

No. 02-2444

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ACLU NEBRASKA FOUNDATION,
and JOHN DOE**

Plaintiffs-Appellees,

vs.

CITY OF PLATTSMOUTH, NEBRASKA

Defendant-Appellant.

**On Appeal *En Banc* from the United States District Court for the
District of Nebraska**

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

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CORPORATE DISCLOSURE STATEMENT

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 or more of *amicus*.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law, Inc. (“the Foundation”), is a national public interest organization based in Montgomery, Alabama, committed to advocating for a return to the historic and proper interpretation of the United States Constitution by the courts and to educating the public about the Constitution and the Godly foundation of this country’s laws. Founded in December 2002, the Foundation has participated in multiple cases concerning the display of the Ten Commandments because the Foundation believes that such displays represent important acknowledgments of God. The Foundation has also aided in the legal defense of former Alabama Chief Justice Roy Moore. The Foundation has already garnered nationwide support for its mission by emphasizing the importance of acknowledging God as the source of our rights and justice system.

SOURCE OF AUTHORITY TO FILE

Because no Rule governs the filing of *amicus* briefs for an *en banc* rehearing, and pursuant to instructions of this Court, the Foundation is filing this brief along with a “Motion for Leave to File an *Amicus* Brief.” The Foundation has informed both parties of the filing 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, particularly as it was historically defined by common understanding at the time of the Amendment's adoption. The Ten Commandments monument ("the Monument") displayed by permission of the City of Plattsburgh ("the City") in its Memorial Park is therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the U.S. 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. The test created in *Lemon v. Kurtzman*, 403 U.S. 603 (1971), is one such example of extra-constitutional jurisprudence that ought not be followed by this Court in determining whether the Monument violates the Establishment Clause.

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 Monument, it becomes evident that it is not a law, it does not dictate religion, and it does not represent a form of an

establishment. Thus, a textual analysis demonstrates that the display of the Monument 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 TEN COMMANDMENTS MONUMENT SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, RATHER THAN JUDICIALLY-FABRICATED TESTS.

At the outset of its analysis on the merits of the plaintiffs' claims, the panel of this Court that initially heard this case noted that, as applied to the states, "the U.S. Constitution . . . prohibits Plattsmouth from making any laws 'respecting an establishment of religion'" *ACLU Nebraska Foundation v. City of Plattsmouth*, ___ F.3d ___, ___ (8th Cir. 2004) (quoting U.S. Const. amend. I). However, following this lip-service to the text of the Establishment Clause, the panel never applied the text to the facts of this case.

The simple fact is that when the City permitted the Eagles in 1965 to place the five-foot-tall granite monument in its Memorial Park, the City 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 City make a "law respecting an establishment of religion" when it maintained the area around the monument or re-erected the monument after it had been toppled. *Id.*

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. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803). It remains 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). Both this Court and the district court evaluated this display of the Ten Commandments under the guise of the *Lemon* test at the expense of the actual words of the Establishment Clause. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

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). Federal judges take an oath to decide cases “agreeably to the constitution,” not agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; see also, U.S. Const. art. VI. Contrary to *Lemon’s* claim 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, the text of the Establishment Clause contains a definite, relatively straightforward meaning. *Lemon*, 403 U.S. at 612. Thus, this Court may and should decide this case according to the text of the First

Amendment's Establishment Clause and should refrain from deciding this case based on the judicially-fabricated *Lemon* test. *See Marbury*, 5 U.S. at 180.

II. NEITHER THE TEN COMMANDMENTS MONUMENT, NOR THE CITY OF PLATTSMOUTH'S ACTION IN MAINTAINING OR RE-ERECTING THE MONUMENT, IS A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

A. Neither the Ten Commandments monument, nor the City's actions in relation to the monument, is a "law."

In its initial review of this case, the panel of this Court, like the court below, assumed that the action of the City either to install the Monument or to permit its placement amounts to a "law." *City of Plattsburgh*, ___ F.3d at ___. However, not every action taken by the City under its constitutional and statutory authority constitutes a law.

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). Noah Webster's 1828 Dictionary states 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* (1828) (emphasis in original).

By either installing the Monument or by allowing it to be erected in the corner of Memorial Park, the City commands no action from its residents, nor does it restrain them from any action or conduct that they wish to pursue. In fact, the City maintains that the monument is in Memorial Park “out of gratitude to the Eagles for their civic work.” *City of Plattsmouth*, ___ F.3d at ___. The City has stated no intent to command its residents to perform any action or to prohibit its residents from any conduct by means of the Monument. Indeed, John Doe did not bring this suit because the inanimate Monument commanded or proscribed any action on his part, at least not such as would be enforced by the City; rather, he brought the suit because he claimed that the Monument “alienates” him and “makes him feel like a second-class citizen,” claims that are completely unrelated to the Monument’s resemblance to a “law.” *City of Plattsmouth*, ___ F.3d at ___.

