NO. 03-1500

IN THE
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

PHYLLIS SCHLAFLY
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND
7800 Bonhomme Avenue
St. Louis, MO 63105
(314) 721-1213

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Amicus Curiae

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. 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 the Ten Commandments.

SUMMARY OF ARGUMENT

The lower court properly applied the *Lemon* test, and its ruling should be affirmed. The court recognized that the test under *Lemon* is an objective one, focusing on whether a "reasonable observer" would understand the display to constitute an "endorsement" of a particular religion. Because the Ten Commandments have a well-established secular as well as religious meaning, the court correctly held that an objective observer would not perceive their display as an "endorsement" of religion.

The Fifth Circuit's analysis therefore stands in stark contrast to that in *McCreary*, where the court barred a similar Ten Commandments display after applying a highly subjective analysis of the intentions of the government actors responsible for the display. The disparate rulings by the courts in *Van Orden* and *McCreary* provide a powerful illustration of the problems inherent in the *Lemon* test.

The *Lemon* test has caused confusion among the lower courts and often restricts religious liberty in a manner that is inconsistent with the original meaning of the First Amendment. The Establishment Clause was originally viewed as a federalism provision that protected state establishments from interference by the federal government. The Framers wisely recognized that the individual states should remain free to adopt diverse practices with respect to

religion without the threat of an established church at the national level.

The *Lemon* test is inconsistent with this original understanding. It interjects the federal government into state decisionmaking in a manner that restricts religious liberty. Accordingly, *Amicus* respectfully requests that the Court abandon the *Lemon* test in favor of an analysis that is more consistent with the original meaning of the First Amendment—one that makes clear that the display of the Ten Commandments does not constitute an "establishment" of religion.

BACKGROUND

Petitioner asks the federal courts to order the removal of a display of the Ten Commandments that all parties agree has been an element of a legally-protected National Historic Landmark for over forty years. *See Van Orden v. Perry*, 351 F.3d 173, 175 n.1 (5th Cir. 2003). The display is one of a "wide array" of monuments, plaques and seals on the grounds of the Texas State Capitol "depicting both the secular and religious history of Texas." *Id.* at 175-76. The Ten Commandments monument was a gift of a private organization, the Fraternal Order of Eagles, and contains an inscription to that effect. *Id.* at 176.

Petitioner maintains that the display violates the Establishment Clause under the test set forth in *Lemon v. Kurtzman*. While Petitioner concedes that the monument does not involve an "excessive entanglement" of government and religion, he maintains that it lacks a secular purpose and that its primary effect is to advance religion. *Id.* at 177. Both the district court and the Fifth Circuit rejected this contention, concluding that a reasonable observer would not perceive the display as an endorsement of religion. *See id.* at 182.

ARGUMENT

I. The *Lemon* test is inconsistent with the original meaning of the Establishment Clause and has resulted in confusion.

The Fifth Circuit correctly applied the *Lemon* test. Its ruling should be affirmed. In many instances, however, the *Lemon* test has caused confusion among the lower courts, resulting in the prohibition of religious expression that the Framers never thought constituted an "establishment" of religion.[2] This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence and bring it more closely in line with the original meaning of the First Amendment.

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[2] *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2327 (2004) (Thomas, J., concurring in judgment) (noting the "difficulties with our Establishment Clause cases"); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment) (noting "the long list of constitutional scholars who have criticized *Lemon*"); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (*Lemon* "has received well-earned criticism from many Members of this Court"); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (refusing to "adopt[] [the *Lemon*] test as our primary guide in [holiday display cases]"); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment) (noting the "difficulties inherent in the Court's use of the test articulated in *Lemon*"); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment) ("Despite its initial promise, the *Lemon* test has proved problematic."); *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

A. The *Lemon* test has caused confusion among the lower courts.

Under the three-part test articulated by the Court in *Lemon,* governmental action is constitutional only if it has a "secular" purpose, its "principal or primary effect" is one that "neither advances nor inhibits religion," and it does not "foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). In certain contexts, the entanglement prong may be considered as an aspect of the effects inquiry. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). Governmental actions that run afoul of any of these three prongs may be barred as unconstitutional under this test. The test has proven particularly problematic given that each element is highly malleable and is subject to a multitude of inconsistent and confusing constructions.

