No. 06-2355

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL F. WEINBAUM, *et al*.,
Plaintiffs-Appellants,
v.
CITY OF LAS CRUCES, NEW MEXICO, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court for the
District of New Mexico
Case No. CIV 05-0996-RB/LAM

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

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Paul F. Weinbaum, et al.. v. City of Las Cruces, New Mexico, et al., 06-2355

CORPORATE DISCLOSURE STATEMENT

06-2355

PAUL F. WEINBAUM, *et al*.,
Plaintiffs-Appellants,
v.
CITY OF LAS CRUCES, NEW MEXICO, *et al.*,
Defendants-Appellees,

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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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 religious symbolism in the public sphere does not violate the Constitution. Moreover, the Foundation is concerned that government officials may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to those government officials that have demonstrated indifference, ignorance, or disdain toward them. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the use of the three crosses in the Las Cruces, New Mexico city symbol violates the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a)-(b), and because all parties did not consent to the filing of this brief, *Amicus* has contemporaneously filed with this Honorable Court a motion for leave to file this brief.

SUMMARY OF ARGUMENT

The city of Las Cruces, New Mexico's official symbol ("Las Cruces symbol") does not violate the Establishment Clause of the First Amendment because such symbols do not violate the text thereof as it was historically defined by common understanding at the time of the Amendment's adoption. The Las Cruces symbol 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*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing 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). As applied to the Las Cruces symbol, the symbol 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 LAS CRUCES SYMBOL SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below performed an admirable job of applying the Supreme Court's current Establishment Clause jurisprudence, such as it is; but by ignoring the plain words of the constitutional text, the court's foray into this "murky, turbulent water" has only perpetuated the "'hopeless disarray'" in which this Court found this area of the law a decade ago. *See Weinbaum v. City of Las Cruces, New Mexico*, 465 F. Supp. 2d 1164, 1166, 1167 (D. N.M. 2006) (quoting *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997)). The district court reached the right conclusion, but its analysis of the Las Cruces symbol should have

been governed by the text of "supreme Law of the Land" instead of judicial tests created by the Supreme Court.

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.

Chief Justice John Marshall observed that 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, considered the "Chief Architect of the Constitution," 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). The same year, the United States Supreme Court confirmed that the constitutional words deserve deference and precise definition: "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).

B. The *Lemon* test, the endorsement test, and the *Van Orden/McCreary* compare-and-contrast test, or all of them together, are constitutional counterfeits that contradict and obscure the text of the "supreme Law of the Land."

Although the district court below correctly quoted the Establishment Clause toward the outset of its analysis, it quickly moved to a contrast of the "polar-opposite views" of the Clause held by Justices Antonin Scalia and John Paul Stevens to demonstrate not only "how contentious this area of the law remains," but also to "dispel the notion that there are easy answers to be had in Establishment Clause jurisprudence." *Weinbaum*, 465 F. Supp. 2d at 1167, 1168. The court then shunned its duty to interpret the words of the law, claiming that, in Establishment Clause cases, there is "'no simple and clear measure'" and that "'an elegant interpretive rule to draw the line in all the multifarious situations is not to be had.'" *Id.* at 1168 (quoting *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (citation and quotation omitted), and *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 875 (2005), respectively).

Instead, the court cobbled together its own "interpretive rule" based upon the "contentious" *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "sound analytical framework" of the endorsement test from Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984), and the two recent cases of *Van Orden* and *McCreary County*. *See Weinbaum*, 465 F. Supp. 2d at 1176. Having deserted the "clear measure" of the constitutional words, it is little wonder that the

legal "standard" the lower court applied to the Las Cruces symbol looked like this in the opinion's subheading:

> VI. Application of *Lemon*, modified by the endorsement test, tempered by *McCreary County* and *Van Orden*, to the City's adoption and use of the Symbol.

Id. at 1177.

