No.

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,

Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

PARTIES

The Petitioners consist of McCreary County, Kentucky, and Jimmie Greene as County Judge Executive of McCreary County, and Pulaski County, Kentucky, and Darrell Beshears, as County Judge Executive of Pulaski County.

The Respondents include the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 8

I.

THE SIXTH CIRCUIT'S OPINION CONFLICTS DIRECTLY WITH THE THIRD, FIFTH, TENTH AND ELEVENTH CIRCUITS AND THE COLORADO SUPREME COURT ON THE CONSTITUTIONALITY OF A DISPLAY OF THE TEN COMMANDMENTS. 8

II.

THE SIXTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ON THE DISPLAY OF RELIGIOUS SYMBOLS. . . 14

III.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE PAST HISTORY OF A CHALLENGED PRACTICE 19

IV.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH A PRIOR DECISION FROM THE SAME CIRCUIT AND WITH THE THIRD AND SEVENTH CIRCUITS ON THE LEGAL EFFECT OF A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL PURPOSE. 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page(s)**
Federal Cases

ACLU v. McCreary Cty.,
145 F. Supp. 2d 845 (E.D. Ky. 2001) 1

ACLU v. McCreary Cty.,
354 F.3d 438 (6th Cir. 2003) 1

ACLU v. McCreary Cty.,
361 F.3d 928 (6thy Cir. 2004) 1

ACLU v. McCreary Cty.,
96 F. Supp. 2d 679 (E.D. Ky. 2000) 1

ACLU v. Pulaski Cty.,
96 F. Supp. 2d 691 (E.D. Ky. 2000) 1

ACLU v. Ashbrook,
211 F. Supp.2d 873 (N.D. Ohio 2002) 12

ACLU v. Grayson Cty.,
2002 WL 1558688 (W.D. Ky. 2002) 12

ACLU v. Hamilton Cty.,
202 F. Supp.2d 757 (E.D. Tenn. 2002) 12

ACLU v. Mercer Cty.,
240 F. Supp.2d 623 (E.D. Ky. 2003) 12, 28

ACLU v. Plattsmouth,
358 F.3d 1020 (8th Cir. 2004) 12

ACLU v. Rutherford Cty.,
209 F. Supp.2d 799 (M.D. Tenn. 2002) 12, 28

ACLU v. Schundler,
168 F.3d 92 (3rd Cir. 1999) 25-27

Adland v. Russ,
307 F.3d 471 (6th Cir. 2002) 12, 25, 29, 30

Americans United for Separation of Church and State v. Grand Rapids,
980 F.2d 1538 (1992)(en banc) 16

Anderson v. Salt Lake City Corp.,
475 F.2d 29 (10th Cir. 1973) 7, 9, 10

Books v. City of Elkhart,
235 F.3d 292 (7th Cir. 2000) 12, 24, 29

Capitol Square Rev. and Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 16, 17

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 7, 14-16, 17, 18, 19, 27

Edwards v. Aguillard,
482 U.S. 578 (1987) 18, 19, 20, 22

Elk Grove Unified School Dist. v. Newdow,
Slip op. (June 14, 2004) 1, 2, 16

Freethought Society v. Chester Cty.,
334 F.3d 247 (3d Cir. 2003) 8, 9

Glassroth v. Moore,
335 F.3d 1282 (11th Cir. 2003) 13

Granzeier v. Middleton,
173 F.3d 568 (6th Cir. 1999) 15, 25, 29

Griswold v. Connecticut,
381 U.S. 479 (1965) 18

Harvey v. Cobb County,
811 F. Supp. 669 (N.D. Ga. 1993) 13

Indiana Civil Liberties Union, Inc. v. O'Bannon,
259 F.3d 766 (7th Cir. 2001) 12

Kimbley v. Lawrence County,
119 F. Supp.2d 856 (S.D. Ind. 2000) 13

King v. Richmond Cty.,
331 F.3d 1271 (11th Cir. 2003) 9, 11, 13

Lemon v. Kurtzman,
403 U.S. 602 (1971) 6, 9, 24

Lynch v. Donnelly,
465 U.S. 668 (1984) 7, 14-16, 18, 19, 24

McGowan v. Maryland,
366 U.S. 420 (1961) 18

Mercier v. City of La Crosse,
276 F. Supp. 2d 961 (W.D. Wis. 2003) 13

Metzl v. Leininger,
57 F.3d 618 (7th Cir. 1995) 25, 28, 29

Ring v. Grand Forks Public Sch. Dist. No. 1,
483 F. Supp. 272 (D.N.D. 1980) 13

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 19-22

Society of Separationists v. Pleasant Grove City,
Case No. 2:03-CV-839-J (D. Utah May 28, 2004) . . 10