In determining whether government action has a "secular purpose," for example, courts have relied on the subjective intentions of the authors of government action to a greater or lesser extent. Insofar as these subjective intentions guide the constitutional analysis, the potential for disparate outcomes increases as different judicial entities are called upon to review similar government actions. *See Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (observing that the secular purpose prong "has proven mercurial in application").

Similarly, courts take different approaches in determining whether government action "advances" or "inhibits" religion. Often courts do not take sufficient account of the inhibitory nature of governmental conduct on religion or are overly deferential to government actors when the question is whether they are inhibiting religious practices. As a result, courts have upheld governmental actions that are openly hostile to religion or religious belief. *See, e.g., American Family Ass'n, Inc. v. City and County of*

San Francisco, 277 F.3d 1114, 1119, 1122 (9th Cir. 2002) (upholding resolution denouncing the "Religious Right" and various religious organizations for their position on the morality of homosexuality after concluding that there was "little guidance concerning what constitutes a primary effect of inhibiting religion").

Finally, there are disparate approaches to what constitutes "excessive" entanglement given that "[e]ntanglement is a question of kind and degree." *See Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Some courts take a deferential view, while others take a more rigid approach. Lacking sufficient guidance, the lower courts are left to "puzzle through this analysis" on their own. *See Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 497 (5th Cir. 2001) (en banc) (Wiener, J., concurring in part and dissenting in part) ("[T]o date the Supreme Court has offered scant guidance as to what quality and quantity of entanglement is excessive.").

The fact that this Court has refused to apply a "single test or criterion" in analyzing purported Establishment Clause violations has only added to the confusion. *See Lynch*, 465 U.S. at 679. Not only are courts unsure how to apply the factors identified in *Lemon*, but they are unsure whether and to what extent those factors apply in individual cases. Moreover, even in cases where the *Lemon* factors apply, the test "has caused this Court to fracture into unworkable plurality opinions, . . . depending upon how each of the three factors applies to a certain state action." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). The result has been a string of decisions that are difficult to reconcile.

In sum, the *Lemon* test does not provide the well-defined rules that are required to give the lower courts and government actors clear guidance as to what is constitutionally permissible state action. As such, it only encourages wasteful and expensive litigation.

B. The lower courts invoking *Lemon* have prohibited religious expression that the Framers never thought constituted an "establishment" of religion.

More significantly, as a result of confusion among the lower courts applying *Lemon*, there have been instances in which state action that was never thought to constitute an "establishment" of religion has been prohibited. Thus, for example, courts have barred a reference to God in the pledge of allegiance, *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2301 (2004), prayers opening town council meetings that mention Jesus Christ, *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), and the display of a cross on public land as part of a privately-erected war memorial, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

As a result, the *Lemon* test often has interfered with religious expression. This Court has emphasized that "the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). It has recognized that religious speech is protected to an equal extent whether on government or private property. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Nonetheless, the test the Court outlined in *Lemon* has often resulted in an overt hostility to religious expression, thereby bringing the courts "into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Lynch*, 564 U.S. at 673 (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948)). *See also Edwards v. Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) ("We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and typically we do not really try.").

Moreover, the chilling effect of potential litigation on public religious expression has been significant.[3] Because the *Lemon* test does not provide clear guidance, state actors are often inclined to prohibit religious expression rather than face the possibility of costly and protracted litigation. Thus, not only is the *Lemon* test overly restrictive of religious expression on its face, but in its application it often has practical effects that the Court never intended.

C. The *Lemon* test is based on a flawed historical metaphor.

At bottom, the problems with the *Lemon* test are directly traceable to its lack of historical support. The test is premised on the notion that the First Amendment creates a "wall of separation" between church and state. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). These terms, however, are nowhere found in the constitutional text. Moreover, this concept of church-state relations is at odds with the historical record. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in

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[3] *See, e.g., Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Professor Vincent Phillip Munoz) *at* http://judiciary.senate.gov/testimony.cfm?id=1218&wit_id=3523 ("The law's vagueness makes state acknowledgement of religious sentiment suspect. It enables special interest litigators, who are professionally hostile toward religion, to file lawsuits to challenge almost any state action that accommodates religion. The chilling effect of such litigation and the mere threat [of] it is considerable. . . . Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation."); *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 49, 51-52 (1996) (testimony of William A. Donohue, Catholic League for Religious and Civil Rights) (maintaining that the potential for lawsuits has "create[d] a chilling effect on the free speech rights of the Catholic clergy" and that confusion about the status of the law has created "religious-free zones").

