

No. 09-4256

In the
United States Court of Appeals
for the Sixth Circuit

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.,
Plaintiff-Appellee,

v.

HON. JAMES DEWEESE, in his official capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW,
ON BEHALF OF DEFENDANT-APPELLANT

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS**

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Pursuant to 6th Cir. R. 26.1, Foundation for Moral Law makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

December 23, 2009

s/Benjamin D. DuPré
Benjamin D. DuPré

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted, or filed *amicus* briefs, in several cases concerning the public display of the Ten Commandments (e.g., pending case no. 08-6069, *ACLU of Ky. v. McCreary County*), legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that Judge James DeWeese's courtroom display that depicts the contrasting legal philosophies between the Ten Commandments and tenets of secular humanism constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of our nation. Thus, government, including judges, should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether Judge DeWeese's display violates the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), both parties have granted consent to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Judge James DeWeese has posited that our legal system is at a jurisprudential crossroads: either we will adhere to the fixed principles of morality laid down by God and built upon by the Founders, or we will continue to move toward ever-changing, subjective morality embraced by secular humanism. The district court below rejected Judge DeWeese's display not because he was wrong to pit the two philosophies of law against one another, but because Judge DeWeese "subscribes to the first view." *American Civil Liberties Union of Ohio Found. v. DeWeese*, No. 1:08-CV-2372, Slip op. at 17 (N.D. Ohio Oct. 8, 2009); *see also, Id.* at 20 (rejecting the argument that the two philosophies are given "equal treatment in the poster" because "the Humanist Precepts are included as examples of what standards of behavior should not be followed"). The court held that Judge DeWeese had a "religious purpose" in demonstrating the mutual exclusivity of God's law with the Humanist Precepts, *id.* at 10—and yet concluded that Judge DeWeese should have instead had a "secular purpose" that "must predominate." *Id.* at 9. In ruling that Judge DeWeese erred, the court unwittingly proved the point of his display to be correct.

The trial court's error in this case was evident from the outset when it chose to apply not the words of the Constitution, but judicially-created case "tests" to determine whether Judge DeWeese's display violated the Establishment Clause of

the First Amendment. The court below and, indeed, this Honorable Court, should exercise its judicial authority in this case based on the text of the document from which that authority is derived, the U.S. Constitution. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the "supreme law of the land."

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment of religion*." U.S. Const. amend. I (emphasis added). When these words are defined as they were originally understood at the time of the ratification of the First Amendment, it becomes evident that Judge DeWeese's display is not a "law," it does not require anyone to subscribe to a "religion" or how it should be practiced, and it does not represent an official "establishment" thereof. Thus, Judge DeWeese's display is constitutional. The decision of the court below should be reversed.

ARGUMENT

This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF JUDGE JAMES DEWEESE'S PHILOSOPHIES OF LAW DISPLAY SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

In its order granting summary judgment against Judge James DeWeese, the district court below began its analysis of the Establishment Clause issue by quoting from the text of the First Amendment: “Congress shall make no law respecting an establishment of religion.” *American Civil Liberties Union of Ohio Found. v. DeWeese*, No. 1:08-CV-2372, Slip op. at 8 (N.D. Ohio Oct. 8, 2009) (quoting U.S. Const. amend. I.). Unfortunately, the court never looked back: the trial court never defined or even discussed the meaning of the text that it held was violated when Judge DeWeese hung the poster in his courtroom display juxtaposing the fixed moral standards of the Ten Commandments with the relative moral standards of secular humanism. Instead, the court applied the extra-constitutional *Lemon*¹-as-

¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

reformulated-in-*McCreary*² test and in so doing made its first and most fundamental error.

A. The Constitution is the “supreme Law of the Land.”

Our Constitution dictates that the Constitution and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All “judicial Officers” are “bound by Oath or Affirmation, to support *this Constitution*” and not a person, office, government body, or judicial opinion. *Id.* (emphasis added); *see also* 28 U.S.C. § 453 (oaths of justices and judges). This Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document’s fundamental principles. “[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* Why otherwise does it direct the judges to take an oath to support it?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that “[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself.” J. Madison, Letter to Thomas Ritchie, September

² *McCreary County v. ACLU*, 545 U.S. 844 (2005).

15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). “The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself.” *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires “resorting to the sense in which the Constitution was accepted and ratified by the nation” because “[i]n that sense alone it is the legitimate Constitution.” J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: “In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.” *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court reaffirmed this approach last year in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008):

[W]e are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Heller*, 128 S. Ct. at 2821.