Stone v. Graham,
449 U.S. 39 (1980) 18, 19

Suhre v. Haywood County,
55 F. Supp.2d 384 (W.D.N.C. 1999) 13

Summum v. City of Ogden,
297 F.3d 995 (10th Cir. 2002) 8, 10

Tilton v. Richardson,
403 U.S. 672 (1971) 24

Turner v. Habersham Cty.,
290 F. Supp. 2d 1362 (N.D. Ga. 2003) 13

Van Orden v. Perry,
351 F.3d 173 (5th Cir. 2003) 8, 9

Wallace v. Jaffree,
472 U.S. 38 (1985) 24

Wolman v. Walter,
433 U.S. 229 (1977) 24

State Cases

Colorado v. Freedom From Religion Foundation, Inc.,
898 P.2d 1013 (Col. 1995) 9, 11

STATUTES

28 U.S.C. §1254(1) 1

OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a - 95a) is reported at 354 F.3d 438. The opinion of the Court of Appeals denying rehearing en banc (App., 189a - 202a) is reported at 361 F.3d 928. The opinion of the District Court in the consolidated case of *ACLU v. McCreary County* (App., 96a - 114a) granting a supplemental preliminary injunction is reported at 145 F. Supp. 2d 845. The opinion of the District Court in *ACLU v. McCreary County* (App., 115a - 138a) granting a preliminary injunction is reported at 96 F. Supp. 2d 679. The opinion of the District Court in *ACLU v. Pulaski County* (App., 139a - 162a) granting a preliminary injunction is reported at 96 F. Supp. 2d 691.

JURISDICTION

The judgment of the Court of Appeals was filed on December 18, 2003. The Court of Appeals denied rehearing en banc on March 23, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

“[G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution.” *Elk Grove Unified Sch. Dist. v. Newdow*,

concurring slip op. at 5 (O'Connor, J., concurring). This case presents one of those circumstances. This is one of those cases where "some references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id*. at 3. The Defendants have attempted to display documents and symbols on the origin of American law and government. Inevitably, such a display will include religious references without violating the Constitution.

This case began as a challenge to displays containing the Ten Commandments brought by the American Civil Liberties Union of Kentucky and several Kentucky citizens ("Plaintiffs"). The Plaintiffs filed three separate complaints and motions for preliminary injunction on November 18, 1999, against McCreary and Pulaski Counties and the Harlan County School District.[1] The complaints originally challenged a display in McCreary and Pulaski Counties consisting of a single copy of the Ten Commandments. (App., 6a).

Shortly after the lawsuit was filed, and before a hearing on the motions, the Defendants amended the displays in an attempt to bring them within constitutional boundaries. (App., 7a) ("Second Display"). The Second Display consisted of the following:

(1) An excerpt from the Declaration of Independence.
(2) The Preamble to the Kentucky Constitution.
(3) The National Motto of the United States.

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[1]Harlan County has separately petitioned this Court for a Writ of Certiorari due to the constitutional and factual differences involved in that case.

(4) A page from the Congressional Record dated February 2, 1983, declaring 1983 to be the year of the Bible and containing a copy of the Ten Commandments.
(5) A proclamation by President Lincoln declaring a National Day of Prayer.
(6) A quote from President Lincoln that stated, "The Bible is the best gift God has ever given to man."
(7) A proclamation by President Reagan proclaiming 1983 the year of the Bible.
(8) The Mayflower Compact.

(App., 7a). Most of the documents were included in their entirety, but the excerpted portions of the Declaration of Independence and the quote from President Lincoln presented primarily the religious references in the documents. *Id*.

The Plaintiffs pursued their requests for a preliminary injunction despite the modifications to the displays, and the District Court held a hearing on April 20, 2000. On May 5, 2000, the District Court entered separate orders granting preliminary injunctions and ordering that the displays be removed immediately and that no similar displays be erected in the future. (App., 8a, 137a-138a, 161a-162a).

After the initial Preliminary Injunctions were entered, the Defendants hired new counsel and filed a Motion to clarify the District Court's Injunction so as to determine whether any of the documents could ever be re-posted in a constitutional

manner.[2] (App., 4a). The District Court denied the Motion to Clarify stating that "the injunction speaks for itself." *Id*.[3]

Defendants modified the displays again in an attempt to bring them within constitutional boundaries. ("Third Display"). The Third Display contained the following ten documents placed in eleven equal size frames:

(1) The full text of the Declaration of Independence (App., 190a-195a).
(2) The entire lyrics of the Star Spangled Banner (App. 185a-186a).
(3) The full text of the Mayflower Compact (App., 188a).
(4) The full text of the Bill of Rights (App., 196a-198a).
(5) The full text of the Magna Carta (App. 199a-212a) (contained in two equal frames).[4]
(6) The complete National Motto (App. 184a).
(7) The entire Preamble to the Kentucky Constitution (App. 184a).
(8) The full text of the Ten Commandments (App., 189a).