Everson.'" *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).[4] Rather, they contemplated that there would be a healthy interaction between religion and government.[5]

Indeed, this Court has acknowledged that "[t]he metaphor of a 'wall' or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis," *Gillette v. United States*, 401 U.S. 437, 450 (1971), and that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," *Lynch*, 465 U.S. at 673. Even in *Lemon*, the Court observed that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. The experience under *Lemon*—a history that is marked by controversy and confusion—has demonstrated that the test is inherently flawed.

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[4] *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) ("As should be clear from the contrast between separation and the religious liberty guaranteed by the First Amendment, the constitutional authority for separation is without historical foundation."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 485 (1991) ("With little or no support from text, history, or tradition, the members of the *Everson* Court braided into the Religion Clause the notions that the establishment provision was meant to create a 'wall of separation' between religion and the government, that it was to be broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion.").

[5] *See, e.g.*, MASS. CONST. OF 1780, art. III (observing that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality" and that "these cannot be generally diffused through a Community, but by the institution of the publick worship of GOD, and of publick instructions in piety, religion, and morality").

II. The Establishment Clause was originally understood as a federalism provision.

The difficulties associated with the *Lemon* test may largely be avoided by returning to an interpretation of the Establishment Clause that is more consistent with its original meaning. "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring in judgment).[6] As such, the clause merely reiterates the fundamental division of power embodied in the original Constitution. The federal government was not delegated the authority to establish a national church. Nor was it given the authority to interfere with the state establishments.

A. The Establishment Clause prohibits federal interference with state establishment of religion.

The Establishment Clause provides that Congress shall pass no law "respecting an establishment of religion." U.S. CONST. amend. I. The term "respecting" was understood as being synonymous with the term "relating." *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773). To "establish" meant "[t]o settle in any

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[6] *See also Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (Establishment Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations"); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (Establishment Clause "was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments").

privilege or possession; to confirm." *Id.* A "privilege", in turn, was understood as a "[p]eculiar advantage," an "[i]mmunity", or a "publick right." *Id.*

Thus, the text suggests that the Establishment Clause was designed to prohibit Congress from passing any law that would uniquely privilege a single religion by establishing it at the national level. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Such uniformity would interfere with the religious liberty found in the several states, which took diverse approaches to religious worship and establishment of particular churches. The text, however, "does not purport to protect individual rights." *Id.* Rather, it is a structural provision that prohibits the federal government from undertaking certain prohibited actions. As such, it is not subject to incorporation against the states pursuant to Section One of the Fourteenth Amendment. Indeed, incorporation of the Establishment Clause would "lead[] to a peculiar outcome"—i.e., "[i]t would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion." *Id.* at 2331 (emphasis added).[7]

The history of the clause further confirms this construction. When the amendment was proposed and

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[7] *See also Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (incorporation of the clause would lead to the "irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy"); AMAR, *supra*, at 41 ("As a more pure federalism provision, then, the establishment clause seems considerably more difficult to incorporate against states."); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 95 (1987) (incorporation of the Establishment Clause is "logically impossible; it would be like trying to apply the Tenth Amendment to the states"); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 253 n.19 (1988) ("[T]o the extent that the framers of the first amendment sought to protect state establishments against national action, it is not entirely coherent to say that the amendment is now applicable to the states.").

ratified, several of the states maintained established churches. *Id.*; AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998). Nonetheless, the approaches to public measures regarding religion varied widely from state to state. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 11 (1994).[8] While some states had exclusive establishments, authorizing only a single established church, a few states provided for multiple established religions. *See, e.g.*, S.C. CONST. OF 1778, art. XXXVIII (providing a mechanism by which religious societies could become "established" and "enjoy equal Privileges"); VT. CONST. OF 1777, art. XLI ("all religious societies" shall be "encouraged and protected"). Other states, in contrast, prohibited the establishment of any church in preference to another. *See, e.g.*, N.J. CONST. OF 1776, art. XIX ("[T]here shall be no Establishment of any one Religious Church or denomination in this State in Preference to any other.").