B. The *Van Orden/McCreary* compare-and-contrast test, the *Lemon* test, and other case-made tests form a confusing labyrinth that contradicts the text of the “supreme Law of the Land.”

The current jurisprudential attitude confuses complexity with intelligence and sensitivity with difficulty. Just because an area of the law deals with a sensitive subject (such as a person’s religion) does not mean that the answer to the conflict must be difficult to achieve, and interweaving various factors and levels of analysis into an area of the law does not automatically make the law more intelligent. Yet this is exactly what the Supreme Court has done with its proliferation of tests: the *Lemon* test, the *Agostini*-modified *Lemon* test, the endorsement test, the coercion test, the neutrality test, and so on. These tests have created more problems than they have solved, producing a continuum of disparate

results. *See, e.g., Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas J., concurring in judgment) (collecting cases). “[T]he very ‘flexibility’ of [the Supreme] Court’s Establishment Clause precedent leaves it incapable of consistent application.”³ *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the “straight-edge” of the Constitution is simply impossible.

The federal courts’ abandonment of fixed, *per se* rules results in the application of judges’ complicated substitutes for the law. The “law” in Establishment Clause cases changes so often and is so incoherent that few can

³ Other courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that “[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays.” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it “the often dreaded and certainly murky area of Establishment Clause jurisprudence,” *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and “marked by befuddlement and lack of agreement,” *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a “vast, perplexing desert.” *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev’d sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). This Court Circuit has noted the “oft-aired criticism and debate” in Establishment Clause jurisprudence, *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 490, n.5 (6th Cir. 2004), and even once labeled it “purgatory.” *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the “persistent criticism” that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is “perceived to be a morass of inconsistent Establishment Clause decisions.” *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

discern what it is today nor can guess what it will be tomorrow, “leav[ing] courts, governments, and believers and nonbelievers alike confused”⁴ *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). “What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.” *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting).

By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases “agreeably to the constitution,” and instead decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon* and *McCreary*⁵

⁴ District courts in recent cases have issued scathing critiques of the unsettled nature of the law in this area, noting that the Supreme Court’s Establishment Clause jurisprudence is: “convoluted, obscure, and incapable of succinct and compelling direct analysis,” *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); “mystif[ying] . . . inconsistent, if not incompatible,” *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005), and “utterly standardless” jurisprudence in which “ultimate resolution depends on the shifting subjective sensibilities of any five members of the High Court.” *Newdow v. Congress*, 383 F. Supp.2d 1229, 1244 n.22 (E.D. Cal. 2005).

⁵ This Court should bear in mind that, just as *Lemon* was a substantial departure from the actual wording of the Establishment Clause, *McCreary* is a substantial departure from *Lemon*. *Lemon* simply held that the law must have “a secular purpose,” but did not say the secular purpose had to be the *only* purpose, or even the *primary* purpose. Subsequent cases, such as *Aguillard v. Edwards*, 482 U.S. 578 (1987), held that the secular purpose could not be a “sham” purpose, but until *McCreary* the Supreme Court had never held that the secular purpose must predominate over any religious purpose. This Court should be hesitant to base

is a poor substitute for the concise language of the Establishment Clause and, as Judge DeWeese's display tries to warn against, raises the rule of man above the rule of law.

II. JUDGE DEWEESE'S PHILOSOPHIES OF LAW DISPLAY IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

As the court below recognized initially, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. Regardless of whether Judge DeWeese displayed the Ten Commandments alone, as he once did, or in a poster contrasting the Decalogue's moral absolutes with the relative morality of secular humanism, his actions do not constitute a "law respecting an establishment of religion."⁶

A. Judge DeWeese's courtroom display containing the Ten Commandments is not a "law."

Judge DeWeese's act of displaying the Ten Commandments in his courtroom is not a "law" in the constitutional sense of the term. At the time of the ratification of the First Amendment, Sir William Blackstone defined a "law" as "a

constitutional decisions on a framework that represents a departure from another departure from the Establishment Clause itself.

⁶ *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual arguments raised in this brief.

rule of civil conduct . . . commanding what is right and prohibiting what is wrong.”

1 W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster’s 1828 Dictionary defined “laws” as “*imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty.” N. Webster, *American Dictionary of the English Language* (Found. for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained the essential attributes of a law in *Federalist No. 15*:

It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15, at 72 (Alexander Hamilton) (Carey & McClellan eds. 2001).

The district court below strives to demonstrate that Judge DeWeese’s display amounts to a “governmental endorsement of religion” but never asserts that it is a “law.”

