

# AMERICAN ATHEIST

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# Permanent Legal Victory in *Utah*

by Brian M. Barnard

Six-year battle removes  
12-foot crosses from  
government land.



Barnard next to a memorial, altered in an attempt to avoid the court's ordered removal. The officer's name remains, but American Atheist removed it here because the lawsuit was never about the fallen troopers. Photo by Brian M. Barnard

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n the last day of October 2011, American Atheists won a major legal victory when the United States Supreme Court declined to consider a case involving 14 roadside memorials in Utah. The memorials are in the form of twelve-foot-high crosses, placed by the Utah Highway Patrol Association (UHPA), a private group that advocates for and supports highway patrol troopers and their families. This program began in 1998 to memorialize highway patrol troopers who lost their lives in the line of duty.

There is no question that these troopers, who gave their lives in service to the state, should be honored and

remembered. But if they are to be honored and remembered with a state-approved memorial, that memorial cannot emphasize one religious faith to the exclusion of all others, and it must represent those who are not religious as well as those who are. In other words, it must be inclusive.

The stark white steel crosses bear the name, rank, call number, and date of death of the trooper. There is also a small plaque with a biography of the trooper. At the intersection of the beams is the official beehive-shaped logo of the Utah Highway Patrol (UHP), which is distinct from the private UHPA. The beehive logo is the same size and shape as the symbol

on troopers' vehicles. That emblem is trademarked and its use restricted by the Utah Highway Patrol.

Each cross stands near the spot where the memorialized trooper was killed. The first three crosses went up on private property, because the Utah State Legislature had denied the UHPA special permission to erect the crosses on government land. Shortly after the program started, Chris Allen, a resident of Utah at the time, and a member of the American Atheists Board of Directors, complained to the state and to the UHPA about the misuse of the obviously religious symbol. His concerns were dismissed by designers of the memorial and the

UHPA, which stated "we knew those people" would complain. The UHPA was adamant that the memorial had to be in the form of a Roman cross, and that no other shape or symbol would be appropriate.

UHPA was unable to find private land near the sites of other troopers' deaths, so they sought and were granted permission from the Utah Department of Transportation for the fourth cross to stand on a prominent knoll in a state-owned rest area of an interstate highway near the Utah - Wyoming border.

Because the department was aware of the potential problems, UHPA was required to sign an agreement stating that if the state were ever sued over the memorials, UHPA would pay the state's legal fees. That agreement also says that the state neither approved nor disapproved of the cross shape, and could order the memorial removed at any time.

Emboldened by their lack of

of the crosses on state property and the official UHP logo on the monumental crosses constituted an improper mixing of church and state.

The first ten Amendments to the U.S. Constitution protect civil rights. The protection they provide to the people is from the power of the government. The rights granted are only against actions taken by government officials, generally referred to in the Constitution as "the State."

Therefore, American Atheists brought the suit against state officials, and not the UHPA, because as a private organization, its actions are not restricted by the First Amendment. They are party to the lawsuit only as a result of their asking permission to be so, on the grounds that the outcome of the case would have an effect on location of their crosses, and on their ability to erect more crosses in the future.

UHPA was represented by attorneys from the Alliance Defense Fund of

are not obliged to consider arguments of an amicus brief, but they may do so.

Among the five amicus briefs filed in opposition to our appeal were those by the American Legion and the infamous former Alabama Supreme Court Chief Justice Roy Moore. Justice Moore was removed from the bench in 2003 after refusing to remove a monument to the Ten Commandments placed inside his courthouse. In the years before his election to the Alabama Supreme Court, Moore successfully resisted attempts to have a display of the ten commandments in his courtroom removed. Moore is also an attorney for the opposition in American Atheists' current appeal in a lawsuit against the Kentucky Department of Homeland Security.

I argued the case before a three-judge panel of the 10th Circuit in March 2009. In August 2010, the judges decided in our favor. Their decision is thorough, detailed, and well-reasoned. It follows Supreme Court precedent

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## The State argued that these crosses were no longer religious symbols.

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challenges, UHPA eventually requested permission from the state for two crosses to stand on the front lawn of a UHP field office in a Salt Lake City suburb. The permission that was granted to them also allowed for additional crosses to be erected on that site.