From the outset, the Founders recognized that the federal government lacked authority to interfere with these state establishments, and in particular lacked the authority to establish a national church. The federal government was to be a government of limited and enumerated powers. The Framers emphasized that "[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined." THE FEDERALIST NO. 45, at 292 (Clinton Rossiter ed. 1961) (James Madison).

This general principle extended to matters of religion. James Madison observed in the Virginia ratification debates that "[t]here is not a shadow of right in the general

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[8] *See also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381 (2002) ("Modes of establishments in the colonies differed very widely, and the word 'establishment' was not used consistently.").

government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." 5 THE FOUNDERS' CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987). James Iredell similarly stated in defending the proposed Constitution that "[i]f any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Everyone would ask, 'Who authorized the government to pass such an act?'" 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 194 (Jonathan Elliot ed., 2d ed. 1881). Thus, even before the Establishment Clause was embodied in the text of the Constitution, there was a general recognition that the federal government lacked the power to interfere with the states' regulation of religion.

Despite these structural guarantees, there remained some concern that the federal government might usurp authority to act with respect to the establishment of religion. As James Madison observed in describing the proposed amendment, certain of the state conventions "seemed to entertain an opinion" that the Necessary and Proper Clause might enable Congress to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion." 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789). In order to reinforce this jurisdictional division between the states and the federal government and better secure religious liberty, when crafting the Bill of Rights the Framers sought to make this division of power express.

Congress went through several drafts in creating what ultimately became the Establishment Clause. James Madison initially proposed the following language: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 451. The House Committee of the Whole subsequently debated language that provided that "no religion shall be established

by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. Madison indicated that this provision meant 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." *Id.* at 758. According to Madison, "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* At the same time, however, some "thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments." *Id.* at 757 (remarks of Roger Sherman).

Thus, the debates demonstrate that Congress believed that the federal government lacked authority to establish a national church or interfere with the state establishments. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Nonetheless, in order to dispel any concerns, Congress sought to make this division of power express.

In doing so, the Framers made clear that the federal government would take no action that would restrict religious practices in any way. Accordingly, the Establishment Clause was coupled with a further admonition—that Congress was prohibited from passing any law that would impermissibly burden the "free exercise" of religion. U.S. CONST. amend. I. The First Amendment therefore guaranteed religious liberty more broadly—beyond merely prohibiting the establishment of a national church that might interfere with established churches in the several states.

Early commentary on the Constitution confirmed this understanding of the amendment. Justice Story in his *Commentaries on the Constitution* stated that under the Establishment Clause "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the

state constitutions." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833). The clause, according to Story, was merely designed to "prevent any national ecclesiastical establishment." *Id.* § 1871. Similarly, William Rawle, in his treatise on the Constitution, concluded that "[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

Recent historical scholarship has further confirmed the jurisdictional nature of the amendment. Thus, the clauses have been described as an "exercise in federalism," as making "explicit jurisdictional policies that were already implicit in the constitutional order," and as preventing federal "interfer[ence] with any state's religious establishment laws."[9] Such analyses have shown that even

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[9] *See, e.g.*, AMAR, *supra*, at 32 (Establishment Clause "prohibited the national legislature from interfering with, or trying to *dis*-establish, churches established by state and local governments"); BRADLEY, *supra*, at 95 (Establishment Clause intended to make clear "that the national government may neither effect an establishment nor interfere with states that do"); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-18 (1995) ("The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism."); David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (noting the "federalistic motivation for the establishment clause"); Donald L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 650 (1999) (Establishment Clause "merely made explicit the jurisdictional policies that were already implicit in the constitutional order"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41

Thomas Jefferson, whose references to "separation" of church and state form the basis for the Court's Establishment Clause jurisprudence, *see Everson*, 330 U.S. at 16, viewed the clause as a purely jurisdictional provision. *See* AMAR, *supra*, at 34 (observing that Jefferson "appears to have understood the states'-rights aspects of the original establishment clause"); DONALD L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 59-60 (2002) ("A careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national

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STAN. L. REV. 233, 307 (1989) (Establishment Clause was designed "to protect state religious establishments from national displacement"); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003) (Establishment Clause "prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion."); Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) ("[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment."); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (Establishment Clause "acts as a sort of 'federalism-based' guarantee that merely delineates the proper roles of the federal and state governments with respect to religious establishments"); William W. Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 910-11 (1987) (under the Establishment Clause, "Congress would have no power to interfere with any state's religious establishment laws, whatever they might be").

government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises.").[10]

In his Second Inaugural Address, for example, Jefferson made clear that, while the federal government lacked authority to pass measures pertaining to "religious exercises," the states remained free to do so:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.

