No. 03-1693

IN THE

Supreme Court of the United States

McCreary County, Kentucky, et al.,
Petitioners,

v.

ACLU of Kentucky, et al.,
Respondents.

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

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

James A. Friedman *
James D. Peterson
LaFollette Godfrey & Kahn
One East Main Street, Suite 500
Madison, WI 53701-2719
(608)257-3911
*Counsel of Record

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on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the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display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Other Authorities

INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (the "FFRF") is a non-profit educational group whose two primary purposes are to promote the constitutional principle of separation of state and church and to educate the public on matters relating to nontheism.[1] The FFRF was incorporated in Wisconsin in 1978, and it now has more than 5,000 members, who generally describe themselves as "freethinkers," a label intended to include atheists, agnostics and rational skeptics of any pedigree. Those who identify themselves as secular or non-believers are a substantial and rapidly growing segment of the American population, constituting ten to fourteen percent of the adult population in 2001.[2]

The activities of the FFRF are described in the brief amicus curiae filed by the FFRF in the appeal of *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346

---

[1] The parties to this appeal have consented to the FFRF's filing of this brief amicus curiae. The Respondents' blanket consent to the filing of briefs amicus curiae is on file with the Court, and the Petitioners' written consent to the FFRF's filing is submitted with this Brief. Pursuant to Supreme Court Rule 37.6, the FFRF states that no counsel for any party authored this brief in whole or in part and that no party or entity other than the FFRF, its affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

[2] Barry A. Kosmin & Egon Mayer, *American Religious Identification Survey*, Key Findings, available at http://www.gc.cuny.edu/studies/key_findings.htm (last visited January 4, 2005).

(2004). Accordingly, that information will not be repeated in full here. The FFRF's activities include a variety of educational programs and, when necessary, litigation. More information about the FFRF, its programs, and its legal successes is available at its web site, www.ffrf.org.

The FFRF is particularly concerned with the display of the Ten Commandments on government property, which has the effect of casting non-believers as outsiders to the political community. That concern has motivated the FFRF to challenge a number of such displays, notably those in the form of the monuments donated by the Fraternal Order of Eagles in the 1950s and 1960s. *See, e.g., Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004), *rev'd* 2005 U.S. App. Lexis 9 (7th Cir. Jan. 3, 2005).

The FFRF's concern with the display of the Ten Commandments led it to file an amicus brief in the *Van Orden* appeal, which involves an Eagles Ten Commandments Monument. The FFRF's amicus brief suggests several principles concerning how the endorsement test proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984), should be applied to the display of the Ten Commandments. In this amicus brief, the FFRF would like to show how those principles apply to the "Foundations Display" at issue in the appeal of *American Civil Liberties Union v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004).

SUMMARY OF THE ARGUMENT

This Court should not overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but it should refine the *Lemon* test by expressly adopting the endorsement test articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring). The endorsement test properly protects the political standing of non-believers and other religious minorities, who cannot participate equally in the civic life of the nation if government is allowed to endorse specific religious precepts, such as those expressed in the Ten Commandments. In applying the endorsement test, a reviewing court should consider the governmental purpose in displaying religious material, because the speaker's intent is part of the meaning conveyed by any act of communication. The governmental purpose in displaying religious material is no more difficult to determine and evaluate than legislative intent, which routinely guides judicial statutory interpretation.

The FFRF's amicus brief in *Van Orden* suggests two principles concerning how the endorsement test should be applied to the display of the Ten Commandments—principles that are usefully applied to this case. First, certain governmental purposes, such as "commemoration," cannot be evaluated in the abstract apart from the object of commemoration. The commemoration of a predominately religious object is not a genuinely secular purpose. So it is with the purportedly secular "educational" purpose of the Foundations Display at issue in this case. The government's intent to "educate" citizens that the Ten Commandments provides the moral foundation of the Declaration of

Independence is not a genuinely secular purpose. Such "education" is tantamount to the government's declaration that ours is a Christian nation, which is an impermissible endorsement of religion.