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[2]Defendants also filed a Notice of Appeal with the Sixth Circuit. This appeal was dismissed voluntarily after the Defendants modified the display again. (App., 4a).

[3]At a subsequent hearing, the District judge acknowledged that the order barring "no similar displays" was unclear. (Joint Appendix on appeal to Sixth Circuit at 220).

[4]The Magna Carta was displayed in two frames due to size.

(9) A picture of Lady Justice (App. 187a).

(10) An explanatory document entitled "The Foundations of Law and Government Display" explaining the significance of each of the documents in the display (App., 206a-210a).

(App., 9a-10a, 206a-212a). The explanatory document states that the "display contains documents that played a significant role in the foundation of our system of law and government." (App., 10a, 60a, 206a). Among other descriptions, the explanatory document describes the Declaration of Independence as "[p]erhaps the single most important document in American history." (App. 207a). The Magna Carta is described as, "By signing Magna Carta, King John brought himself and England's future rulers within the rule of law." (App. 208a). The document also describes the Ten Commandments by stating:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

(App. 207a).

None of the documents are set apart or have any greater prominence than any other document. (App., 60a, 178a, 179a). Each of the documents is placed in a frame that is exactly the same size. The Ten Commandments is only one of eleven equal sized frames. *Id.* Each of the County Courthouses also contains numerous other historical documents on display *in addition* to the Third Display. In McCreary County, there are 58 historical documents posted in the Judge's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. (Record on appeal to Sixth Circuit #5, Mem. in Support of Motion to Dismiss at 6). Likewise, the Pulaski County courthouse, as part of its 200th anniversary of the County, posted numerous historical documents in the Judge's office, in the waiting room, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. (Record on appeal to the Sixth Circuit #6, Mem. in Support of Motion to Dismiss at 6).

After the Third Display was erected, the Plaintiffs filed a Motion in the District Court seeking a supplemental preliminary injunction. The District Court issued a supplemental preliminary injunction and ordered that the Third Displays be removed immediately. (App., 113a-114a).

Defendants appealed and a divided panel of the Sixth Circuit affirmed in a fractured opinion. (App., 1a-95a). Two judges found the Third Display violated the purpose prong of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). (App., 16a-42a). The judge who wrote the opinion commented on the effects prong, but no one joined him. (App. 51a). One judge dissented and would have held that the Third Display was constitutional. (App., 52a-95a). The court held that the

Defendants must "present the Ten Commandments objectively and integrate them with a secular message." (App., 22a). The court also held that the constitutionality of the display must be judged by viewing the content of the display, the context of the display and the evolution of the displays. (App., 24a). In viewing the content of the display, the court held that the content of the displays did nothing to detract from the religious nature of the Ten Commandments because the historical documents did not demonstrate an "analytical or historical connection with the other documents." (App., 24a-34a). The court held the context of the display was religious because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). Finally, the court held that the evolution of the display demonstrated that the Defendants' actions had an "unconstitutional taint" because of the original display. (App., 41a). The court held the display lacked a secular purpose. (App., 42a). The dissent would have upheld the Third Display based on *Lynch* and *Allegheny*. (App., 52a-95a). The dissent took particular exception with the court's requirement that the Defendants establish an analytical and historical link between the Ten Commandments and the other documents on display, pointing out that neither *Lynch* nor *Allegheny County* require such a connection. (App., 76a-82a).

Defendants sought rehearing en banc, and in an opinion dated March 23, 2004, the Sixth Circuit denied the Petition for rehearing en banc with the judge who wrote the majority opinion concurring and two judges dissenting, in which they pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a). The dissent from the denial of rehearing found troubling the opinion's requirement of a historical and an analytical connection and

the opinion's treatment of the past history of the display as "tainting" the present display. (App., 172a-175a). The dissent wrote that no court has ever required an analytical or historical connection and that the history of the displays is entitled to "considerably less weight than the majority gives it." (App. 173a-174a). The dissent scoffed at the novel "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a).The dissent correctly pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a).

REASONS FOR GRANTING THE PETITION

I.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE THIRD, FIFTH, TENTH AND ELEVENTH CIRCUITS AND THE COLORADO SUPREME COURT.

