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No. 04-20667

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**In The United States Court of Appeals  
For The Fifth Circuit**

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KAY STALEY

*Plaintiff-Appellee*

v.

HARRIS COUNTY, TEXAS

*Defendant-Appellant*

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**On Appeal From The United States District  
Court For The Southern District of Texas, Houston Division**

ON PETITION FOR REHEARING EN BANC

**BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL  
DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLANT**

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December 21, 2006

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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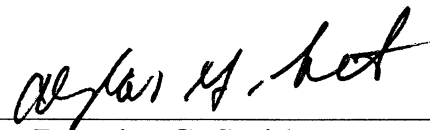
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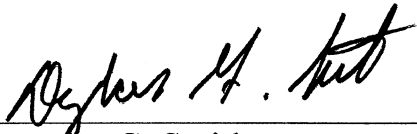


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**CONSENT OF THE PARTIES**

Pursuant to FRAP 29(a), this brief is filed with the consent of all parties.

  
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## INTEREST OF AMICUS CURIAE

Eagle Forum Education and Legal Defense Fund (“Eagle Forum ELDF”) is a nonprofit organization that has defended principles of limited government, individual liberty, and moral virtue for over twenty years. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display items that have both religious and historical significance, such as the King James Bible that is a component of the display at issue here.

## STATEMENT

This case involves a challenge to a memorial to William S. Mosher, a prominent Houston businessman and philanthropist. The memorial was erected on the grounds of the Harris County Courthouse in 1956 by a private organization, the Star of Hope Mission. *Staley v. Harris County, Texas*, 332 F. Supp. 2d 1030, 1033 (S.D. Tex. 2004) (*Staley I*). The Mission is a local Christian charity that provides food and shelter to the indigent. *Id.* Mr. Mosher was a long-time supporter of the Star of Hope Mission and its work to help the poor. *Id.*

The monument is specifically identified as a memorial to William S. Mosher that was erected by the Star of Hope Mission. *Id.* It includes an open Bible contained in a glass display that is designed to memorialize and commemorate Mr. Mosher's philanthropic works, which were motivated by his Christian faith. *Id.*; *Staley v. Harris County, Texas*, 461 F.3d 504, 513 (5th Cir. 2006) (*Staley II*).

It takes some effort for the public to notice that the monument contains a display of the Bible: "a passerby would have to walk up to the monument to observe that it contains a Bible and would have to stand in front of it to read the Bible." *Id.* at 506; *see also Staley I*, 332 F. Supp. 2d at 1033. "The open Bible as displayed" measures only "twelve by sixteen inches." *Staley II*, 461 F.3d at 506. The primary purpose of the display "was to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community." *Id.* at 513.

The memorial to Mr. Mosher is not the only display at the Harris County Courthouse. "Other monuments, markers, and plaques are present in and near other county buildings," *id.* at 506, including "the same area as the Mosher monument," *Staley I*, 332 F. Supp. 2d at 1033-34. None of these historical displays contains a "religious message." *Id.*; *Staley II*, 461 F.3d at 506.

It is undisputed that the Mosher memorial is neither owned nor maintained by the county. *See Staley I*, 332 F. Supp. 2d at 1035. Nonetheless, a local lawyer,

Plaintiff-Appellee Kay Staley, challenged the display – approximately 40 years after it was first erected – on the ground that “she is offended by the Bible display in the Mosher memorial because it advances Christianity.” *Id.* at 1034-35. The District Court agreed that the Mosher memorial violated the Establishment Clause, ordering the county to remove the Bible from the display and awarding plaintiff over \$40,000 in attorneys’ fees. *See id.* at 1041. A prior panel affirmed that ruling in a 2-1 split decision, *Staley II*, 461 F.3d 504, which this Court has agreed to rehear *en banc*.

### SUMMARY OF ARGUMENT

The Mosher memorial does not violate the Establishment Clause. The Supreme Court has repeatedly upheld displays of symbols having religious significance where such displays have both religious and secular meaning. The “dual significance” of such monuments renders them constitutional. That is the case here, where the Bible has played an important role in the history of Western Civilization, serving not only as a sacred religious text, but also as a “powerful teacher of ethics.” *See Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003).

Applying these established principles, the Supreme Court recently rejected a constitutional challenge to a similar display of the Ten Commandments that this Court held constitutional. In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005),

a plurality of the Supreme Court observed that displays that have both historical and religious significance do not violate the Establishment Clause. The same established principles the Court applied in *Van Orden* are dispositive here. All of the relevant factors from *Van Orden* – the circumstances surrounding the monument’s placement on government grounds, the physical setting, and the amount of time the display stood without a challenge – demonstrate the constitutionality of the Mosher monument. *See id.* at 2870 (Breyer, J., concurring). *Van Orden* requires that the monument be upheld.

