No. 04-20667

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KAY STALEY

Plaintiff-Appellee,

vs.

HARRIS COUNTY, TEXAS

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, INC., ON BEHALF OF DEFENDANT-APPELLANT, IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

No. 04-20667

KAY STALEY,
Plaintiff-Appellee
v.
HARRIS COUNTY, TEXAS,
Defendant-Appellant

The undersigned counsel of record certifies that no persons in addition to those listed by the parties to this case have an interest in the outcome of the case. *Amicus curiae* Foundation for Moral Law, Inc., is a non-profit corporation whose 501(c)(3) application is pending. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Benjamin D. DuPré

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. 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.

The Foundation has an interest in this case because it believes that the public display of the Bible represents one of the many ways in which government can acknowledge the sovereignty of God and His influence (past and present) on this nation. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the display at issue violates the words of the Establishment Clause.

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[1] Counsel for *amicus* authored this brief in its entirety. No person or entity—other than the Foundation, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SOURCE OF AUTHORITY TO FILE

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

SUMMARY OF ARGUMENT

The display of the Bible on public property does not violate the Establishment Clause of the First Amendment because such a display does not implicate the text thereof, particularly as it was historically defined by common understanding at the time of the Amendment's adoption. The Bible displayed as part of the memorial to William S. Mosher ("the Mosher monument"), by permission of Harris County, Texas ("the County"), in front of the Harris County Civil Courthouse 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 that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution to guide its Establishment Clause jurisprudence.

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 Bible on display, it becomes evident that the Bible is not a law, does not dictate religion, and does not represent a form

of an establishment. Thus, a textual analysis demonstrates that the display of the Bible on public property is not prohibited by the Establishment Clause.

For these reasons, the decision of the district court should be reversed.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE MOSHER MONUMENT DISPLAYING THE BIBLE SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court started its overview of the "relevant law" in this case by quoting in its entirety the First Amendment to the United States Constitution. *Staley v. Harris County, Texas,* 332 F. Supp.2d 1030, 1031 (S.D. Tex. 2004). Unfortunately, instead of evaluating the monument at issue according to the terms of that Amendment, the district court immediately moved on to discuss the *Lemon* test, a three-prong test formulated by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), that, according to the district court, "articulated three criteria for determining whether government action violates the Establishment Clause." *Id*. The court never returned to the actual words of the Establishment Clause, the true law of the case.

The simple fact is that when the County permitted the Star of Hope Mission to place the approximately four-and-a-half-foot tall monument in front of the entrance to the County courthouse in 1956 to honor William Mosher, the County did not violate the Establishment Clause because it did not make a "law respecting an establishment of religion." U.S. Const. amend. I. Neither did the County make a "law respecting an establishment of religion" when it permitted a state district

judge to refurbish the monument at private expense and return a Bible to the display. *Id.*

Our constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judicial officers—including the district court and the judges of this court—take their oath of office to support *the Constitution itself* (and no person, office, or government body). *Id.* *Amicus* respectfully submits that this Constitution and its 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) (emphasis in original). It must remain true that

> [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). Instead of heeding this truth, the district court below evaluated the monument at issue under the guise of the *Lemon* test at the expense of the actual words of the Establishment Clause.

The Establishment Clause is designed to restrict the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). In "religious display" cases, however, the U.S. Supreme Court has, in effect, expanded its own power by unconstitutionally amending the Establishment Clause, ruling that the Clause may be violated either by a "statute or practice." *See County of Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 592 (1989). By adopting this rule of interpretation, federal judges have turned constitutional decision-making on its head, changing their duty to decide cases "agreeably to the constitution," to deciding them agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI.

Using precedents such as *Lemon* and its progeny is a poor substitute for the concise language of the Establishment Clause. Indeed, the district court implicitly agreed: "Unfortunately, it is difficult to find coherent guidance from the Supreme Court's later opinions applying the *Lemon v. Kurtzman* analysis."[2] *Staley*, 332 F.

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[2] The district court's expression of frustration over the current state of Establishment Clause jurisprudence is mild compared to statements by other federal courts. For example, this Court 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 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

Supp. 2d at 1031. *Lemon* claims 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. However, jurisprudential experiments with various extra-textual "tests" such as *Lemon* have produced a continuum of disparate results. This is because attempting to draw a clear legal line without the straight-edge of the Constitution is simply impossible. The abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. *See e.g.*, *Lynch v. Donnelly,* 465 U.S. 668, 678-79 (1984) ("[A]n 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"). No judicial decision should coerce a court to abandon the text of the Constitution.