### The Challenge Begins

In December 2005, American Atheists, Inc., along with three individual members living in Utah, Mike Rivers, a former Utah State Director of American Atheists; Richard Andrews, President of Utah Atheists and then a member of the Board of Directors of American Atheists; and Stephen Clark, brought a civil rights action in federal court, challenging the crosses as a violation of the Establishment Clause of the First Amendment. The suit alleged that the prominent placement

of the crosses on state property and the official UHP logo on the monumental crosses constituted an improper mixing of church and state.

Scottsdale, Arizona, a religious-right legal advocacy group that provides free representation to defend the rights of people to practice religion and display religious symbols.

In November 2007, the federal trial court in Utah dismissed the case. That court did not see the state's involvement with the crosses as unconstitutional. The written decision contains little discussion or analysis. In March 2008, we took our appeal to the 10th Circuit Court of Appeals in Denver, Colorado. Several groups including Americans United for Separation of Church and State and the Anti-Defamation League filed amicus briefs in our favor. An amicus brief is written argument filed by people or organizations that have no legal right to be involved in the lawsuit, but have an interest in the outcome. When making their decisions, judges

based on what a "reasonable observer" would understand upon encountering one of these monumental-sized crosses standing alone at a state highway rest area or on the front lawn of a UHP building.

The appeals court held that the special and exclusive permission granted these crosses, as well as the presence of the official UHP logo on them, improperly gives the appearance of Utah endorsing Christianity. No other person or entity in Utah is allowed to erect similar towering religious monuments on government land.

The State argued that these monumental-sized Roman crosses were no longer religious symbols. They claimed the addition of the UHP logo along with information about the trooper transformed them into non-religious markers. Some of

that information could be seen from a vehicle passing at 60 miles per hour. But the small plaque of biographical detail could be read only if the cross was approached on foot. The appeals court still found the memorials overwhelming religious in nature. The main thing one sees when driving by on the highway is the cross—not the name, not the logo, and not the plaque.

The court determined that the longstanding religious meaning of the Roman cross cannot be nullified or diluted by simply calling it a memorial and adding a logo. The Supreme Court has long held that such conspicuous government action, having the primary effect of advancing religion, especially one religion, violates the First Amendment. In accordance, the appeals court held that the crosses constitute an improper religious endorsement by the UHP and the State of Utah.

### When is a Cross not a Cross?

During the course of the litigation, the UHPA took a position that directly conflicted with that of the State. That ultimately aided in their defeat. The Alliance Defense Fund attorneys argued for UHPA that the memorial crosses were chosen by the families of the deceased troopers, and that the families of non-Christian troopers were free to select other religious memorial symbol. Thus a Jewish trooper would be memorialized by the UHPA with a Star of David and not a Roman cross. Taking this position, UHPA made it clear that the crosses are indeed icons displaying the faith of the trooper, and not generic symbols of death, honor, and remembrance. The Alliance Defense Fund regularly and unabashedly advocates for the display of religious icons in the public square.

The Utah Attorney General consistently argued in the case that the Roman cross is merely a generic symbol of death, honor, and remembrance. To emphasize the non-religious nature of the Roman cross, he told the court that the State would never allow a

religious symbol as a roadside memorial. Apparently there is no commandment against denying that a religious symbol is religious in order to keep it in the public square.

Denying that the Roman cross is a religious symbol or arguing that in certain contexts it loses its religious nature are ploys often used in response to challenges under the Establishment Clause. Such defenses have been used successfully in some cases dealing with the display of the Ten Commandments



This U.S. military cemetery in Normandy, France, is often mistaken for Arlington

on government property. An argument in this case was that the Roman cross has lost so much of its religious meaning that it is now comparable to a Christmas tree as a secular symbol. In our case, the appeals court saw through the State's subterfuges. The judges found the Roman crosses still to be poignant and overwhelmingly religious symbols as acknowledged, at least in part, by UHPA.

### Supreme Court Says No

In December 2010, the full Court of Appeals was asked to reconsider the appeal and the August 2010 decision, but by a 5-4 vote they denied a rehearing and let the earlier ruling stand. After that decision, the state and the UHPA each made separate requests to the U.S. Supreme Court to review the case. Eleven amicus briefs were

filed against us and urged the Supreme Court to review the case. The Supreme Court, even with its current majority of Republican - appointed conservative justices, declined to review the case.