Second, the display of a religious text, more than the display of religious imagery or symbols, inevitably tends to suggest endorsement. The Ten Commandments is an inherently religious and intensely sectarian text, and the context of the Foundations Display enhances, rather than diminishes, the message of government endorsement of religion. To any reasonable observer, the Foundation Display states that our nation is devoted to, and divinely guided by, the God of the Bible.

ARGUMENT

I. This Court should expressly adopt Justice O'Connor's endorsement test for evaluating the governmental display of religious texts and symbols.

For more than three decades, this Court's Establishment Clause jurisprudence has been guided by some version of the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although a majority of this Court has criticized *Lemon* at one time or another, another majority appears prepared to embrace Justice O'Connor's endorsement analysis, based on *Lemon*, which she articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), and which she has refined in several cases since, notably *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring). Under the endorsement test, the Establishment Clause of the First Amendment is violated by

> government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch, 465 U.S. at 688.

A. The endorsement test protects the political standing of non-believers and members of other religious minorities.

The endorsement test does not permit government hostility, or even mandate silence, on the subject of religion. *C.f., Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). But the endorsement test does require that the government not take sides, or even appear to take sides, on issues of religious faith. This neutrality is constitutionally required not because it protects the *feelings* of members of religious minorities, but because, as *Lynch* makes clear, it protects *their standing in the political community.* Religious beliefs are, as numerous amici have pointed out,[3] vitally important to a majority of Americans. It is precisely *because* of the intensity of religious feelings among so many people that government must remain scrupulously neutral in religious matters. A member of a religious minority simply cannot participate in the political process on an equal footing when the government itself appears to embrace the views of the religious majority.

The problem is particularly acute for non-believers. Earlier in our nation's history, our notion of religious

---

[3] *See, e.g.*, Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners (filed Dec. 8, 2004 in No. 03-1693); Brief of the American Legion as Amicus Curiae In Support of Petitioners (filed Dec. 8, 2004 in No. 03-1693).

diversity encompassed only diversity among Christian sects, and it would have seemed appropriate for our government to ignore Jews and other religious minorities in its acknowledgment of the religious beliefs and practices of our citizens. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). But today, even passive anti-Semitism on the part of government would be an outrage; even proponents of the governmental display of the Ten Commandments apparently accept the necessity of acknowledging the beliefs of Jews, who constitute approximately two percent of the American population.[4] But the Petitioners in this case would permit the government to disregard the convictions of non-believers, who now constitute between ten and fourteen percent of the United States population.[5]

Of course, non-believers risk more than being disregarded. Those who publicly criticize governmental involvement in religion are commonly subjected to abuse. This abuse is sometimes so severe that plaintiffs in Establishment Clause cases are allowed to proceed anonymously. *See, e.g., Doe v. Harlan County School Dist.*, 96 F. Supp. 2d 667, 670 (E.D. Ky. 2000) (permitting plaintiffs to proceed anonymously with challenge to display of Ten Commandments); *Doe v. Stegall*, 653 F.2d 180, 185 (5th

---

[4] The Harvard Pluralism Project: Statistics by Tradition, available at http://www.pluralism.org/resources/statistics/tradition.php (last visited Jan. 5, 2005); *see also* American Religious Identification Survey, *supra* note 2.

[5] American Religious Identification Survey, *supra* note 2.

Cir. 1981) (permitting plaintiffs to proceed anonymously with challenge to prayer and Bible reading exercises in public school); *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004) (affirming challenge by parents of school children and FFRF to Bible classes in public schools in which individual plaintiffs were allowed to proceed anonymously). FFRF personnel are themselves commonly subjected to intense harassment and physical threats as a result of their advocacy of the separation of church and state. As one federal court summed up the situation faced by the FFRF and the plaintiffs in a challenge to the display of the Ten Commandments:

> It would be a refreshing surprise if the [plaintiffs] were spared the vituperation customarily heaped upon plaintiffs in lawsuits of this sort. But that's not likely. Given what usually happens in these cases and given what has already been said, the defenders of the Ten Commandments likely will continue their verbal assault on the [plaintiffs] and the FFRF. Religious challenges are not for the faint of heart and the [plaintiffs] probably realized this before they decided to file their complaint.