This jurisprudential experiment is doomed to fail because federal courts have aimed to achieve a mythical "neutrality" concerning religion in the public square that does not exist and was never intended in our law. The court below was

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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). The Tenth Circuit 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).

no different, intoning that *"[t]he government should be neutral*: it should neither support nor oppose religion or any particular religious practice."[3] *Staley*, 332 F. Supp. 2d at 1040 (emphasis in original). But our United States was never intended to be "neutral" toward religion. The district court itself correctly observed that "[r]eligion played an important role in colonial life," *id*. at 1039-40, and the United States Supreme Court noted in *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963), that "religion has been closely identified with our history and government." 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 of 1789, Article III, *reprinted in* William J. Federer, *America's God and Country* 484 (1994).

[3] The district court inappropriately conflates "religion" and "religious" here and elsewhere, a flaw that is addressed in II(B)(1) *infra*.

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [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.

S. Rep. No. 32-376 (1853).

As late as 1954 when Congress placed the words "under God" in the Pledge of Allegiance, President Dwight Eisenhower explained that such had been done to "reaffirm[] the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war." Speech of June 14, 1954, *reprinted in* William J. Federer, *Treasury of Presidential Quotations* 313-14 (2004).

These facts of history illustrate what the United States Supreme Court stated in *Abington*: "[T]hat the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington*, 374 U.S. at 213. Thus, the Constitution was not intended to require, nor until relatively recently was it interpreted to require, that anything associated with God must be devalued in, or removed from, the public square in an attempt to achieve "neutrality" which supposedly prevents the possibility of some passerby suffering offense.

For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. The text of the Establishment Clause contains a definite, relatively straightforward meaning that should be followed in this case. Thus, this Court may and should reverse this decision and instruct the district court to decide this case according to the text of the First Amendment's Establishment Clause, not the judicially-fabricated *Lemon* test. *See Marbury*, 5 U.S. at 180.

II. NEITHER THE BIBLE ON DISLAY, NOR HARRIS COUNTY'S ACTIONS IN PERMITTING THE ERECTION AND REFURBISHMENT OF THE MOSHER MONUMENT, IS A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. In no way could the County's act of permitting the erection of the Mosher monument constitute a "law respecting an establishment of religion."[4]

A. Neither the Mosher monument, nor the County's actions in relation to the monument, is a "law."

In its review of this case, the district court conflated the concept of "law" with subjective, self-imposed feelings of "offense" and "pressure." The district court concluded that "a reasonable observer would understand that Harris County endorses the Bible and encourages its citizens to read it," and that this is unacceptable because "everyone [must be] free to adopt and practice his or her own faith, or not to adopt any form of faith, *without any pressure*, direct or implied, from government." 332 F. Supp. 2d at 1037, 1040 (emphasis added). However, the mere fact that Staley feels "offended" by the Bible on display in the Mosher memorial or even that she feels that it "sends a message to her and to non-

[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.

Christians that they are not full members of the Houston political community" does not make the monument a law. *Id.* at 1034.

At the time of the ratification of the First Amendment, Sir William Blackstone had 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 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).

The County has made no law. By permitting the erection and subsequent refurbishment of the Mosher monument, the County has not commanded any action from its residents (whether in whole or in part), nor has it restrained them from any action or conduct that they wish to pursue. Likewise, the County has not stated or implied any intent to command its residents to perform any action or to prohibit their residents from any conduct by means of the monument. In fact, all evidence indicates that the monument was erected to honor the memory of William Mosher, and that the Bible was placed in the display simply to signify an important part of Mosher's life. Any pressure Staley feels as a result of the Bible's presence

is self-imposed,[5] allegedly born from an implication of what the monument indicates about the County's position concerning religion. It is a highly tenuous implication, and even if the implication were sound, it would not matter because the County has not used its powers of coercion to force anyone to believe (or even gaze upon) anything through its action of permitting the erection and refurbishment of the monument.

Harris County, like all Texas counties, has the statutory authority to "adopt . . . an ordinance, rule, or police regulation . . . for the good government, peace, or order of the municipality." Tex. Local Government Code Ann. § 51.001 (1999). The County did not use this lawmaking authority; instead, it permitted a private group to erect a monument in honor of a respected citizen. Even if having the Bible on display "encourages people to read the Bible," 332. F. Supp. 2d at 1037, as the district court claims, that claim is wholly unrelated to the monument's resemblance to a "law" because there is no force behind the recommendation. To hold otherwise, the district court necessarily enlarged the meaning of "law" well beyond its proper scope.