The Sixth Circuit's opinion conflicts with the Third Circuit's decision in *Freethought Society v. Chester Cty.*, 334 F.3d 247 (3d Cir. 2003), the Fifth Circuit's decision in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), the Tenth Circuit's decisions in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), the Eleventh Circuit's decision in *King v. Richmond Cty.*, 331 F.3d 1271 (11th Cir. 2003) and the Colorado Supreme Court's decision in *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013

(Col. 1995).

The Third Circuit upheld a stand alone bronze Ten Commandments plaque that had been on a county courthouse since 1920. *Freethought Society*, 334 F.3d. at 250. "While the Ten Commandments are undeniably religious, the Supreme Court has held that the context of an otherwise religious display can render the message of the overall display as not endorsing religion." *Id*. at 263.The court stated that a reasonable observer aware of the history of the plaque would not perceive endorsement. *Id*. at 265. The court held that the county had a secular purpose of displaying the Ten Commandments as a key source of our laws. "Given the relatively low threshold required by the purpose prong of *Lemon* (the purpose of the display does not have to be exclusively secular and courts normally defer to the stated purpose of the display), it would appear that the Commissioners' articulations are sufficient to demonstrate a legitimate secular purpose." *Id*. at 267 (citation omitted). The Third Circuit conflicts with the Sixth Circuit regarding the purpose prong and the perception of a reasonable observer regarding the Ten Commandments.

In *Van Orden*,[5] the Fifth Circuit upheld a granite monument containing the Ten Commandments on the Texas State Capitol grounds. *Van Orden*, 351 F.3d at 173. The Ten Commandments monument was placed on the Capitol grounds in 1961 after the State accepted it as a gift from the Fraternal Order of Eagles. *Id*. at 176. The Capitol grounds contain sixteen other monuments regarding Texas history

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[5]The *Van Orden* case is currently pending before this Court on a Petition for Writ of Certiorari. *See* Case No. 03-1500.

spread throughout a large area. *Id*. The Fifth Circuit held that the monument was accepted by the State with the secular purpose of honoring the efforts of the Eagles to reduce juvenile delinquency. *Id*. at 178-79. The court rejected the argument that the State had a religious purpose because the Ten Commandments has a religious message. *Id*. at 179-80.

In contrast, the Sixth Circuit's opinion held that the Ten Commandments has a religious message and that the Defendants did nothing to "integrate the Ten Commandments with a discussion or display of a secular subject matter." (App., 33a). The Sixth Circuit, in conflict with the Fifth, required a demonstration of an "analytical connection" between the Ten Commandments and a secular subject matter.

The Sixth Circuit also conflicts with the Tenth Circuit's decisions in *Anderson* and *Summum*. In *Anderson*, the court upheld a stand alone Ten Commandments monument on city-county courthouse grounds. *See Anderson*, 475 F.2d at 30. The court found the monument had a secular purpose and effect even though one of the articulated purposes of the monument was "to inspire respect for the law of God...." *Id*. at 33. "[W]e cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects." *Id*. at 34. The Tenth Circuit recently affirmed *Anderson* in *Summum. See Summum*, 297 F.3d 995, 999-1000 (10th Cir. 2002) (upholding Ten Commandments); *see also Society of Separationists v. Pleasant Grove City*, Case No. 2:03-CV-839-J (D. Utah May 28, 2004) (upholding Ten Commandments in city park), *available at* http://www.utd.uscourts.gov/reports/ 00000034.pdf (last

visited June 17, 2004).

The Eleventh Circuit's decision in *King*, 331 F.3d at 1271, also conflicts with the Sixth Circuit. In *King*, the court upheld the Ten Commandments on a city seal. The Richmond County seal had been used since 1872 and contained an outline of the Ten Commandments, a sword and the name of the court. *Id*. at 1273. The court held the seal had a secular purpose because the Ten Commandments was a recognizable symbol of law and that the use of the seal to validate legal documents, the use of other symbols on the seal, the small size of the seal and the length of time the seal had been used did not send a message of endorsement. *Id*. at 1282-86.

In *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Col. 1995), the Colorado Supreme Court upheld a stand alone Ten Commandments in a state park. After finding that the Ten Commandments was one of the "smallest and least conspicuous" displays in the park and that "in the immediate vicinity" was a larger statue and a monument, the court held that the "content and the context of the monument negate[s] any suggestion that the government is endorsing religion." *Id*. at 1025.

If the Ten Commandments may be displayed as a symbol of secular law, then they may be displayed as *one* of the documents that has played a role in the founding of our system of law and government. If a stand-alone monument of the Ten Commandments has a secular purpose and does not endorse religion, then how much more does the Third Display have a secular purpose because the Ten Commandments are dwarfed by other secular historical documents.

