No. 06-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES W. GREEN, *et al.*,
Plaintiffs-Appellants,
v.
HASKELL COUNTY BOARD OF COMMISSIONERS, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court for the
Eastern District of Oklahoma
Case No. 05-CIV-406-RAW

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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James W. Green, et al. v. Haskell County Bd. of Comm'rs, et al., 06-7098

CORPORATE DISCLOSURE STATEMENT

06-7098

JAMES W. GREEN, et al.,
Plaintiffs-Appellees,
v.

HASKELL COUNTY BOARD OF COMMISSIONERS, *et al.*,
Defendants-Appellants,

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

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Gregory M. Jones

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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 in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that this display of the Ten Commandments constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of the United States as a nation. The Foundation believes that the government 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 the Haskell County Ten Commandments display violates the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The display of the Ten Commandments on public property does not violate the Establishment Clause of the First Amendment because such displays do not implicate the text thereof as it was historically defined by common understanding at the time of the Amendment's adoption. The Ten Commandments display on the Haskell County courthouse grounds in Oklahoma is therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. 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. U.S. Const. art. VI.

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 applied to the Ten Commandments display at issue, it becomes evident that the display is not a law, it does not dictate religion, and it does not represent a form of an establishment. Thus, the decision of the court below should be affirmed, but the rationale should rest on an explication of the text

of the First Amendment rather than the weak foundation of discordant Establishment Clause precedents.

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 THE HASKELL COUNTY TEN COMMANDMENTS MONUMENT SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court's opinion in this case offered a refreshing respite from the run-of-the-mill decisions in most Ten Commandments display cases as it highlighted the absurdity of the plaintiff's alleged injury and the incoherence of the United States Supreme Court's precedents in this area of the law. Bound as the district court believed it was by those precedents, the court did its best to wade through the "Limbo" that is Establishment Clause jurisprudence to reach its sound conclusion that the Haskell County Ten Commandments monument does not offend the Constitution. *Green v. Haskell County Bd. of Comm'rs*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006). There is, however, a simpler, more legitimate way of arriving at this conclusion: applying the actual text of the First Amendment to the display in this case.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that 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." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> 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). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n 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). Though the district court quoted the Establishment Clause at the outset of its analysis, it regrettably opted to forego an examination of that text in favor of comparing the display in this case to Ten Commandments displays evaluated in two recent U.S. Supreme Court cases—*Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S.

844 (2005)—as well as subjecting it to the *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Green*, 450 F. Supp.2d at 1284, 1287-88, 1292-93. In so doing, the opinion, though it is sharp-tongued and reaches the proper result, ultimately contributes to the cacophony of Establishment Clause precedents that it so amusingly mocks.

B. The *Van Orden/McCreary* compare-and-contrast test, the *Lemon* test, and other constitutional counterfeits form a confusing labyrinth that contradicts the text of the "supreme Law of the Land."

The district court below memorably described "the state of Establishment Clause jurisprudence" as "hardly Paradise," but "more akin to Limbo" because it keeps everyone in the dark as to what the Supreme Court may determine violates or does not violate the Constitution in this area. *Id*. at 1285. The court below is far from the first to make such an observation,[1] but its critique is telling with regard to what plagues current Establishment Clause jurisprudence. It observes that "nothing close to a bright line test exists to guide either elected officials or judges in determining whether a government has established religion by displaying the Commandments." If one looks to the Supreme Court for guidance on this issue, that is certainly true, but adherence to the carefully crafted words of the Establishment Clause would yield such a clear test.

[1] *See, e.g., Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (Thomas J., concurring in judgment) (collecting cases).

The Supreme Court apparently views the lack of a bright line test to be laudatory because in *Lemon* the Court observed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. The Court reiterated this idea in *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984), intoning that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."

This 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. As Justice Thomas recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment

Clause precedent leaves it incapable of consistent application."[2] *Van Orden*, 545 U.S. at 694 (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. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

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[2] Several 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). The Sixth Circuit has 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).

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow,"[3] "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *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).

The inconsistency of principle is reflected in the variety of judicial tests employed in Establishment Clause cases, all of which have apparently grown so tiresome and confusing that district courts—especially in religious display cases—resort to a kind of matching game in which they compare and contrast the display at issue to those discussed in the *Van Orden* and *McCreary County* Ten Commandments cases. Such is exactly the "analysis" the district court below

[3] 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).

performed, concluding that "[t]he circumstances regarding the Monument bear distinct similarities to the scenario in *Van Orden*." *Green*, 450 F. Supp.2d at 1288.

This approach puts courts in the absurd position of becoming judges of artistic design rather than constitutionality. The court below correctly described as a "scary prospect" the idea that judges must decide the "artistic, architectural or historical" propriety of the display, "the proper amount of 'integration' in a display, or whether the texts are appropriately 'historical.'" *Id*. at 1289. Though it reluctantly applied the compare-and-contrast method using *Van Orden* and *McCreary*, the court stated that it could not "fathom how artistic integration must be a bedrock constitutional requirement simply because a text of one of the displays contains religious sentiments." *Id*. at 1290. The district court's confusion is readily understandable, but with a jurisprudence so untethered from the text of the Constitution, delving into non-legal areas like artistic integration is an inevitable result.

