in San Diego”).

128. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1025–26 (10th Cir. 2008).

129. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1159 (10th Cir. 2010).

130. *Id.* (quoting *Weinbaum*, 541 F.3d at 1033).

The court's approach also contrasts with the Supreme Court's approach in two recent cases, *Van Orden v. Perry*¹³¹ and *McCreary County v. ACLU*,¹³² where purpose carried substantial weight in the effect prong and in large part explains the different outcomes. The five-justice majority in *McCreary* held that Ten Commandment displays put up in two Kentucky county courthouses were unconstitutional.¹³³ The Court gave dispositive weight to the government's improper and "unmistakable" religious purpose (both in the purpose analysis and in the effects analysis) in finding the displays unconstitutional.¹³⁴

In *Van Orden*, a decision issued on the same day, Justice Breyer, who voted with the majority in *McCreary*, cast his vote with the *McCreary* dissenters. In a separate concurrence, he found a standalone Ten Commandments display on the Texas State Capitol Grounds constitutional,¹³⁵ at least in part because of the government's secular purpose in erecting the display.¹³⁶ While he refused to base his decision on any single test, he argued that the display might pass both the purpose and effect prongs of the *Lemon* test if the majority had chosen to apply it, at least in part due to the government's secular purpose.¹³⁷

131. 545 U.S. 677 (2005).

132. 545 U.S. 844 (2005).

133. *Id.* at 850–51.

134. *Id.* While the Court frames its decision in terms of the purpose prong of the *Lemon* test, *id.* ("We hold that the counties' manifest objective may be dispositive of the constitutional enquiry . . ."), it engages in substantial analysis of effects in the eyes of the reasonable observer, *id.* at 869 ("The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." (emphasis added)); see also *id.* at 872 ("No reasonable observer could swallow the claim that the Counties had cast off the [religious] objective so unmistakable in the earlier displays." (emphasis added)), leading to the inference that the effects prong—and the analysis of purpose as part of the effects prong—played a significant role in the Court's decision.

135. *Van Orden*, 545 U.S. at 681 (plurality opinion). While the court does not describe the display as "standalone," and Justice Breyer places some weight on the fact that the monument is an integrated part of other non-religious displays, *id.* at 702 (Breyer, J., concurring), the fact remains that the display, for all practical purposes, stands alone, as it shares "no common appearance" or apparent relation to any of the seventeen other displays on the twenty-two acre grounds where the displays were found, *id.* at 742 (Stevens, J., dissenting).

136. *Id.* at 701 (Breyer, J., concurring) ("The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended . . . nonreligious aspects of the tablets' message to predominate." (emphasis added)).

137. *Id.* at 703.

In light of its own statements and the apparent weight that the legislatures' purposes received in both *McCreary* and *Van Orden*, the Tenth Circuit gave too little weight to the State's undeniably secular purpose in choosing to include the cross in its fully integrated memorial. In *McCreary*, the government's unmistakable religious purpose was dispositive in the Court's finding of unconstitutionality.¹³⁸ In *Van Orden*, Justice Breyer cast the deciding vote in favor of constitutionality—giving the government's secular purpose substantial weight.¹³⁹ However, the Tenth Circuit in *Duncan* does little more than mention government purpose in passing when analyzing the effects prong.¹⁴⁰ It found that the religious nature of the Cross (which is, admittedly, the primary element of the memorial) overcame the secular government purpose and conveyed an endorsement effect despite the secularizing features of the other elements of the fully integrated memorial.¹⁴¹ Further, it discounted the context and history of the memorials given Utah's religious demographics.¹⁴² This combined context and history is arguably even more secularizing—and thus should have made it even harder to overcome a secular government purpose—than that in *Van Orden*.¹⁴³

138. *McCreary*, 545 U.S. at 850–51.

139. *Van Orden*, 545 U.S. at 699–703 (Breyer, J., concurring).

140. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1159 (10th Cir. 2010) (noting that purpose is analyzed in the effect prong, but is not dispositive).

141. *Id.* at 1162–63.

142. *Id.* at 1163–64.