The Third, Fifth, Tenth and Eleventh Circuits and the Colorado Supreme Court conflict not only with the Sixth Circuit, but also with the Sixth, Seventh and Eleventh Circuits as well as numerous District Court decisions.[6] Cases in the Sixth Circuit have reached conflicting results. *See Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (striking down Ten Commandments on Capitol grounds in a 2-1 decision); *ACLU v. Hamilton Cty.*, 202 F. Supp.2d 757 (E.D. Tenn. 2002) (striking down single copy of Ten Commandments in courtroom); *ACLU v. Grayson Cty.*, 2002 WL 1558688 (W.D. Ky. 2002) (striking down Ten Commandments with other historical documents); *ACLU v. Ashbrook*, 211 F. Supp.2d 873 (N.D. Ohio 2002) (striking down Ten Commandments in courtroom); *ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down Ten Commandments with other historical documents under purpose prong but upholding under effects prong); *ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding Ten Commandments with other historical documents).

Cases in the Seventh Circuit have held displays of the Ten Commandments unconstitutional. *See Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (striking down Ten Commandments monument in a 2-1 decision); *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001) (striking down Ten Commandments monument in a 2-1 decision); *Kimbley v. Lawrence County*, 119 F. Supp.2d 856 (S.D. Ind. 2000) (striking down Ten Commandments

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[6] The Eighth Circuit held in one case that a display of a Ten Commandments monument violated the Establishment Clause. *See ACLU v. Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) However, that case has been vacated pending rehearing en banc.

monument on courthouse lawn); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003) (striking down City's sale of property containing Ten Commandments to private group and finding unconstitutional).

Cases in the Eleventh Circuit have reached conflicting results. While *King* upheld a Ten Commandments display, other cases have struck them down. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (striking down Ten Commandments monument in Alabama Supreme Court building); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (striking down Ten Commandments in courthouse but allowing county to modify the display); *Turner v. Habersham Cty.*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003) (striking down Ten Commandments in county courthouse).

Other District Court cases have likewise reached divergent results. *See Ring v. Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980) (striking down statute requiring display of Ten Commandments in classrooms); *Suhre v. Haywood County*, 55 F. Supp.2d 384 (W.D.N.C. 1999) (upholding Ten Commandments displayed with other items in courtroom).

The Circuits are fractured over displays containing the Ten Commandments. Some of these decisions with opposing holdings contain exactly the same Ten Commandments displays (either stand alone or with historical documents). This Court should resolve the conflict and establish clarity to the Establishment Clause jurisprudence.

II.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE DISPLAY OF RELIGIOUS SYMBOLS.

The Sixth Circuit conflicts with this Court's precedent in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

This Court has stated that government may display a religious symbol in connection with other secular symbols and doing so avoids the appearance of endorsement of religion. *See Lynch* and *County of Allegheny*. In *Lynch*, this Court, in a fractured opinion, upheld the constitutionality of a nativity scene in a Christmas display that also contained such items as a Santa Claus house, a Christmas tree and a "Season's Greetings" banner. *Id*. at 671. This Court held that the inclusion of a nativity scene in the Christmas display did not send a message of endorsement of religion because, "The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions." *Id* at 692 (O'Connor, J., concurring).

In *County of Allegheny*, this Court upheld the display of a Menorah in a seasonal display, but struck down the display of a creche. The creche was held unconstitutional because it was by itself on the Grand Staircase of the county courthouse, but, "No figures of Santa Claus or other decorations appeared on the Grand Staircase." *Id*. at 580-81. In contrast, the

Menorah was displayed with a Christmas tree. *Id*. at 581. With regard to the creche, the Court stated that, "nothing in the context of the display detracts from the creche's religious message." *Id*. at 598. With regard to the Menorah, this Court held that the inclusion of a Christmas tree and a sign saluting liberty would not lead a reasonable observer to believe that the county was endorsing religion. *Id*. at 620.

In contrast to these cases, the Sixth Circuit held that the inclusion of the Ten Commandments with other secular symbols and documents had only a religious purpose, in part, because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). This decision conflicts with *Lynch* and *County of Allegheny*. The opinion turns Establishment Clause jurisprudence on its head and requires that the Defendants affirmatively establish an "analytical and historical link" between the documents on display. Neither *Lynch* nor *County of Allegheny* required the affirmative demonstration of a link. Indeed, if Frosty the Snowman and Santa Claus are analytically and historically linked to a nativity scene, then so are the Ten Commandments linked with the historical documents in this display. Requiring the Defendants to demonstrate an analytical and historical link (whatever that means) between the documents in the display completely side-steps the objective reasonable observer test and places a subjective, unreasonable observer (someone who must be convinced, instead of someone who merely objectively views the display) in its place.[7] As Justice

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[7]The Sixth Circuit majority decided the case on the purpose prong, yet the decision discusses a reasonable observer. In *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1542-45 (1992) (en banc), and *Granzeier*

O'Connor recently stated:

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any governmental action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.