Each year, the Supreme Court receives over 8,000 requests (in legal terms the request is called a petition for a writ of certiorari [pronounced sir-shuh-RARE-ee]), but hears only 50 to 70 of them. When a case is accepted for review, it is usually for one of two reasons. The first reason is if a

very significant constitutional issue of national import is involved. Since our case is limited to Utah, the issue does not affect the rest of the nation. No other state has a similar government-approved memorial program for its fallen law enforcement officers. And no other state allows crosses of similar size, adorned with state emblems, to stand in front of its government offices.

The second reason to review a case is if separate lower appellate courts hand down conflicting decisions on the same issue. There are no conflicting decisions from other courts involving similar memorial crosses. Research for this litigation showed that no other law enforcement agency in the nation uses monumental roadside crosses as memorials to officers killed in the line of duty. Most agencies have memorials in one form or another to fallen officers, but none of them are conspicuous



religious symbols along the side of the road or in front of government offices.

For a case to be heard, four of the nine justices must vote in favor of granting certiorari. When the Supreme Court declines to consider a case, it does not indicate why. It simply issues a short order stating "petition denied" with no explanation. But in our case Justice Clarence Thomas took an unusual extra step and wrote a lengthy dissenting opinion, an action usually reserved for final rulings. He begins his dissent by saying, "Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles." (His entire dissent is posted on the Supreme Court's website at [www.supremecourt.gov/opinions/11pdf/10-1276.pdf](http://www.supremecourt.gov/opinions/11pdf/10-1276.pdf)).

### No Rows of Crosses at Arlington

Many people believe that military cemeteries in our country routinely honor all fallen soldiers with stand-alone crosses as grave markers. This is not true. When you see pictures of a military cemetery with row upon row of Roman crosses, you are looking at a U.S. military cemetery overseas such as the one in Normandy, France. However, amongst them are graves marked by Stars of David which instantly inform the viewer as to the religious affiliation of the soldiers there buried.

Rows of crosses do not exist at the National Cemetery in Arlington, Virginia. Most graves in that revered veterans' cemetery are marked by a round-top tombstone displaying a small bas relief of a religious symbol chosen by the family of the deceased. Among the 35 symbol choices available is the Atheist atomic symbol. Therefore, Roman crosses at Arlington are not generic universal symbols of death, honor, and remembrance, as the Utah attorney general would like all to believe.

The routine use of religious symbols in government-owned cemeteries differs greatly from a twelve-foot cross prominently displayed in a nontraditional place like a highway rest stop or the grounds of a government building. Government neither endorses nor supports religion when it allows religious symbols in its cemeteries, where, by longstanding tradition, our culture accepts them.

The UHPA crosses stand alone. They are not part of larger displays. That solitary placement and lack of context was important to the appeals court judges in making their decision. Standing solitary in prominent and exclusive places the poignant religious nature of the crosses was not lessened nor diluted.

Some Utah officials are now publicly bemoaning that small homemade roadside memorial crosses are banned in Utah. But the typically two or three feet tall, temporary crosses have never been allowed in Utah. The Department of Transportation prohibits all private memorials near any

Utah Highway. Department employees are instructed to promptly remove and dispose of any private memorials. The rules specifically state: "Religious symbols may not be placed on state rights-of-way" as part of a memorial program.

Such private small roadside markers are allowed and even protected by law in some states, but not in Utah. Only the UHPA was granted this privilege, and this was another factor contributing to the 10th Circuit's decision.

A loud negative public outcry occurred in Utah when we first filed the case in 2005. Public rallies with much wailing and gnashing of teeth were held next to some of the crosses. Negative comments filled the newspapers. With the appeals court ruling and the recent decision by the Supreme Court not to become involved, the public indignation has somewhat subsided. A few Utah politicians are still using this case as a campaign issue, but the general public and the Utah newspapers appear to have a little better understanding of the need for separation of church and state.

People are now suggesting other ways to honor the troopers. The court's ruling does not prevent anyone from honoring these troopers. The decision restricts how the State may participate in doing so.

### Influence Beyond Utah

This decision of the 10th Circuit Court of Appeals will have an effect beyond Utah, because its ruling must be followed by the federal courts in Oklahoma, Kansas, New Mexico, Colorado and Wyoming.

The decision will affect future court cases throughout the nation as guiding, but not controlling, legal authority. Judges outside the 10th Circuit have the option to consider the decision when making future decisions. The decision provides more and strong legal analysis and precedent for future cases to challenge government support for religion.