Similar to an executive Thanksgiving 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, it could be argued that the Monument serves as a **reminder** to citizens of certain standards of conduct. Thus,

because the Ten Commandments monument is not a “law,” neither the Monument, nor the City’s action in allowing its placement, violates the Establishment Clause.

B. Neither the Ten Commandments monument, nor the City’s actions in relation to the monument, respects “an establishment of religion.”

The monument that sits in the City’s Memorial Park 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 given 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), in *Davis v. Beason*, 133 U.S. 333 (1890), and in *Everson v. Board of Education*, 330 U.S. 1 (1947).¹ “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; *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.” *Id.*

¹ The U.S. Supreme Court later reaffirmed the discussions of the meaning of First Amendment found in *Reynolds*, *Beason*, and *Everson* in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

In *Reynolds*, the U.S. 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.” *See id.*

In *Davis*, the 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 *Everson*, fifty-seven years later, the Supreme Court explicitly 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).

In addition to looking at the writings of Thomas Jefferson and James Madison for the definition of “religion,” the *Everson* Court also appended to the opinion the entire text of Madison's *Memorial and Remonstrance*, a document that played a pivotal role in garnering support for the passage of the Virginia statute, and which offered as the first ground for the disestablishment of religion the express definition of religion found in the 1776 Virginia constitution. *See Everson*, 330 U.S. at 11-12, 64.

Thus, the U.S. 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 City’s action of installing or permitting the display of the Monument is in some sense a “law,” such action cannot be considered a law concerning “religion” because, while the commandments 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 (*i.e.*, Protestantism, Catholicism, Judaism, Islam, etc.) detail different ways in which to fulfill this commandment. Something that constitutes a “religion” under the Establishment Clause must inform the follower not only **what** to do (or not do), but also **how** those commands and prohibitions are to be carried out. The Ten Commandments, by themselves, do not do both of these and hence cannot be considered a “religion” under the constitutional definition of the term.

The panel of this Court imputed to the City the Eagles’s purpose of “spread[ing] its version of the Ten Commandments.” *City of Plattsburgh*, __ F.3d at __. The Eagles’s purported goal of spreading “its version” of the Ten Commandments, even if adopted by the City, still would not concern “religion” because, regardless of which version of the Ten Commandments is displayed, the commandments do not dictate the manner of discharging the duties owed to the Creator. Moreover, the only testimony regarding the City’s purpose in accepting

or installing the Monument was to show “gratitude to the Eagles for their civic contributions.” *Id.* at ___. Thus, the only evidence that had been presented to the Court of a purpose for the Monument focused not on the “religion” of the City’s residents, but on civic recognition.

In sum, under no version of the facts presented to the district court could it be said that this monument of the Ten Commandments, standing alone, represents an attempt by the City to dictate the duties that its residents owe to the Creator and the manner in which the residents should discharge those duties. Consequently, the 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 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 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 (reprint 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). 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 City’s monument displaying the Ten Commandments 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 Monument contains an amalgamation of Jewish, Christian, and patriotic symbols, the text is a deliberately non-sectarian version of the Ten Commandments, the Monument was **donated** by the Eagles (a private civic organization), and it requires negligible upkeep by the City.

The U.S. Supreme Court and multiple other courts have recognized that the Ten Commandments hold an important place in this country's historical and legal tradition. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (“the Ten Commandments [did not] play[] an exclusively religious role in the history of Western Civilization.”); *King v. Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) (“Much of our private and public law derives from these final six commandments.”); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003) (“Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.”); and *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (“The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.”).

Given the undeniable general influence of the Ten Commandments in this country's historical and legal tradition and the lack of any showing that the City's stand-alone monument of the Ten Commandments 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

The City’s monument displaying the Ten Commandments 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 City. 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 Ten Commandments monument in Memorial Park.

For the foregoing reasons, the district court’s order to remove the Monument should be vacated and the case remanded to enter a judgment in favor of the Appellant.

Dated this 4th day of June, 2004.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 8th Cir. R. 28A(c)-(d), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). It contains 3, 309 words.
2. The brief was prepared using Microsoft Word 2000.
3. All diskettes submitted to the Court and counsel have been scanned for viruses and are virus-free.

Dated this 4th day of June, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies per counsel of this Brief of *Amicus Curiae* and diskettes containing this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, and that twenty-one copies of this Brief of *Amicus Curiae* and a diskette containing this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the Eighth Circuit, by first-class U.S. Mail, on this 4th day of June, 2004.

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