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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas
non-profit corporation, R. ANDREWS, S.
CLARK and M. RIVERS,

Plaintiffs,

vs.

COLONEL SCOTT T. DUNCAN,
Superintendent, Utah Highway Patrol;
JOHN NJORD, Executive Director, Utah
Department of Transportation; and, F.
KEITH STEPAN, Director Division of
Facilities Construction and Management
Department of Administrative Services,

Defendants.

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
CHRISTIAN CROSS AS RELIGIOUS
SYMBOL**

Civil No. 02:05-CV-00994 DS

Judge David Sam

Defendants Duncan, Njord, and Stepan (State Defendants), by and through their attorney of record, Thom D. Roberts, Assistant Attorney General, hereby submit the following Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment Re: Christian Cross as Religious Symbol:

To prevail on a Motion for Partial Summary Judgment, Plaintiffs must sustain their burden of showing that there is no genuine issue as to any material fact and that they are entitled

to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. Plaintiffs have failed to demonstrate that there are no issues of genuine material fact as to their claim that the memorials in this case are “exclusively religious symbols” and in addition have failed to demonstrate that they are entitled to judgment as a matter of law.

Plaintiffs brought this action under the First Amendment claiming that the action of these State Defendants violated the First Amendment’s provisions regarding the establishment of religion. Plaintiffs ultimately will have to demonstrate that the State Defendants’ actions had the “ostensible and predominate purpose of advancing religion”, McCreary County, Kentucky v. American Civil Liberties Union, 125 S. Ct. 2722, 2733 (2005), that it has the effect of endorsing religious beliefs, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598 (1989).

Plaintiffs seek partial summary judgment asking the Court to determine, as a matter of law, that the trooper memorials which are the subject of this suit are “exclusively religious symbols.” This is a preliminary issue in the Plaintiffs’ claim. If the Court determines that these are religious symbols, or even exclusively religious symbols, in order to ultimately prevail the Plaintiffs will still have to prove the State Defendants’ actions with regard to those symbols constitutes an unconstitutional endorsement or advancement of religion. County of Allegheny, supra, 492 U.S. at 595 and 597.

Plaintiffs’ claim that the memorials are “exclusively religious symbols” is an odd claim. The U.S. Supreme Court has recognized in its establishment of religion cases that symbols, even central and quintessentially religious symbols, have differing meanings and purposes. Van Orden v. Perry, 125 S. Ct. 2854, 2863 (2005), concerned a display of the Ten Commandments.

Justice Reinquest, in his plurality opinion, recognized that while the Ten Commandments were religious, “the Ten Commandments have an undeniable historical meaning.” Van Orden, 125 S. Ct. at 2863; and Justice Breyer, in his concurring opinion (which as the deciding vote may be one narrowest “basis” of the decision) also recognized that while the Ten Commandments may convey a religious message they can also convey a “secular moral message” and “historical message”, Van Orden, 125 S. Ct. at 2869-70. Similarly in the McCreary, supra, involving the Ten Commandments, the Court stated while the Ten Commandments may have a religious message, displaying tablets with ten roman numerals “could be seen as alluding to a general notion of law, not a sectarian conception of faith.” McCreary, 125 S. Ct. at 2738. In County of Allegheny, supra, a suit of over the display of a creche and Chanukkah menorah in city and county buildings, the Court noted that while a creche, consisting of the familial representation of the birth of Jesus Christ, “is capable of communicating a religious message” its meaning depends on its setting. Allegheny, 492 U.S. at 598. Concerning the Chanukkah Menorah while it can be religious symbol, “the menorah’s message is not exclusively religious” but can have both religious and secular dimensions. Allegheny, 492 U.S. at 613-14. The Allegheny Court also noted that the Christmas tree once had a religious connotation but now is a secular symbol of Christmas. 492 U.S. at 416. And in Lynch v. Donnelly, 465 U.S. 668 (1984), again involving a creche or nativity scene as a Christmas display, the Court stated that while the creche is a reminder of or represents the origins of Christmas in a Christian context, it also depicts the historic origins of a national holiday and can be a secular display.

The Supreme Court has recognized that the legal resolution of governmental action in establishment cases is based upon the meaning, purpose, and intent of the action which is in turn determined based upon the reasonable, knowledgeable observer:

[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the [display] appears.

McCreary, 125 S. Ct. at 2737. Further:

[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears.

McCreary, 125 S. Ct. at 2738. Further, “detail is key.” *Id.*

The meaning of symbols can also change over time. That change can include losing a prior religious meaning and connotation. Examples include Christmas trees as mentioned above, see Allegheny, *supra*, as well as Sunday closing laws. In McGowan v. State of Maryland, 366 U.S. 420 (1961) challenge was made to the Sunday closing laws. Plaintiffs brought an establishment of religion against the Sunday closing laws, arguing that Sunday was the sabbath day of the predominate Christian sects involved. The Court noted that “there is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces”, 366 U.S. at 431, but ultimately concluded:

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than religious character. . .