Very visible religious icons have been removed from public space in Utah and a state imprimatur has been removed from poignant religious symbols. As these crosses are moved, a few more bricks are put back into that wall between church and state.



Atheist grave marker at Arlington

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Brian M. Barnard is a Salt Lake City civil rights attorney who represented American Atheists in this case, as well as many others over the last two decades. Our website, [atheists.org](http://atheists.org), contains more information about this victory. ■

# Reliance on Almighty God Still Required in Kentucky...for Now

by Ed Hensley, Kentucky State Director for American Atheists

On October 28, 2011, a three-judge panel of the Kentucky Court of Appeals, in a split decision, ruled that the Commonwealth of Kentucky could lawfully display a plaque declaring "dependence on Almighty God as being vital to the security of the Commonwealth" and order the governor and director of the Emergency Operations Center (EOC) to annually make the same declaration. This appeal reversed the 2009 decision of a circuit court judge who agreed with American Atheists that the law is unconstitutional.

The Kentucky Homeland Security laws were enacted following the horror of the faith-based September 11, 2001, attacks on our country. The facts that had resulted in a successful constitutional challenge by American Atheists and individual plaintiffs began in 2002, when Democratic state representative, and Southern Baptist minister, Tom Riner, inserted religious opinion language into the statutes as part of a "finding," supposedly made by the Kentucky Legislature, that the security of Kentucky could not be assured without reliance on "Almighty God." In 2006, not satisfied with this "finding" alone, Reverend-Representative Riner persuaded the state to go even further into unconstitutional establishment of religion, by passing a law ordering a plaque to be publically displayed that lets everyone know that Kentucky cannot be safe without relying on a god. Further, the epiphany that Kentuckians must rely on (and presumably believe in) an entity known as "Almighty God" to be safe must be inserted by Riner law into state training manuals. Further, state employees are ordered by the law to publish annual affirmations by the governor, and the department's director, in reports and educational materials, showing that the religious duties demanded by the Riner laws have been fulfilled. (When Riner's wife, Claudia, was in the legislature, she caused the State to lose a lot of money trying to defend an unconstitutional scheme she had gotten passed for requiring the Ten Commandments to be displayed in each public school classroom. The case, *Stone v. Graham*, was heard by the U.S. Supreme Court, who in 1980 found the requirement unconstitutional.)

On December 2, 2008, the National Legal Director for American Atheists, Edwin Kagin, filed a lawsuit in Franklin County, Kentucky, on behalf of American Atheists and 11 individual plaintiffs, alleging church-state violations under both the U.S. and the Kentucky Constitutions. On August 26, 2009, after briefing and oral arguments, Judge Thomas Wingate held the laws unconstitutional, but also ruled that American Atheists did not have the same standing to bring the action that was enjoyed by the named plaintiffs. The attorney general of Kentucky appealed the ruling that the laws are unconstitutional, and American Atheists cross-appealed the finding that the organization lacked standing.

The case was argued before a three-judge panel of the Kentucky Court of Appeals on February 24, 2011. They held, by a two-to-one vote, that the laws were indeed constitutional, and the three judges unanimously held that American Atheists lacked standing. In a dissenting opinion on the constitutional issues, Senior Judge Ann O'Malley Shake said the laws cross a constitutional line, describing the law as "active" when compared to other "passive" laws regarding religious statements. She noted the law has criminal penalties, including up to 12 months in jail, for anyone who fails to comply. Shake wrote that Kentucky's law "is a legislative finding, avowed as factual, that the commonwealth is not safe absent reliance on Almighty God. Further, [the law] places a duty upon the executive director to publicize the assertion while stressing to the public that dependence upon Almighty God is vital, or necessary, in assuring the safety of the commonwealth... [the law has an] impermissible effect of endorsing religion because it was enacted for a predominantly religious purpose and conveyed a message of mandatory religious belief." In a motion filed on November 18, 2011, in the Kentucky Supreme Court, American Atheists, and the named plaintiffs have asked the Kentucky Supreme Court to grant Discretionary Review of the rulings by the Court of Appeals and to hold that Judge Shake's dissenting opinion more correctly states the law than the majority opinion. At the time of this writing, it is not known if the Supreme Court will agree to hear the case. Stay tuned.

For a much more detailed report on this case, including arguments and the full text of pleadings and opinions, go to <http://kysecurity.wordpress.com>.