The District Court erred in concluding that the Mosher monument was unconstitutional. The Mosher monument does not fail the “purpose” prong of the *Lemon* test. First, the Supreme Court has explicitly rejected application of *Lemon* in cases such as this, finding that the test “is not useful” for dealing with the sort of passive monument at issue here. *Id.* at 2861. Second, were the test applicable, “an objective observer” would not view the Mosher monument as predominantly motivated by religious purposes. The monument’s primary purpose is to honor the life and contributions of William S. Mosher – an undeniably constitutional objective. The District Court’s speculative analysis regarding the subjective intentions of defendants is prohibited by established Supreme Court precedent.

Finally, the District Court's decision fails to adequately consider the traditional role of state and local authorities in matters touching upon religion. Due regard should be given to local authorities' traditional role in this area.

## ARGUMENT

### **I. The Mosher Memorial Does Not Violate The Constitution Because, Like The Display The Supreme Court Upheld In Van Orden, It Has Both Religious And Historical Significance.**

The Supreme Court has consistently recognized that "religion has been closely identified with our history and government," *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963), that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962), and that "[i]nteraction between church and state is inevitable," *Agostini v. Felton*, 521 U.S. 203, 233 (1997). "The fact that 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." *Schempp*, 374 U.S. at 213. Indeed, there has been "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 v. Donnelly*, 465 U.S. 668, 674 (1984). Thus, the Supreme Court has declared that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

As a result, the Supreme Court has consistently upheld public practices that have both historical and religious significance. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the Nebraska legislature’s practice of opening legislative sessions with a prayer on the ground that it was “deeply embedded in the history and tradition of this country.” *Id.* at 786. In doing so, the Court noted the “unambiguous and unbroken history of more than 200 years” supporting such practices and establishing them as “part of the fabric of our society.” *Id.* at 792.

So, too, the Bible is part of the “fabric of our society.” It has played a significant historical role in the development not only of major religions, but also systems of secular morality. *Cf. id.* at 783 (legislative prayer was a “tolerable acknowledgment of beliefs widely held among the people of this country”). Thus, as the Supreme Court observed in *Stone v. Graham*, “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” 449 U.S. 39, 42 (1980).<sup>1</sup>

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<sup>1</sup> The statement in *Stone* is particularly significant given that the Supreme Court has repeatedly “recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school.” *See Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring in the judgment). The Mosher memorial is even more clearly constitutional than the use of the Bible discussed in *Stone*. No one is compelled to view the Bible that is incorporated in the Mosher memorial. In fact, it takes some effort to view it at all. *See Staley II*, 461 F.3d at 506. Even then, one may view only a couple pages of the Bible, which are selected by a private organization. *Id.* at 507 (“Star of Hope has maintained the

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Indeed, the Supreme Court has repeatedly upheld displays of symbols having religious significance to particular denominations where such displays manifest both a religious and secular meaning. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah). To exclude the Bible – part of the fabric of our society – would be inconsistent with these prior rulings. Moreover, it would cleanse from the public square an important aspect of our nation’s history.

In *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), this Court applied these established principles under nearly identical circumstances, upholding a display of the Ten Commandments on the grounds of the Texas State Capitol. Much like plaintiff here, the plaintiff in *Van Orden* argued that the State of Texas had “accepted” the Ten Commandments monument “for the purpose of promoting the Commandments as a personal code of conduct” and that this “contravene[d] the First Amendment.” *Id.* at 176. This Court rejected that argument, observing that there is “no escape” from the Commandments’ “secular and religious character.” *Id.* at 182. The Court noted that although the Commandments are a “sacred text to

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monument and turned the pages of the Bible.”). There is simply no state “establishment” of religion here.

many,” they are “also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people.” *Id.* The Court therefore rejected plaintiff’s claims that the display of the Ten Commandments did not have a secular purpose, or that its secular purpose was eclipsed by its religious message, and held that the display did not violate the Establishment Clause. *Id.*<sup>2</sup>

The Supreme Court affirmed this Court’s decision in *Van Orden*. See *Van Orden v. Perry*, 125 S. Ct. 2854 (2005). Writing on behalf of the plurality, Chief Justice Rehnquist observed that the Supreme Court has *repeatedly* upheld public displays of religious symbols that also have some historical meaning, and stated that a contrary rule would “evinced a hostility to religion by disabling the government from in some ways recognizing our religious heritage.” *Id.* at 2859. The plurality ignored the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), finding that the *Lemon* test was “not useful for dealing with the sort of passive monument” at issue in *Van Orden* and that the analysis should instead be “driven both by the nature of the monument and by our Nation’s history.” *Van Orden*, 125 S. Ct. at 2861. Applying these principles, the Court concluded that “[s]imply having religious content or promoting a message consistent with

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<sup>2</sup> Indeed, the Court observed: “A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the decalogue’s divine origin. Yet in context even that message does not drown its secular message.” *Van Orden*, 351 F.3d at 182.