366 U.S. at 444.

The cross, as an object and as a symbol, of course predates Christianity. There are also many forms of crosses. See *Outward Signs*, Affidavit of Ed Lombard. Many crosses are not used as religious symbols. Examples include the opening segment of the Ben Casey television series from 1961, see Lombard Affidavit, various military medals including the “Utah Cross”, see Lt. Col. Campbell Affidavit, and crosses used as survey markers, see Baird Affidavit. Other examples include the mathematical symbols for addition and multiplication (+, x) which while in the form of a cross are not religious.[†]

From another perspective, some religious symbols in their use do not have a religious connotation. Examples include the Star of David which is the badge of the Utah Highway Patrol Trooper, see Perry Affidavit, and use of Poseidon (a Greek god), see Occupation Medal, Campbell Affidavit.

The cross is also firmly recognized as a symbol of death or a place of burial. This is shown by its use in the classic introduction to the 1961 Ben Casey TV series. The American military cemeteries, with their row upon row of crosses, are an established part of the cultural landscape of representing death. Lombard Affidavit. This image is so prevalent that the cover writing for a documentary on war memorials references the “row upon row of crosses” in Arlington Cemetery even though Arlington Cemetery does not contain “row upon row of crosses.” Lombard Affidavit. The Utah Department of Alcoholic Beverage Control, in a anti drinking and driving campaign, similarly used crosses as an indication of death in its warning

[†]Footnote reference marks can (like here) also appear in the form of a cross.

billboard. Lombard Affidavit. See also Montana White Cross Program and Salt Lake Tribune photo article, Lombard Affidavit.

The Affidavits submitted by the Utah Highway Patrol Association also reflect that these memorials symbolize death and not religion. The declaration of Lee Perry, at p. 4, paragraphs 17 and 18, states that the creators of the memorials sought a symbol to convey that a trooper died while serving near the spot and only the cross effectively conveyed that message. Further, “a cross is internationally recognized as a memorial for a person’s death.” Similarly the declarations of Kameron Thorne paragraph 16 on page 3, states that the cross “declares” that “someone died here.” And as stated in the declaration of Luke Stradinger, at p. 4, paragraph 18, the memorials “symbolize death and not any religious denomination.”

As shown in the declarations from those involved in the creation and installation of the memorials, there was and is no intent or purpose that these memorials or crosses be religious symbols, let alone “exclusively religious” symbols. As set forth in the declaration of Luke Stradinger, p. 3, paragraph 15:

The purpose of these memorials is fourfold: (1) the memorials stand as a lasting reminder to UHPA members and Utah highway patrol troopers that a fellow trooper gave his life in service to the State; (2) the memorials remind highway drivers that a trooper died in order to make the state safe for all citizens; (3) the memorials honor the trooper and the sacrifices he and his family made for the State of Utah; and (4) encourage safe conduct on the highways.

His declaration goes on, p. 4 paragraph 17 that:

The cross represents the death of a person. The UHP logo represents the persons identity as a State Trooper. Together they represent a trooper who died in the line of duty.

And he also states, as mentioned above, that the memorials “symbolize death and not any religious denomination,” p. 4 paragraph 18.

The State of Utah is unique in many ways. As concerns this lawsuit and Plaintiffs’ claim it is unique in a particular way - an extensive majority of Utahns, up to 70%, are members of the Church of Jesus Christ of Latter Day Saints (LDS). The LDS Church, even though a Christian church, does not recognize or utilize the cross as a symbol of its religion nor does it use a cross in any of its religious buildings or services.

In viewing these memorials and the use of a cross, the meaning, purpose, and intent of the display depends upon its context and is to be judged based upon how the reasonable observer, who is aware of the history, context, community and forum in which the display occurs, would understand them. McCreary, supra. That reasonable observer would understand that these crosses were intended to symbolize death and the place of death without a religious purpose. The cross is a recognized and widely used symbol of death. In addition, to the predominate culture and majority of the population of Utah, the cross is not recognized or used as their religious symbol. Plaintiffs have not presented any factual evidence that these crosses are religious symbols or that they “exclusively religious symbols.” They have, as yet, presented no evidence contrary to the history of how these memorials came to be, their purpose, and what they symbolize.

Plaintiffs have not met their burden under Rule 56(c), Federal Rules of Civil Procedure, that there is “no genuine issue as to [the] material fact[s]” as they claim them to be - that the crosses are “exclusively religious symbols.” Based upon the affidavits and evidence presented by the Defendants, the best that Plaintiffs could hope for would be for this Court to determine

that there is a factual issue concerning whether these memorials are not religious but symbolize death in order for their case to go forward.

This Court should deny Plaintiffs' Motion for Summary Judgment that as a matter of law the crosses in these memorials are "exclusively religious symbols." Rather, the Court could conclude that these memorials are not exclusively religious symbols but rather symbolize the death of an individual.

Dated this 5th day of May, 2006.

MARK L. SHURTLEFF
Attorney General

/s/ Thom D. Roberts
THOM D. ROBERTS
Assistant Attorney General
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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