The district court was obviously trying to do the best it could with current Supreme Court jurisprudence, but that is exactly the problem: lower court cases following the Supreme Court's cases and tests instead of the Constitution. It is the Supreme Court's jurisprudential rejection of the First Amendment's text—indeed, its rejection of *any* one firm standard—and lower court cases based upon that rejection that continues the grand legal march away from the Constitution and into greater disarray. The court noted the confusing state of Establishment Clause jurisprudence, "particularly in light of the 10 separate opinions authored in *McCreary County* . . . and *Van Orden*," *id.* at 1167, but it is far from the first to complain[1] and will probably not be the last. The more opinions the Supreme Court

[1] 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

and lower courts generate under modern Establishment Clause jurisprudence, the more "murky" the waters become, and the courts' repetitious claim of "no clear standard" becomes a self-fulfilling prophecy.

Unfortunately, the Supreme Court views the lack of a bright line test to be laudatory. 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

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

subject like 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." *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 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.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases is so voluminous,

incoherent, and incessantly changing that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ."[2] *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. *See Marbury*, 5 U.S. at 180; U.S. Const. art. VI. In addition to jurisprudential confusion, even when, as here, the government is allowed to keep whatever religious practice or display is at issue, the practical result of these judicial tests is to foster *hostility* toward religion.

[2] Recent district court opinions have aimed scathing critiques at the unsettled nature of the law in this area, noting that the Supreme Court's Establishment Clause jurisprudence is: "hardly Paradise" but "more akin to Limbo" than Purgatory, *Green v. Haskell County Bd. of Comm'rs*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006); "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).

C. The district court's opinion demonstrates that the primary effect, if not the purpose, of *Lemon* and other judicial tests is often hostility to the historically important role religion has played in our country.

Pursuant to the district court's *Lemon*-endorsement-*Van Orden*-*McCreary County* test, the court diligently searched the record in this case high and low for any hint of a "religious purpose" on the part of Las Cruces officials, past and present, who designed, redesigned, and maintained the city's symbol. From what little evidence about the purpose of the symbol's design exists, the court found: (1) the three-crosses symbol was adopted as the city seal in 1946, "at the behest of Mayor [Sam] Klein, who was Jewish,"[3] *Weinbaum*, 465 F. Supp. 2d at 1173; (2) the seal was designed by the city attorney at the time, *id.*; (3) testimony of subsequent uses of the three-crosses design in official city business included no reference to religion, *id.* at 1173-74; and (4) the designer of the current Las Cruces

[3] The court twice mentions that the Las Cruces mayor in 1946 "was Jewish," although the significance of that repeated fact is left primarily to the reader's interpretation. *See Weinbaum*, 465 F. Supp. 2d at 1173, 1179. Despite the fact that the very first Christians were Jewish, and that there remain a minority of Jews today who believe Jesus Christ is the Messiah (*i.e.*, Messianic Jews) and would therefore consider the cross a "powerful symbol of their faith," *id.* at 1170, the court seems to suggest that the Las Cruces mayor's identity as Jewish must mean that he harbored only a secular purpose in urging the adoption of a new three-crosses city seal. *See id.* at 1179 (reviewing evidence of no "religious purpose" associated with symbol). The court's implication is that, had the mayor harbored any religious purpose, it would have been one of at least indifference, if not outright aversion, to the symbol of the cross, an assumption that is not only religiously presumptuous but also potentially offensive in its ethnic stereotyping of Jews. Such religious pigeon-holing is yet another unwanted byproduct of the "religious purpose" inquisition required by modern Establishment Clause tests.

symbol, Bobby De La Rosa, testified that the symbol "'just evolved' from the three-crosses-in-a-sunburst design" and that "'[a]t no time did religion enter into the concept of the logo . . . . [t]here was never any discussion of religion at all,'" *id.* at 1174 (quoting Hunner Report at 8). A report and deposition by a New Mexico State University history professor, Dr. Jon Hunner, frequently cited by the district court, concluded that there was "no indication that the City contemplated a religious meaning with respect to use of the Symbol in particular or three crosses in general." *Id.* at 1174 (citing Hunner Depo. at 94). Moreover, the City of Las Cruces expressly "disavowed any religious purpose in connection with the Symbol," claiming the symbol instead served only the secular purposes of identifying the city and its unique history and origin. 465 F. Supp. 2d at 1177. The court was ultimately satisfied that "[t]here is no evidence that the Symbol is now, or was ever, associated with a religious purpose." *Id.*