Though this compare and contrast method is the latest gleaning from recent cases handed down by the Supreme Court, to be safe the district court below "also deal[t] with the trinity of the *Lemon* test" because it somehow "retains precedential value despite the fact that "[a] majority of justices of the Supreme Court appear willing to exorcize" it. *Id*. at 1292. There could not be a more clear indication of the acute disarray of Establishment Clause jurisprudence than the fact that courts

must continue to perform an analysis that dissatisfies even most of the Supreme Court. Dutifully evaluating the facts under this test has become "required penance, an act of piety toward the law, and a mitzvah," but it is not in any sense useful or principled law.[4] *Id*.

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* is a poor and improper substitute for the concise language of the Establishment Clause.

II. THE HASKELL COUNTY TEN COMMANDMENTS DISLPLAY IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

[4] At least one justice on the Supreme Court has arrived at the point that, for him, there is "no test-related substitute for the exercise of legal judgment," which he assures everyone is not the same thing as deciding according to one's predilections. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). *Amicus* respectfully submits that this is the inevitable conclusion of abandoning the constitutional text in favor of fabricated tests: eventually the veneer of legitimacy and logic accompanying these tests is washed away through repeated use until only the fabric of personal preferences remains. This thin thread is sustainable only through raw judicial power compelling the particular outcome in a given case.

thereof." U.S. Const. amend I. Regardless of whether the Ten Commandments were displayed alone or surrounded by a diverse context of other monuments, in no way could the Haskell County Board of Commissioners' act of allowing the Ten Commandments to be displayed be a "law respecting an establishment of religion."[5]

A. Neither the monument, nor the county's action in relation to the monument, is a "law."

In its analysis of this case, the district court below, although it arrived at the correct result, incorrectly assumed that the actions of the county commission in allowing the erection of the Ten Commandments monument in front of the Haskell County courthouse amounted to a "law." It should be patently obvious that a passive monument 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 rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what

[5] *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 argument raised in this brief.

may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not 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).

By permitting the display of the Ten Commandments on the front lawn of its courthouse, the Haskell County Commission has made no law commanding any action from its citizens or restraining them from any action or conduct that they wish to pursue. The monument was erected by a lifelong citizen of the city of Stigler at his own expense because he felt a "burden on [his] heart" to put up such a display. *Green*, 450 F. Supp.2d at 1276. Haskell County levies no penalty for failing to obey the commandments, which means that, as Hamilton explained, at most the monument amounts to a recommendation concerning right conduct. 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"). The Ten Commandments monument is simply a granite display on county property, not a law under the First Amendment.

B. The Haskell County monument does not "respect[] an establishment of religion."

The Ten Commandments monument at issue 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).[6] In all these instances, "religion" was defined as:

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

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

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[6] 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.

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."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[7] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

Everson, 330 U.S. at 13. The *Virginia Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance. See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5 *Founders' Constitution*, 84-85 (Kurland and Lerner eds., U. Chi. Press: 1987). The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a

[7] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339 U.S. at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

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 as recently as last year 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).

Assuming, *arguendo*, that the Haskell County Ten Commandments monument is in some sense a "law," such an act 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. 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

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> [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.

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

Commandments, by themselves, do not do both of these and hence cannot be considered a "religion" under the constitutional definition of the term.

The Haskell County monument is not religion; rather, by displaying the Ten Commandments Haskell County is acknowledging God as the moral and historical foundation of the country's legal system. Examples of such acknowledgments 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 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 have been required to 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.

Posting the Ten Commandments, particularly on public grounds where the law is rendered and 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 the Haskell County

monument represents an attempt by the county to dictate the duties that its citizens owe to the Creator, or to enforce the manner in which the citizens should discharge those duties. Consequently, the Haskell County Ten Commandments monument is not a law respecting an establishment of "*religion*."

2. The Definition of "Establishment"

Even if it is assumed that the Ten Commandments monument is a "law" under the First Amendment—which it is not—and even if it is assumed that the monument pertains to "religion" under the First Amendment—which it does not—the Haskell County monument does not represent an "establishment" of religion.

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]

[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

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). For example, in Virginia, "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

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> 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.

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). At the time of its adoption, therefore, "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).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the monument

> 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*).

The Ohio Motto was not an "*establishment* of religion," and neither is the Ten Commandments monument on the front lawn of the Haskell County courthouse. The monument does not in any fashion represent the setting up of a state-sponsored church, it 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, the monument 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 Establishment Clause jurisprudence in religious display cases and the

words of the Establishment Clause. The proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be affirmed, but its rationale should be corrected to comport with the text of the Establishment Clause of the First Amendment.

Dated this 3rd day of April, 2007.

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Dated this 3rd day of April, 2007.

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