Mercier v. City of La Crosse No. 02-C-0376-C (W.D. Wis. July 29, 2002) (order denying plaintiffs' motion to proceed anonymously). Such zealotry is not characteristic of the majority of Americans, but the pervasiveness of this abuse demonstrates the intensity of feeling that prevents the non-believer from participating equally in the political process.

The ultimate question in this appeal, as in *Van Orden*, is

whether government may declare ours to be a nation of God—or even a Christian nation—so long as no one is compelled to worship against their belief. But this is not a genuine religious freedom: we are not truly free to worship or not as we choose if we can exercise that freedom only by sacrificing our full participation in the political community. Only the endorsement test protects the rights of religious minorities to full participation in the political community.

B. The government's intended purpose is a proper consideration under the endorsement test.

The primary difference between the *Lemon* test and the endorsement test is the role of the government's purpose in the Establishment Clause analysis. Under the purpose prong of the *Lemon* test, a government act is unconstitutional unless it has a secular purpose. *Lemon*, 403 U.S. at 612. Under the endorsement test, the proper inquiry is "whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

Critics of the *Lemon* test contend that the inquiry under its first prong into governmental purpose is improper because it leads the reviewing court to "psychoanalyze" individual government officials, which focuses on irrelevant personal motives and produces inconsistent results. Brief for Petitioners at 36-39 (filed Dec. 8, 2004 in No. 03-1693) (citing *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting), and *Wallace v. Jaffree*, 472 U.S. at 108 (Rhenquist, J., dissenting)). The endorsement test is not concerned with

the private motives of government officials and it avoids this problem. Under the endorsement test, governmental intent is one factor that determines whether observers will view a display of religious material as an endorsement of religion.

The government's intent is a relevant consideration under the endorsement test because a speaker's intent is a significant component of the meaning of the message conveyed. *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring). The meaning we take from any act of communication, whether a conversation, a work of art, or a symbolic display, is determined in large measure by the inferences we draw about the speaker's intent. For example, the utterance "nice job" means one thing when it is said by someone who we believe intends a sincere compliment, but it means quite another thing when said by someone who we believe intends to criticize. To the extent that we know, or can infer from the circumstances, what was intended by an act of communication, that knowledge greatly influences the meaning of the communication. In fact, some contemporary linguists contend that inferences about the intent of the speaker are more important to the meaning conveyed to the recipient than the conventional content derived from word meanings and syntax. *See, e.g., Radical Pragmatics* (Peter Cole, ed., 1981); Dan Sperber and Dierdre Wilson, *Relevance: Communication and Cognition* (1986).

This concern for governmental intent does not mean that the endorsement test must focus on the "subjective motives" of government officials, as the Petitioners suggest. Brief for Petitioners at 7, 36-39. This Court has made clear that the

actual mental state of the individual legislator or government official is immaterial to the Constitutionality of the governmental act. *See, e.g., Wallace v. Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring). For example, a legislator may be subjectively motivated purely by religious conviction to vote for a public welfare program without posing any Establishment Clause problem. No reasonable observer would consider a public welfare program to communicate an endorsement of religion because some—or even all—of the legislators who voted for it were motivated by Christian charity.

The issue is not the subjective motives of the individual legislator or official; the issue is the government's intended purpose, which is demonstrated by the public acts and statements of the government itself. Thus conceived, the governmental purpose for a religious display is no more difficult to discern than the legislative intent behind a statute, and reviewing courts discern this legislative intent every day in the process of statutory interpretation. In so doing, a court does not "psychoanalyze" the individual legislator, the court discerns the purpose of legislation by analyzing the terms of the legislation itself, its context, statements of legislative purpose, and legislative history. The legislative intent is determined through a rational, objective process from the public statements and acts of the government. Discerning legislative intent is sometimes a difficult process, but the answer to the question "What was the legislature trying to do?" is nevertheless crucial to determining the meaning of a statute.

Under the endorsement test, reviewing courts must

conduct a similar analysis of the governmental purpose behind display of religious texts or symbols. The reasonable observer will be aware of that purpose as it is disclosed in the government's public acts and statements. To put it simply, the answer to the question "What was the government trying to do?" will bear heavily on whether a display of religious texts or symbols communicates the government's endorsement of religion.