Second Inaugural Address (March 4, 1805), 3 THE WRITINGS OF THOMAS JEFFERSON 378 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905). Similarly, in a letter to Samuel Miller, Jefferson maintained that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states, as far as it can be in any human authority." Letter from Thomas Jefferson to Rev.

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[10] The relevance of Jefferson's views is also questionable given that he was not involved with drafting the First Amendment: "Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting). *See also* DREISBACH, *supra*, at 98-99 (Jefferson's "influence on the actual text of the First Amendment was at most indirect").

Samuel Miller (Jan. 23, 1808), *in* 5 THE FOUNDERS' CONSTITUTION 98 (Philip B. Kurland & Ralph Lerner eds., 1987).

This is not to say that Congress has no authority in matters of religion. The First Amendment merely prohibits legislation respecting an "establishment" of religion. *See* U.S. CONST. amend. I. In fact, the Framers specifically rejected more sweeping language that would have prohibited Congress from passing any law "touching religion." *See* 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789).

In exercising its enumerated powers, Congress remained free to enact measures that had the incidental effect of aiding or promoting religion. Thus, for example, the same Congress that drafted the First Amendment took a variety of measures that aided or promoted religion, including enacting legislation providing for paid chaplains and proclaiming a day of thanksgiving and prayer. *Lynch*, 465 U.S. at 674, 675 n.2; *Wallace*, 472 U.S. at 100-01 (Rehnquist, J., dissenting) (citing 1 ANNALS OF CONG. 914 (1789)). Indeed, Justice Story concluded that "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (1833).[11]

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[11] *See also* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 160 (1964) ("A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval."); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 113 (1997) ("There was nothing either in the text of the provision . . . or in Madison's explanation of its meaning to suggest either that it forbade Congress to provide impartial support to religion in general or that it entitled those with religious scruples to exemptions from generally applicable laws."); Douglas Laycock, *"Nonpreferential"*

Nor does this mean that there are no constraints on state activity with respect to religion. Such activities would still be subject to the prohibitions found in the Free Exercise Clause as incorporated under the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).[12] To the extent a state engaged in activity that had the effect of impairing citizens' right to exercise their religious preferences, such actions would be constitutionally prohibited. *See Newdow*, 124 S. Ct. at 2332 (Thomas, J., concurring in judgment) (observing that "coercive state establishments" might be constitutionally prohibited); *Schempp*, 374 U.S. at 312 (Stewart, J., dissenting) ("That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized.").

B. Recognition of the jurisdictional nature of the Establishment Clause would be consistent with this Court's jurisprudence enforcing other aspects of the federal structure.

Recognition of the jurisdictional nature of the Establishment Clause would be consistent with the Court's jurisprudence in other areas in which it has given renewed emphasis to the structural guarantees embodied in the Constitution. *See, e.g., United States v. Morrison*, 529 U.S.

Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 909 (1986) ("[T]he establishment clause was debated on the assumption that the government may have some power to aid religion.").

[12] The Free Exercise Clause is properly subject to incorporation, unlike the Establishment Clause, because it acts not as a structural guarantee, but rather protects individual liberties. *See* AMAR, *supra*, at 254-56.

598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

It is "incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). While the states "surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)). This fundamental aspect of our constitutional system is "reflected throughout the Constitution's text." *Id.* at 919. In particular, residual state sovereignty is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Id. See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

Because the Constitution is "'an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.'" *New York*, 505 U.S. at 156 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)). Indeed, this has been "the Court's consistent understanding." *Id.*

This aspect of our constitutional structure represents a "'unique contribution of the Framers to political science and political theory.'" *Printz*, 521 U.S. at 921 n.11 (quoting *Lopez*, 514 U.S. at 575). The "separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921. "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181-82 (quoting *Ashcroft*, 501 U.S. at 458).