The Mosher monument is simply a memorial display on public property, not a law under the First Amendment. Similar to an executive Thanksgiving

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[5] Indeed, it is an imposition that, by the district court's admission, would require Staley to walk up to the monument to even see the Bible and to stand in front of the monument to read it. *See Staley*, 332 F. Supp. 2d at 1033.

proclamation, the monument "has not the force of law, nor was it so intended." *See 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"). At most, the Mosher monument recognizes the God upon which our Nation was founded, and the God upon Whom William Mosher based his life and faith. Thus, because the Mosher monument is not a "law," neither the monument, nor the County's action in allowing its placement, violates the Establishment Clause.

B. Neither the Mosher Monument, nor the County's actions in relation to the monument, respects "an establishment of religion."

The monument that sits on the grounds of the Harris County Civil Courts Building does not violate the Establishment Clause because it does not "respect," *i.e.*, concern or relate to, "an establishment of religion."

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, in James Madison's *Memorial and Remonstrance*, and was embraced 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] "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; *see also 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 considered and rejected the argument that the First Amendment definition of religion included the practice of polygamy. In arriving at its conclusion, the Court applied the definition of "religion" contained in the Virginia Constitution as controlling the meaning of that term in the First Amendment. *Reynolds*, 98 U.S. at 163-66. It 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, "within the legitimate scope of the power of . . . civil government." *Id.*

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

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":

> The 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*. . . . The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience . . . .

Beason, 133 U.S. at 342 (emphasis added).

In *Macintosh*, the Supreme Court's decision resulted in the denial of the respondent's application for citizenship by naturalization because the respondent refused to take an oath to bear arms in defense of the United States on the ground that he would have to believe the war in question was morally justified before he would take such action. 283 U.S. at 613-14, 618.[7] Chief Justice Hughes dissented in *Macintosh*, believing that the respondent's refusal to take the oath based on religious principle ought not disqualify him from citizenship. In part, Chief Justice Hughes reasoned:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, . . . : "The term 'religion' has

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

> 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." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

Macintosh, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Thus, Chief Justice Hughes's dissent in *Macintosh* was rooted in the historic constitutional definition of religion, a definition that presupposes God.

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 statute" explicitly founded its declaration of religious freedom on the basis that "Almighty God hath created the mind free" and that "all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy Author of our religion . . . ." Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 *The Founder's Constitution* 84 (Kurland and Lerner eds., U. Chi. Press: 1987).

The *Everson* Court also 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. *Id*. at 12. Indeed, 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 dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64.

Thus, the United States Supreme Court 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; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship"). Assuming, *arguendo*, that the County's action permitting the installation of the monument is in some sense a "law," such action cannot be considered a law concerning "religion" because displaying a Bible dictates neither the duties that Harris County residents owe to God nor the way in which those duties ought to be carried out.

The district court below made much of the fact that "the Bible sits by itself [and] it is not part of a larger display of other objects," as one reason the Mosher monument did not pass constitutional muster. *Staley*, 332 F. Supp. 2d at 1039. But noticeably absent from the proper definition of religion, *supra*, is *any* implication that *context* plays a factor in whether a particular practice or display is

constitutionally permissible. Context does not define whether something is a religion; *content* does. Whether the Bible is displayed in a museum or a public park, or whether it is displayed alone or is surrounded with "other objects" is irrelevant to whether its display prescribes the duties we owe to the Creator and the manner of discharging them, *i.e.*, whether it falls under the constitutional definition of religion. The monument is not religion; rather, even according to the district court's findings, the display of the Bible simply acknowledges William Mosher's faith.

The district court concluded that "[b]y allowing an open Bible to be displayed in front of the main entrance to the Courthouse, the County has allowed the communication of the Christian *religious* message that the Star of Hope Mission and Judge Devine sought to advance." *Staley*, 332 F. Supp. 2d at 1036 (emphasis added). But the fact that the Bible is a "religious" work does not make it a "*religion*." Many actions and objects can be qualified as religious in nature, but that does not automatically make them a religion for First Amendment purposes. Madison's *Memorial* protested against "[a] Bill establishing a provision for Teachers of the Christian *Religion*," not one that condoned a religious act (such as prayer) or a religious object (such as the Bible, the Koran, or any other "religious" book). J. Madison, *Memorial and Remonstrance* (1785), *reprinted in American State Papers and Related Documents on Freedom in Religion* 112

(William Addison Blakely ed. 1949) (emphasis added). Again, even though the Bible on display acknowledges *William Mosher's* faith, it does not follow that the County is supporting the Christian *religion*.