The court also determined that the primary *effect* of the Las Cruces symbol was not to "send a religious message," but only to "communicate[] the secular message that the City's name means 'The Crosses' and links the City to its historic roots." *Id.* at 1179, 1180.

> The fact that the City has used the Symbol for more than three decades, combined with the lack of any evidence of an intent to proselytize, is significant in concluding that the adoption and use of the symbol does not have the effect of endorsing religion in general or Christianity in particular.

Id. at 1180. Thus, the court eventually concluded, the symbol "does not violate the Establishment Clause of the First Amendment." *Id.*

The court's correct conclusion yields a (perhaps unintended) anti-religious result. The implied holding of the court is that if a religious purpose or effect by a Las Cruces official connected to the symbol *had* been discovered or avowed, the symbol would have run afoul of the Establishment Clause. Recognition was given that "[r]eligious significance does not necessarily render the City's use of the Symbol unconstitutional," 465 F. Supp. 2d at 1177, but the lesson here is plain: it is only by avoiding and denouncing all things religious that the three crosses in the Las Cruces symbol has been preserved. Religion is made into an embarrassing liability.

What if, on the other hand, the three crosses had been introduced to recognize the crucifixion of Jesus Christ and acknowledge the Christian heritage of the city? That would clearly be a religious purpose, one exacerbated, in the court's eyes, if the introduction had been more recent than 1946. Or what if the name "Las Cruces" referred directly to the three crosses traditionally linked to the crucifixion of Jesus Christ rather than, as the court found, to the groupings of cross-marked graves from the geography's past? Again, the court would target this as an impermissible "religious purpose." Another dangerous precedent has been set in this case, one that lays the groundwork for the removal of other government

symbols with religious significance whose origin and history are not as "secular" as Las Cruces's. Courts and local governments should never be encouraged to take such a hostile stance toward religion.

"There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674; *see also Van Orden*, 545 U.S. at 686-90 (listing numerous examples of the "rich American tradition" of the federal government acknowledging God and religion). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary

Committee report concerning the constitutionality of the congressional and military chaplaincies:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853). Even the Supreme Court itself has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Like Las Cruces, cities across the land, and particularly in the West, have names and symbols that reflect the faith of the Spanish and American setters.

Acknowledgments of religion and God should not be removed for being plainly religious or for originating from those with religious purposes. Judicial tests that have departed from the text of the First Amendment, when not merely

adding to the confusion that reigns in Establishment Clause jurisprudence, will continue the modern trend of expunging from the public square anything that is plainly or admitted to be religious. It is time for the federal courts to return to the plain and original text of the First Amendment, which, when applied to this case, supports the conclusion of the district court below that the Las Cruces symbol is perfectly constitutional.

II. THE LAS CRUCES SYMBOL 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 thereof." U.S. Const. amend I (emphasis added). Regardless of whether the three crosses of the Las Cruces symbol were religious or historical (or both), the symbol could not be a "law respecting an establishment of religion."[4]

A. Neither the Las Cruces symbol nor the city's actions in relation to the symbol is a "law."

The district court made substantial findings about the origin and official adoption of the Las Cruces symbol, but never resolved the threshold legal question: whether the symbol at issue was a "law" under the Establishment Clause. If the

[4] *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.

symbol is not first a "law," then it could not violate the text of the Establishment Clause.

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). Only 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 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 adopting the three-crosses as part of its seal, the City of Las Cruces has made no law commanding any action from its citizens or restraining them from any action or conduct that they wish to pursue. Identifying markers used by a government entity are not "rules of civil conduct" to which penalties for

disobedience are attached. In fact, they are not rules or laws at all. By their nature, and regardless of their imagery, all city symbols are used "to identify City activity and property," as the district court found with the Las Cruces symbol. *Weinbaum*, 465 F. Supp. 2d at 1179.