Elk Grove Unified Sch. Dist. v. Newdow, concurring slip op. at 2-3 (June 14, 2004) (O'Connor, J., concurring). The reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J.,

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v. Middleton, 173 F.3d 568, 573 (6th Cir. 1999), the Sixth Circuit ruled that the reasonable observer is relevant only on the effects prong. From this Court's decisions it is not clear whether the reasonable observer is relevant to the purpose prong. *See Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (stating that the inquiry under the purpose prong is whether the government intends to send a message of endorsement); *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring) (applying endorsement test but not applying purpose prong).

concurring). In discussing the reasonable observer in the context of a display of a religious document or symbol, this Court has also stated:

> There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable. It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny*, "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." **Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.**

Pinette, 515 U.S. at 780 (emphasis added). The Sixth Circuit's opinion fell into the trap of assuming that the reasonable observer was either ignorant or bent on a mission to eradicate religious symbols. Instead, the reasonable observer is deemed aware of the history and ubiquity of the challenged practice.

Understanding the history and widespread use of the documents in the display focuses the objective observer on over three hundred years of history and use and prevents a

"heckler's veto" by an observer who is not reasonable and who simply is unaware of what this Court has stated numerous times: that the Ten Commandments have played a role in the founding of our system of law and government. *See Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable ... that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *Lynch*, 465 U.S. at 677-78 (describing the depiction of Moses with the Ten Commandments on the wall of the Supreme Court chamber and stating that such acknowledgments of religion demonstrate that "our history is pervaded by expressions of religious beliefs...."); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (acknowledging that the Ten Commandments did not play an exclusively religious role in the history of Western civilization).

The reasonable observer is aware of the impact of religion on our society and does not view the Ten Commandments and historical documents display on a clean slate, but is charged with knowledge of the role of religion in American law and government. This Court made clear in *Lynch* and *Allegheny* that the reasonable observer is an objective test and demonstrates someone who understands the history and ubiquity of a practice and does not need an "analytical

connection" explanation. The dissent noted in the Sixth Circuit opinion:

> Thus, neither *Lynch*, nor *Allegheny*, nor any other decision, and certainly not *Stone*, support the majority's rule that a government that wishes to use a religious symbol in a public display must integrate that symbol into a secular curriculum. As if the absence of authority were not enough, common sense militates against such a rule. Government monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose.

(App., 81a).

This Court has never mandated that a governmental display contain an "analytical link" between the documents on display. Instead, this Court's precedent requires that the display, when viewed by an informed reasonable observer, not convey a message of endorsement. The Sixth Circuit replaces the objective observer with a subjective, unreasonable observer.

III.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE PAST HISTORY OF A CHALLENGED PRACTICE.

The Sixth Circuit's opinion also conflicts with precedent

from this Court concerning the past history of a display of religious symbols. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) and *Edwards v. Aguillard*, 482 U.S. 578 (1987). The Sixth Circuit's opinion demands that, when viewing the purpose of a governmental action, the history of the display must be taken into account, and that any negative history forever taints future displays.(App., 22a). The Sixth Circuit's opinion actually conflicts with *Santa Fe* and *Edwards*.

In *Santa Fe*, the School District had a long-standing practice of a student giving a prayer over the loudspeaker before football games. *See Santa Fe*, 530 U.S. at 294. The District, during the course of litigation, adopted four separate policies. *Id*. at 296-98. The last Policy the District adopted was termed the "October Policy". *Id*. at 298. In reviewing the constitutionality of the October Policy, the Court reviewed the purpose in light of the "text and history" of the October Policy. *Id*. at 308. The Court stated, "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Id*. In conducting the inquiry into whether the enunciated purpose of the October Policy was insincere or a sham, the Court stated:

> According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's

> *approval of only one specific kind of message*, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that *only one student is permitted to give a content-limited message* suggests that this policy does little to "foste[r] free expression."

Id. at 309 (citations omitted) (emphasis added).