143. *Duncan* provides an extremely poor case for establishing the baseline for when history and context will overcome a clearly secular government purpose. In contrast, *Trunk v. City of San Diego*, 2011 U.S. App. LEXIS 53 (9th Cir. Jan. 4, 2011), provides a useful contrast and a situation that illustrates the type of historical and contextual factors that should be present to overcome an undeniably secular government purpose. In *Trunk*, it was not the mere use of the Latin cross as the primary element of the war memorial that overcame an admittedly secular congressional purpose in purchasing the monument from the city. *Id.* at *43–44. Instead, the *Trunk* court stated its analysis was driven by other factors, including the memorial's physical dominance of the other memorial elements, *id.* at *69, *71–72, its location and visibility from a major interstate, *id.* at *71, and its history as an exclusively religious symbol for over forty years, which then sat alone as a memorial for thirty-five more, *id.* at *2, *56–57. Further, San Diego had a history of anti-Semitism and religious discrimination toward non-Christians. *Id.* at *68–70.

D. Utah's Demographics

Finally, the *Duncan* court cites *County of Allegheny v. ACLU*¹⁴⁴ for the proposition that a state may establish a religion using the religious symbol of a minority religion in the state, and thus downplays the importance of Utah's religious context.¹⁴⁵ However, in its analysis, the Tenth Circuit once again understates the potential importance of the purpose factor while ignoring that the Supreme Court has not addressed the situation posed by *Duncan*.¹⁴⁶

In *Allegheny*, the Supreme Court held that the use of an eighteen-foot tall menorah sitting outside the city-county building was constitutional considering its context (sitting next to a forty-five-foot Christmas tree).¹⁴⁷ The Court stated in dicta that an unadorned, standalone menorah may have been unconstitutional even though adherents of the Jewish religion were a minority, thus establishing the proposition that a government could conceivably endorse a minority religion.¹⁴⁸ However, it is simply unclear what the court would have done had the menorah been adorned with secular features, such as a large "Happy Holidays from the City of Pittsburg" sign across the center of the menorah (similar to the prominent display of the trooper name on the cross's crossbar, along with the official UHP insignia) bounded by small Christmas trees or other secular items on either side (similar to the trooper picture and biography), which is a more apt analogy to the use of the cross in *Duncan*—adorned by secular features in a state where only a small minority of the residents revere the cross.

Further, the Tenth Circuit's approach in understating the importance of Utah's religious demographics stands in stark contrast to the importance the Ninth Circuit placed on the religious history and demographics of San Diego in *Trunk*.¹⁴⁹ There, the Ninth Circuit placed particular importance on the fact that the cross at issue in *Trunk* stood at a prominent place in La Jolla, a place where being

144. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989).

145. *Duncan*, 616 F.3d at 1163–64 (citing *Allegheny*, 492 U.S. at 616 n.64, 634, 655).

146. *See id.* at 1164 ("These factors that Defendants point to as secularizing the memorials do not sufficiently diminish the crosses' message of government's endorsement of Christianity.").

147. *Allegheny*, 492 U.S. at 582.

148. *Id.* at 616 n.64, 634, 655.

149. *Trunk v. City of San Diego*, 2011 U.S. App. LEXIS 53, at *64–66 (9th Cir. Jan. 4, 2011).

religious is essentially synonymous with being Christian, and which had a “history of anti-Semitism that reinforces the Memorial’s sectarian effect.”¹⁵⁰ In contrast, the cross at issue in *Duncan* is not even used as a religious symbol of the predominant religion in Utah.¹⁵¹

Considering the secular history and context of the display in *Duncan*, and the secular purpose surrounding its creation, this factor should weigh more heavily against finding an impermissible effect under *Lemon* than the Tenth Circuit conceded.

V. CONCLUSION

The Tenth Circuit is likely to continue to face Establishment Clause challenges similar to the one at issue in *Duncan*.¹⁵² To ensure that future decisions are not based on its errors, *Duncan* should be reversed. The Court should hold that the crosses at issue would not create an impermissible effect of endorsement of a particular religion in the eyes of a reasonable observer because of the secular nature of the crosses’ history as memorials honoring the fallen dead, the secular context in which the *Duncan* crosses were displayed (as fully integrated in a memorial honoring fallen UHP troopers), the purpose of the memorial’s creators, and the religious demographics of the state of Utah.

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150. *Id.* at *64.

151. *Duncan*, 616 F.3d at 1163–64. Indeed, it would be ironic if a state using the “preeminent symbol of Christianity,” *id.* at 1160 (internal citation omitted), to memorialize fallen troopers was held to be endorsing Christianity where the mainstream Christian world rejects Mormonism, the state’s predominant religion. RICHARD ABANES, *INSIDE TODAY’S MORMONISM: UNDERSTANDING TODAY’S LATTER-DAY SAINTS IN LIGHT OF BIBLICAL TRUTH* 253 (2004).

152. *See* Forster, *supra* note 2, at 402.

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