In implementing this division of authority, "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Areas of fundamentally local concern such as marriage, *Trammel v. United States*, 445 U.S. 40, 50 (1980), domestic relations, *id.*, and criminal law, *Lopez*, 514 U.S. at 561 n.3, were reserved to the states.

Religion—and in particular decisionmaking by local governmental bodies concerning the public display of symbols that have religious meaning—is just such a uniquely local matter. Indeed, "it is common knowledge that the Constitution's framers thought that religion was a matter for the states, not for the national government . . . ." SMITH, *supra*, at 119. *See also* AMAR, *supra*, at 34 (observing that the Establishment Clause "calls for the issue [of establishment] to be decided locally"). Under our Constitution, "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions." *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) (quoting STORY, *supra*, § 1878).

The same considerations that drove the Framers to reserve the power over matters of religion to the states apply today. There are dramatic cultural and religious differences both among and within the states. The Constitution's reservation of local control over matters touching upon religion wisely allows for a diversity of practices instead of imposing a judicially-enforced, uniform rule.

These structural principles, if not dispositive, should at a minimum inform the Court's Establishment Clause jurisprudence. Due regard should be given to the states' traditional role in matters of religion, particularly where, as here, the issue before the Court implicates local control over state or municipal property. *Cf. New York*, 505 U.S. at 161 (federal government may not "commandeer" or direct local authorities).

III. Even under the *Lemon* test, the Establishment Clause does not prohibit displays that have both religious and historical significance.

Even under the *Lemon* test—flawed as it is—the display of the Ten Commandments does not violate the Establishment Clause. This Court has emphasized that where public displays have both religious and historical significance, they do not constitute an "establishment" of religion. All that is required is that a display not be "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. That is the case here where the Ten Commandments have played an important role in the history of Western Civilization and the development of our legal system.

A. Displays of the Ten Commandments have both religious and historical significance.

The Court has consistently recognized that "religion has been closely identified with our history and government," *Schempp*, 374 U.S. at 212, that "[t]he history of man is inseparable from the history of religion," *Engel*, 370 U.S. at 434, and that "[i]nteraction between church and state is inevitable," *Agostini*, 521 U.S. at 233. 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*, 465 U.S. at 674. At bottom, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

In particular, the Court has upheld public practices that have both historical and religious significance. *See Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, for example, the Court eschewed rigid application of the three-part *Lemon* test and 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, which the Court concluded established "the practice of opening legislative sessions with prayer" as "part of the fabric of our society." *Id.* at 792.

So, too, the Ten Commandments are part of the "fabric of our society" in that they have played a significant historical role not only in the development of major religions and systems of secular morality, but also our legal system. *Cf. id.* at 783 (legislative prayer was a "tolerable acknowledgment of beliefs widely held among the people of this country"). As a direct result of their significant historical role in our society, the Commandments are posted on many public buildings, including this Court, the U.S. Capitol, various state capitols, and numerous federal courthouses. *See Aguillard*, 482 U.S. at 593-94 (observing that the Ten Commandments have not "played an exclusively religious role in the history of Western Civilization"); *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting) ("Undeniably, . . . the Commandments have secular significance . . . because they have made a substantial contribution to our secular legal codes.").

Even in *Stone* where the Court strictly applied the three-part *Lemon* formula and held that a specific Ten Commandments display in a public school violated the Establishment Clause, it further observed that such a display would have been appropriate if it had been "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citing *Schempp*, 374 U.S. at 225). The Court concluded that the particular Ten Commandments display was unconstitutional only because it "had no secular legislative purpose." *Id.* at 41. Here, the situation is much different, given that the display was associated with the historical role the Ten Commandments played in the development of legal and moral principles that

have had a significant impact on Western Civilization. *See Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003) ("The Ten Commandments have both a religious and secular message."). Its placement within a National Historical Landmark containing a variety of monuments regarding the history of Texas and its government further underscore the historical nature of the display. *See id.* at 182.