In sum, under no version of the facts presented to the district court could it be said that this monument displaying the Bible represents an attempt by the County to dictate the duties that its residents owe to the Creator and the manner in which the residents should discharge those duties. Consequently, the Mosher monument is not a law respecting an establishment of "religion." U.S. Const. amend I.

2. The Definition of "Establishment"

Even if it is assumed that the Mosher monument displaying the Bible 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 monument is not 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). 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 J. Story, *Commentaries on the Constitution* § 1871 (1833). 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). 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).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992).

The monument in front of the County courthouse displaying the Bible does not in any fashion represent the setting up of a state-sponsored church, nor does it in any way lend government aid to one faith over another. Indeed, the Mosher monument was erected and paid for by a private organization (the Star of Hope Mission) and the County does not maintain the monument. *See Staley*, 332 F. Supp. 2d at 1034.

The district court found fault with the monument because purportedly "the purpose for installing the open Bible in the glass display case was to commemorate Mosher's Christian faith." 332 F. Supp. 2d at 1036. Even if this is true, commemorating Mosher's Christian faith as part of a display which has as its primary purpose, according to the district court, "to honor William Mosher," is no more an "establishment" of religion than any memorial that honors a revered person in a community and recognizes his or her beliefs in doing so. *Id.* Both the Jefferson and Lincoln memorials in Washington, D.C., for instance, contain inscriptions from these important men's speeches and writings that reference "God" seven times in each, reflecting their belief in God and His providence, yet no one suggests that either of these memorials is an establishment of religion in violation of the First Amendment. *See* National Park Service, *Thomas Jefferson Memorial: Statue Chamber Inscriptions*, *at* http://www.nps.gov/thje/memorial

/inscript.htm; National Park Service, *Lincoln Memorial: Inscriptions*, *at* http://www.nps.gov/linc/memorial/inscript.htm.

The Bible on display acknowledges an influence on William Mosher's life. Such an acknowledgment is no more an "establishment" of religion than it would be if the Star of Hope Mission had chosen any other book to reflect Mosher's life. Suppose Mosher had declared during his lifetime that his favorite book and the one from which he garnered his principles for how to live had been Homer's *Odyssey*. Then suppose that as part of its honoring of Mosher's life the Mission had placed a copy of *The Odyssey* in a display case as part of the memorial to William Mosher. Would displaying a book full of references to Greek religion and religious mythology on public property inevitably mean that Harris County had "established" the religion of ancient Greece? Of course not, but such a notion is no more absurd than the district court's conclusion that a Bible on display in a memorial monument establishes Christianity.

Moreover, the Bible has played an immeasurable role in the development of our country. In *McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203 (1948), the United States Supreme Court observed:

> Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and

> its chief purpose inculcation of piety. . . . The emigrants who came to these shores brought this view of education with them.

Id. at 213-14. In *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963), the Court acknowledged that, "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities." Justice Powell's concurrence in *Edwards v. Aguillard*, 482 U.S. 578 (1987), noted that "[t]he [Bible] is, in fact, 'the world's all-time best seller' with undoubted literary and historic value apart from its religious content." *Id*. at 608 (Powell, J., concurring) (citation omitted).

Given the undeniable general influence of the Bible in this country's historical and legal tradition and the lack of any showing that the Mosher monument represents support for or gives aid to a church or religious sect, the Monument cannot be said to concern an "establishment" of religion. U.S. Const. amend. I.

CONCLUSION

Similar to the Sixth Circuit's conclusion in *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289, 299 (6th Cir. 2001) (*en banc*), concerning the Ohio Motto ("With God All Things are Possible"), this Court ought to find that the Mosher 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.

Id. at 299. In other words, the monument displaying the Bible is not a "law," it does not concern or relate to an "establishment," and it does not purport to dictate "religion" to the residents of the County.

As it is the responsibility of this Court to decide this case based on the text of the Constitution, from which it derives its authority, and not based on extra-constitutional tests that obscure rather than clarify the issues at stake, this Court should find that the Establishment Clause of the First Amendment was not violated by the presence of the Bible in the Mosher monument.

For the foregoing reasons, the district court's order to remove the Bible from the monument should be vacated and the case remanded for the district court to evaluate the monument according to the text of the First Amendment.

Dated this 16th day of February, 2005.

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CERTIFICATE OF SERVICE

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