The *Santa Fe* Court held that the October Policy's enunciated secular purpose was insincere or a sham because the enunciated secular purpose and what, in actuality, was occurring at the football games did not "match up." The District's Policy of allowing one student access to the microphone for the sole purpose of giving an invocation, the content of which was severely limited by the Policy did not "match up" with the District's assertion that it was promoting student free speech. This Court, when viewing the inconsistency between enunciated purpose and actual conduct, stated, "The District further asks us to accept what is obviously untrue: that these messages are necessary to 'solemnize' a football game and that this single-student, year-long position is essential to the protection of student speech." *Id*. at 315. Additionally, even though the school had adopted a new policy, it continued to operate under the old practice. The person selected under the old practice to give the invocation was the same person still giving the invocation under the new policy and the school did not conduct a new student election after the new policy was adopted. The articulated purpose was a sham because the school had not

changed its practice even though it adopted a new policy.[8]

The *Santa Fe* case is similar to *Edwards* where this Court was asked to decide the constitutionality of a Louisiana statute that forbade the teaching of evolution in public schools unless creationism was also taught. 482 U.S. at 581. The Court viewed the articulated secular purpose of the statute and held it was insincere or a sham because the articulated purpose did not "match up" with the terms of the statute. The Court stated:

> True, the Act's stated purpose is to protect academic freedom.... Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Id. at 586. The Court held that because the articulated purpose did not "match up" with the actual practice, it was insincere.

This Court has never allowed the history and evolution of a policy to be a *primary* factor in determining the purpose behind the policy *except* in cases where the articulated secular purpose and the practice in actuality are not congruent. Such

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[8] As the dissent in the Sixth Circuit's case stated, "At most, *Santa Fe* held that a modified policy, or display, cannot be used as a shield to prevent litigation. However, *Santa Fe* does not state that a history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display." (App., 87a).

is not the case here where the articulated secular purpose is to display documents that played a significant role in the founding of our system of law and government, and where the Ten Commandments is only one of many displays.[9] This purpose, when viewed in light of the actual display is clearly not a sham or an insincere purpose. If the Defendants had articulated a purpose of displaying documents that played a role in the founding of our system of law and government, and then actually displayed a sermon from Billy Graham or the lyrics of a religious song authored in 2004, it would be clear that the articulated purpose and the actual conduct were not congruent leading to the ineluctable conclusion that the articulated purpose was a sham. However, the Defendants in this case accomplished their purpose. The articulated purpose and the actual conduct "match up."

The Sixth Circuit's opinion, in essence, establishes a *per se* rule that whenever government has violated the Constitution in the past, its present actions on the same issue are per se unconstitutional. The dissent termed this novel theory the "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a). Adopting the Sixth Circuit's "indelible, unconstitutional 'taint'" theory leads to absurd results. How long will a past action taint a government's efforts? What must be done to

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[9]Defendants dispute that they enunciated five different secular purposes throughout this litigation. Instead, the secular purpose has always been to display documents and symbols that had an impact in the development of our system of law and government.

remove the taint? Is a government's protestations of current constitutionality sufficient tor remove the taint? Indeed, the Sixth Circuit's "indelible, unconstitutional 'taint'" theory seems to be punitive in nature.

The dissent in the Sixth Circuit opinion stated that "the majority seems to envision a display that contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, perhaps a syllogism incorporating the foregoing, and, I suppose, at least as much evidence as was presented to this court in the official record of more than 200 pages." (App., 76a-77a). The dissent further observed that "in order to integrate the Ten Commandments into a secular curriculum in a manner that would satisfy the majority's new rule, the defendants would have to append to their displays a library of learned treatises and court briefs, or perhaps audio or video accompaniment, explaining beyond all reasonable doubt and in great detail what most Americans already know and the courts have expressly recognized: that 'the Ten Commandments no doubt has played a role in the secular development of our society.' Books [*v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000)]." (App., 81a-82a).

The conflict with the Sixth Circuit's opinion is clear when viewed in light of this Court's statements that the line between constitutional and unconstitutional conduct "is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985)(*citing Lemon*, 403 U.S. at 614; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch*, 465 U.S. at 673). This Court should accept this case to correct this

error.

IV.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH A PRIOR DECISION FROM THE SAME CIRCUIT AND WITH THE THIRD AND SEVENTH CIRCUITS ON THE EFFECT OF A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL PURPOSE.