“Defendant is a judge. A judge is a state government official. *Mumford v. Basinski*, 105 F.3d 264, 268-69 (6th Cir. 1997). The opinions expressed in the poster are those of a judge, not of a private citizen. Defendant signed the poster as a judge, and displayed it in his courtroom located in a building owned by the county and under the control of the county. A reasonable observer would conclude that the

state of Ohio and/or Richland County endorse the opinions set forth in the poster.

DeWeese, Slip op. at 19. The district court duly concluded that Judge DeWeese posted the display “as a judge” and “in his courtroom,” but there was no evidence in this case, nor did the district court hold, that Judge DeWeese ever issued a “rule of conduct” that a courtroom visitor read, agree with, or even look at his display.

A display on a wall does not become a “law” under the First Amendment merely because the wall is in a government courtroom and the judge of that courtroom hangs it. At most, Judge DeWeese “join[ed] the Founders in personally acknowledging the importance of Almighty God’s fixed moral standards for restoring the fabric of this nation,” *Id.* at 10-11 (quoting Ex. A-3, Comment 4), but he never declared a “punishment for disobedience” pertaining to the display or any of its content. Similar to an executive Thanksgiving proclamation, the monument “has not the force of law, nor was it so intended.” *Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) (“The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. . . . It is an excellent custom, but it binds no man’s conscience or requires him to abstain from labor”). Therefore, Judge DeWeese’s display agreeing with the legal philosophy represented in the Decalogue, as Hamilton explained, “amount[s] to nothing more than advice or recommendation.” *Federalist 15, supra*.

B. Judge DeWeese’s courtroom display does not “respect an establishment of religion.”

Judge DeWeese’s display of or including the Ten Commandments does not violate the Establishment Clause because it does not “respect,” *i.e.*, concern or relate to, “an *establishment of religion.*” U.S. Const. amend. I (emphasis added.).

1. The definition of “religion”

The original definition of “religion” as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions’ proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).⁷ In all these instances, “religion” was defined as:

The duty which we owe to our Creator, and the manner of discharging it.

⁷ Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. See *Torcaso*, 367 U.S. at 492 n.7.

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, reprinted in *5 Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties “can be directed only by reason and conviction, and not by force or violence.” Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of “religion” contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was “an offense against [civil] society,” and therefore, was “within the legitimate scope of the power of . . . civil government.” *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of “religion.” *See Beason*, 133 U.S. at 342 (“[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”).

As the constitutional definition makes clear, not everything that may be termed “religious” meets the definition of “religion.” “A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God.” H. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a “religion” because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed “religious” with “religion” would eradicate every vestige of the sacred from the public square. The Supreme Court in *Van Orden* stated that such conflation is erroneous: “Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause.”⁸ *Van Orden*, 545 U.S. at 678 (emphasis added).

⁸ [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

Assuming, *arguendo*, that Judge DeWeese’s display is in some sense a “law,” it cannot be considered a law concerning “religion” because, while the Ten Commandments themselves address duties owed to the Creator, they do not address the *manner* of discharging those duties. Note again the definition of religion: “The duty which we owe to our Creator, *and* [not *or*] the manner of discharging it.” For example, the commandment to “honor thy father and thy mother” does not dictate how this command is to be fulfilled; indeed, different religions and sects (*i.e.*, Protestantism, Catholicism, Judaism, Islam, etc.) detail different ways in which to fulfill this commandment. That which constitutes a “religion” under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out. The Ten Commandments in Judge DeWeese’s display do not do both of these and hence cannot be considered a “religion” under the constitutional definition of the term.

Judge DeWeese’s display is not religion; rather, the judge is acknowledging God as the moral and historical foundation of our legal system. Examples of such acknowledgments by government officials and bodies are replete throughout our history. Thanksgiving proclamations encouraging citizens to offer gratitude to God for “His kind care and protection” have been issued by Presidents of the

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

United States ever since George Washington issued the first one on October 3, 1789. *See* 4 *The Papers of George Washington, Presidential Series* 131-32 (W. W. Abbot et al. eds. 1987). Since the passage of the Judiciary Act of 1789, all federal judicial officers take an oath of office swearing to support the United States Constitution that concludes with the phrase, “So help me God.” *See* 28 U.S.C. § 453. “In God We Trust” has been emblazoned on our nation’s coins and currency for decades and the phrase “under God” was added to the nation’s Pledge of Allegiance over 50 years ago. *See* 36 U.S.C. § 302; 4 U.S.C. § 4.