The City Council in this case certainly "voted to adopt and copyright the Symbol," but such a vote does not translate the use of the symbol into a "law." No citizen of Las Cruces is compelled by city law, policy, or practice to revere, approve, or even look at the city's official symbol. The Las Cruces city symbol, or any government symbol for that matter, is not a law under the First Amendment.

B. The Las Cruces symbol does not "respect[] an establishment of religion."

Moving along the constitutional text, one sees that the Las Cruces symbol also does not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). The district court below eschewed its duty to define the words of the very law it was applying by noting that "'[t]he First Amendment contains no textual definition of "establishment," and the term is certainly not self-defining,'" *id.* at 1168 (quoting *McCreary County*, 545 U.S. at 874-75). Such a dismissive red herring is equally true of the word "religion," and, for that matter, nearly every other word in the Constitution, but it does not follow that a definition must be invented or projected onto the text, or that the text itself is to be ignored altogether. Rather, "every word must have its due force, and

appropriate meaning" for "no word was unnecessarily used, or needlessly added." *Holmes*, 39 U.S. (14 Peters) at 570-71. The First Amendment must be interpreted "by endeavoring to ascertain the true sense and meaning of all the terms," Story, *A Familiar Exposition*, *supra*, § 42, with the understanding that the framers and ratifying public "employed words in their natural sense" and "intended what they have said." *Gibbons*, 22 U.S. at 188.

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).[5] In all these instances, "religion" was defined as follows:

[5] Later in *Torcaso v. Watkins*, 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. 488, 492 n.7 (1961).

> 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 *Reynolds* 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."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[6] 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 pivotal role in garnering support for the passage of the Virginia statute. 330 U.S. 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

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

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.R. 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 2005 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." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [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. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

Even assuming, *arguendo*, that the Las Cruces symbol could in some sense be a "law," such an act could not be considered a law respecting "religion" because, while the cross is certainly a religious symbol sacred to Christians, the symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is certainly "religious" to some but it is not a "religion," properly defined, to anyone. Moreover, 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. A symbol of the cross or even three crosses does neither and thus cannot be considered a "religion."

Even if the facts in this case showed that the three crosses were included in the Las Cruces symbol for religious reasons, *e.g.*, by Christian citizens who wanted to recognize their faith in Jesus Christ, the symbol would still not rise to the level of a "religion." A religious symbol displayed on government property with a

religious purpose still does not a religion make. Under any purpose or procedure for displaying the Las Cruces symbol, secular or "religious," the three crosses therein do not meet the constitutional definition of the term "religion."

2. The definition of "Establishment"

The Las Cruces symbol also does not represent an "establishment" of religion in the City of Las Cruces. 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." *See, e.g.*, Story, *A Familiar Exposition*, *supra,* § 441 (Establishment Clause cannot be attributed to "an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

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 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 Las Cruces symbol

> 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 often overlooked word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. Just as secular symbols on a city seal do not enforce an official orthodoxy of belief, religious symbols and imagery on city property and buildings do not even begin to approach or even

"respect" an establishment of religion. The sunburst outlining the Las Cruces symbol no more compels or enforces sun worship than the crosses in the center compel or enforce the worship of Jesus Christ. Just like the Ohio Motto in *Capitol Square*, *supra*, the Las Cruces symbol does not violate the Establishment Clause because it 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 never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. 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 16th day of April, 2007.

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The undersigned hereby certifies that a true and correct copy of this *Brief of* Amicus Curiae has been served on counsel for each party via first-class U.S. mail, as well as one electronic copy of the *Brief of* Amicus Curiae by electronic mail. Also, an original and seven (7) copies of this *Brief of* Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 10th Circuit, by first-class U.S. Mail, on this 16th day of April, 2007.

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