The legal effect of a governmental entity's past alleged unconstitutional conduct is a question of extreme public importance. The Sixth Circuit's opinion conflicts with a prior decision of the same Circuit, the Third and the Seventh Circuits. The opinion holds that the Defendants' past conduct concerning the displays bears directly on the present purpose, and permanently taints any future displays. (App., 36a-42a). The opinion conflicts with the Third Circuit's decision in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU filed suit to declare a holiday display containing a creche unconstitutional. The original display contained a Menorah and a Christmas tree and had been displayed in front of the City Hall in Jersey City for many decades. *Id*. at 94-95. The District Court enjoined that display and "any substantially similar scene or display." *Id*. at 96. After the injunction, the City erected a modified display that included

a Christmas tree and a Menorah, but also included a creche, Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id*. The ACLU moved to hold the City in contempt and also sought a preliminary injunction against the modified display. *Id*. The District Court denied both motions. *Id*. The Third Circuit Court of Appeals came to the opposite conclusion of the Sixth Circuit in this case. The Plaintiffs argued that the inclusion of secular symbols was "a ploy designed to permit continued display of the religious symbols." *Id*. at 105. In response the Third Circuit stated:

> The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to one that would be permissible in other nearby cities, *counsel for the plaintiffs insisted that Jersey City's "prior history" would have to be taken into account, at least until the time came when it could be considered to be "purged" of the "prior constitutional taint*." Oral Arg. Tr. at 27.
>
> **We reject this argument**. The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (citations omitted) (emphasis added). The Third Circuit went on to explain:

> The plaintiffs' position is also contrary to the Supreme Court's treatment of the two displays at issue in *Allegheny County*. If the plaintiffs' view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

The Third Circuit has clearly rejected the approach taken by the Sixth Circuit in this case. One misstep in the Establishment Clause minefield should not spell disaster for future conduct. If a past mistake casts a looming shadow over the future, then when can the government move from under the shadow? Once the District Court in this case issued a preliminary injunction, the Defendants were faced with the question of how to remedy their conduct to bring themselves within constitutional boundaries. They could either completely remove the displays, or follow the approach taken by Jersey City in *Schundler* and modify the displays. Either option is a valid means of correcting a constitutional violation. Adopting the Sixth Circuit's rationale would lead to a host of unanswerable questions such as, how long is long enough before a new display may be erected, does there have to be an intervening change in the governing body before the

"taint" is "purged," or does the government have to seek approval from the Court before it may put up a new display. The Defendants must be allowed to correct a prior unconstitutional wrong. Otherwise, one governmental body could erect an identical display absent the prior history and have the display upheld. *See ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down identical display as here under the purpose prong but upholding under effects prong where the government had a prior resolution that was never acted upon calling for the display of the Ten Commandments);*ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding the identical display as here under both the purpose and effects prong where the courthouse had no prior history with the Ten Commandments display).

In *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit struck down a statewide Good Friday closing law because it was intended to advance a religious holiday. However, even though the Court had just struck down the Good Friday closing law on the grounds that it advanced a religious purpose, Judge Posner reasoned that the State of Illinois could continue with the Good Friday closing by adopting a secular rationale for the closing. Judge Posner stated, "And we have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts." *Id.* at 623-24. *Metzl* recognized what the Sixth Circuit did not – that a previous unconstitutional purpose does not forever "taint" a governmental action and that it is possible for government to correct an unconstitutional purpose. Similarly, in striking down a Ten Commandments display, the Seventh Circuit

allowed the display to be modified, noting the state of Indiana "retains the authority to make decisions regarding the placement of the monument." *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000).

In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), the Sixth Circuit was asked to decide whether closing governmental offices for Good Friday violated the Establishment Clause. *Id*. at 571. In 1996, shortly before the plaintiffs in that case filed their lawsuit, a governmental official had posted a sign that depicted a crucifix and stated that the offices were closed in observance of Good Friday. *Id*. The defendants in that case admitted that the signs were unconstitutional and promised to never post them again. *Id*. The plaintiffs, however, argued that the government's articulated purpose for closing the offices on Good Friday (that the weekend had turned into a spring weekend with little activity and many people on vacation) was a sham because of the posting of the sign with the crucifix in 1996. *Id*. at 574. The Sixth Circuit stated, in regards to plaintiffs' argument, "This argument implies that the sign posted for several days in 1996 irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id*. The Sixth Circuit rejected that argument, stating that it preferred Judge Posner's reasoning in the case of *Metzl*. *Granzeier* recognized that if Illinois could reinstate its law with a constitutional purpose, there was no reason why one past action that was arguably unconstitutional should forever taint future conduct to the point where the defendant could never act constitutionally. 173 F.3d at 574.

The Sixth Circuit held in *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) that a Ten Commandments monument was

unconstitutional but explicitly held that the State of Kentucky could correct its unconstitutional purpose by modifying the display. The Court stated, "[W]e do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular.... [W]e are nevertheless confident that... the Commonwealth can permissibly display the monument in question." *Id.* at 489-90.

Government must be allowed to correct its past unconstitutional actions and cannot be forever bound if it missteps in the Establishment Clause minefield. The Sixth Circuit's opinion conflicts with precedent from the Third and Seventh Circuits and the Sixth Circuit's own precedent. This Court should accept this case and resolve the conflicts.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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