This duty to acknowledge God has been recognized throughout American history. On November 1, 1777, Henry Laurens, President of the Continental Congress, signed the First National Thanksgiving Proclamation, part of which stated,

. . . it is the indispensable duty of all men to adore the superintending Providence of Almighty God; to acknowledge with gratitude to Him for the benefits received, and to implore such farther blessings as they stand in need of

In September 1789, Congress asked President George Washington to “recommend to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness.” President Washington’s Thanksgiving Proclamation began,

Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor. . . .

The Continental Congress's proclamation of 1777 recognized the duty of "all men" to acknowledge God. President Washington's proclamation in 1789 likewise recognized the duty of "all Nations" to acknowledge God. And President Abraham Lincoln's Thanksgiving Proclamation of October 3, 1863, recognized the "duty of nations as well as of men" to acknowledge God:

It is the duty of nations as well as of men to own their dependence upon the overruling power of God; to confess their sins and transgressions in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history that those nations are blessed whose God is the Lord.

Note that Washington's proclamation recognized in part that God has enabled the American people to "establish a Constitution of government for their safety and happiness." It is especially important that God be acknowledged in public halls where justice is administered and where laws and ordinances are enacted, because displays like those of Judge DeWeese express a philosophy of government, namely, that governmental authority and human rights come from God. In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), the Supreme Court stated, "We are a religious people whose *institutions presuppose* a divine being." (Emphasis added.) And in *McGowan v. Maryland*, 366 U.S. 420, 562-63 (1961) (dissenting opinion), Justice Douglas declared,

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence stated the now familiar theme: “We hold these truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The acknowledgment of God as the source of governmental authority and as the source and guarantor of unalienable rights is not an establishment of religion; it is the expression of the “self-evident truths” upon which this nation is founded. Judge DeWeese’s public adherence to this legal heritage is not only factually correct but it is perfectly constitutional. If “express[ing] a preference for the Judeo-Christian faith” without forcing others to ascribe to it is unconstitutional were an establishment of religion, then the proclamations of Washington and Lincoln, as well as the Declaration of Independence itself, would be unconstitutional. See, Robert J. Barth, *Philosophy of Government vs. Religion and the First Amendment*, Oak Brook Journal of Law and Public Policy, Vol. 5, 2006, 71-88.

Posting the display at issue in a public building where the law is adjudicated represents another acknowledgment of God fitting with the tradition and obligation performed throughout the nation’s history. Under no version of the facts presented could it be said that Judge DeWeese’s display represents an attempt to dictate the duties that Ashland County citizens owe to the Creator, or to enforce the manner in

which the citizens should discharge those duties. Consequently, Judge DeWeese's display is not a law respecting an establishment of "*religion.*"

2. The definition of "establishment"

Furthermore, Judge DeWeese's display does not constitute an "establishment" of religion. An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). The "establishment of religion" with which the Founders were most familiar was that of England, in which the Church of England was the official church, received tax support, the King or Queen was the official head, and dissenters suffered substantial disabilities or worse. And in the Virginia colony, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the

[Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.” 1 *Annals of Cong.* 757 (1789) (Gales & Seaton’s ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that “[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.” II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an “establishment of religion”

must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added). Therefore, an “establishment involved ‘coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*’” *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

At the time the First Amendment was adopted in 1791, “five of the nation’s fourteen states (Vermont joined the Union in 1791) provided for tax support of

ministers, and those five plus seven others maintained religious tests for state office.” Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states’ policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church “establishment.”⁹

Despite this Court’s attempt in *Ashbrook* to distinguish Judge DeWeese’s original display from the display of the Ohio State Motto, “With God All Things Are Possible,” 375 So. 2d at 495, Judge DeWeese’s current display is still quite short of the original definition of “establishment” in that it

⁹ See, e.g., Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*). Judge DeWeese’s display—even if it featured only the Ten Commandments—does not in any fashion represent the setting up of a state-sponsored church or denomination; it does not involve the government’s power of coercion to force anyone to believe in any particular religion’s beliefs or to join any particular religion; and it does not in any way lend government aid to one religion over another. In short, Judge Weese’s display does not create, involve, or concern an “*establishment* of religion.”

CONCLUSION

“When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” *Kelo v. City of New London, Conn.*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the shifting sands of Establishment Clause jurisprudence in religious display cases and the fixed, original words of the Establishment Clause. The

proper solution is to fall back to the foundation, the “Constitution’s original meaning.”

For the foregoing reasons, *Amicus* respectfully urges that the district court’s decision below be reversed.

Dated this 23rd day of December, 2009.

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