Thus, Petitioner's contention that the display of the Ten Commandments has "no secular purpose" is incorrect. (*See* Pet. Br. at 23.) As the Court recognized in *Stone*, the Ten Commandments have both religious and secular meaning. 449 U.S. at 42. Nor is Petitioner's contention that the display of the Ten Commandments must be barred because it "impermissibly discriminat[es] among religions" correct. (*See* Pet. Br. at 18.) Petitioner's test would require that all religious displays be prohibited, for it is impossible for a single display to relate to *all* religions. Moreover, even if such a display could be devised, it would still fail Petitioner's test because it would "impermissibly discriminate" against those who do not believe in God or religion. Quite simply, Petitioner's test would result in a complete prohibition of government acknowledgement of religion—something that is *not* required, but rather is *prohibited*—under this Court's precedents. *See Lynch*, 465 U.S. at 674 (noting the "unbroken history of official acknowledgment" of religion by the government).

Indeed, since the Court issued its decision in *Stone* and its subsequent ruling in *Marsh*, it 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., Pinette*, 515 U.S. at 766 (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 Ten Commandments—part of the foundation of our legal system—would be inconsistent with

these prior rulings. Moreover, it would cleanse from the public square an important aspect of our nation's history.

B. The test under *Lemon* is an objective one.

The lower court properly applied the *Lemon* test. The test under *Lemon* is an objective one. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308 (test based on an "objective observer"); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (Court looks to "the 'objective' meaning of the [government's] statement in the community"). The constitutional analysis is based on the perceptions of a *reasonable* observer. *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring). *See also County of Allegheny*, 492 U.S. at 592.

The reasonable observer "is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in judgment) (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)). Consequently, the Court does not "ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.'" *Id.* at 780 (emphasis in original) (internal quotations omitted).[13] Rather, the standard is based on the

[13] While courts may ascertain whether a state's articulation of a secular purpose is a "sham", the "Court is normally deferential to a State's articulation of a secular purpose." *Aguillard*, 482 U.S. at 586-87. Moreover, this aspect of the Court's jurisprudence should not be construed as an invitation to engage in a wide-ranging inquiry into the subjective beliefs of state actors. Such an invitation is inconsistent with this Court's precedents and would only lead to additional confusion.

perceptions of an *objective* observer. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308.

The lower court properly applied these principles in upholding the Ten Commandments display. As the court observed, the reasonable observer test precludes judicial decisionmaking based on the perceptions of "the uninformed, the casual passerby, the heckler, or the reaction of a single individual." *Van Orden*, 351 F.3d at 178. Rather, the reasonable observer standard "attempts to capture the 'concern with the political community writ large.'" *Id.* (quoting *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in judgment)). Based on this standard, the court properly concluded that "a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of [a] reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed—replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment." *Id.* at 182. Indeed, the court observed that "[s]uch hostility toward religion is not only not required; it is proscribed." *Id.* at 178.

The disparate rulings in *Van Orden* and *McCreary* may largely be attributed to the degree with which the courts adhered to the objective test under *Lemon*. In contrast to the Fifth Circuit's analysis in *Van Orden*, the *McCreary* court rested its decision upon an extensive analysis of what it believed to be the subjective purposes of government officials. *See ACLU of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 457 (6th Cir. 2003). Such an approach is not supported by this Court's precedents. In determining whether the government intends to convey a message of endorsement or disapproval of religion, "a court has no license to psychoanalyze the legislators." *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring in the judgment).

Rather, courts must apply an *objective* analysis based on the perceptions of a *reasonable* observer.

At bottom, the subjective test implemented by the court in *McCreary* "not only misapplies the law, it also invites a new round of First Amendment challenges to religious texts and symbols that are nearly ubiquitous in non-schoolhouse public buildings throughout the nation." *ACLU of Kentucky v. McCreary County, Kentucky*, 361 F.3d 928, 933 (6th Cir. 2004) (Boggs, C.J., dissenting). When the constitutional test requires the courts to analyze the subjective, and often hidden, intentions of government actors it is sure to spur unwarranted and particularly divisive litigation. *See Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (observing that "Establishment Clause cases . . . stir deep feelings"). The courts and government actors require an objective test that provides them with clear guidance.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the states' legitimate authority to display the Ten Commandments and affirm the decision below.

Respectfully submitted,

PHYLLIS SCHLAFLY
EAGLE FORUM EDUCATION &
LEGAL DEFENSE FUND
7800 Bonhomme Avenue
St. Louis, MO 63105
(314) 721-1213

DOUGLAS G. SMITH
Counsel of *Record*
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

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