Petitioners suggest that the governmental purpose underlying previous versions of the Foundations Display should be irrelevant to the analysis of the current versions of the display. Brief for Petitioners at 13-15. In other words, Petitioners contend that once a government alters a religious display, or articulates a new purpose for a religious display, that display should no longer be "tainted" by the government's previous illegitimate purposes. The Court must reject Petitioner's argument both because it is illogical, and because it invites abuse. Whether a previous purpose is relevant to a subsequent display will depend on the relationship between the original display and the new version. In many cases, the original purpose will endure, just as the meaning of an amended statute may be informed by the legislative intent behind the statute as originally enacted. If the altered display appears to advance the original purpose, that original purpose should still be considered under the endorsement test.

The alternative invites abuse, because it would allow a government to remove the "taint" of an improper religious purpose through the expedient of a minor alteration of the display accompanied by the articulation of a new, allegedly

secular, purpose. If the alteration of the display does not completely negate the endorsement of religion, the original purpose of the display remains a factor that a reviewing court should consider under the endorsement test, because it will, if known, influence the meaning of the display.

Petitioners ask the Court to abandon entirely the consideration of governmental purpose in its Establishment Clause jurisprudence. Because governmental purpose is highly relevant to whether a display of religious material communicates endorsement, the Court must not do so.

II. Under the endorsement test, the "Foundations Display" in the courthouses violates the Establishment Clause.

A. The Foundations Display does not have a genuinely secular purpose.

Certain governmental purposes, such as "commemoration," cannot be evaluated in the abstract because whether they are truly secular depends on the object being commemorated. In its amicus brief in *Van Orden*, the FFRF identified these as "transitive purposes," because they require an object to complete their meaning. A transitive purpose is not genuinely secular unless both its object and the means of accomplishing it are secular. The concept of the transitive purpose can be usefully applied to the purposes proffered by the Petitioners for the Foundations Display at issue in this appeal. None of those purposes is genuinely secular.

The first proffered purpose is "to erect a display

containing the Ten Commandments that is constitutional." *McCreary County*, 354 F.3d at 446. Although there is certainly nothing wrong with a government seeking to conform its conduct to the Constitution, this purpose is not genuinely secular. Applying the *Lemon* test, the Sixth Circuit properly rejected this purpose as question-begging, because it "fails to shed any light on [the Petitioners'] motivation for creating the displays." *Id.* at 447. But the Sixth Circuit's analysis can be refined under the endorsement test, where the Petitioner's private motives are not truly at issue. What matters under the endorsement test is that one who sees the Foundations Display and asks "what is the government trying to do?" would not infer that the government had a secular purpose in "trying to erect a display containing the Ten Commandments that is constitutional."

"Erecting a constitutional display of X" is a transitive purpose whose secularity cannot be evaluated apart from X itself. If X is religious, so is the stated purpose of displaying X. Imagine that the Petitioners had offered instead the purpose of "erecting a constitutional display of an inherently religious text," or even "declaring that McCreary County is a Christian county in a constitutional manner." Both of these purposes would be rejected as manifestly religious. The purpose of "erecting a display containing the Ten Commandments that is constitutional" is also transparently religious. To the extent that this purpose is offered as a public justification of the Foundations Display, the observer's awareness of that purpose contributes to the display's message of governmental endorsement.

The Petitioner's second purpose is "to demonstrate that

the Ten Commandments were part of the foundation of American Law and Government." *McCreary County*, 354 F.3d at 446. The remaining purposes are variations on this theme, expressing the government's purported intent to "educate" citizens about the role the Ten Commandments played as part of the "moral background" to the Declaration of Independence and our legal tradition.

"Education" is, like "commemoration," a transitive purpose. One cannot determine whether the purpose "to educate citizens about X" is secular apart from determining whether X is itself genuinely secular. Although it may be an appropriate government purpose to inform students about the diversity of religions and non-religious viewpoints, the government does not have a genuine secular purpose if it attempts "to educate citizens about the life of Christ and His path to salvation." As the Sixth Circuit properly recognized, the claim that the Ten Commandments is *the* foundation of the Declaration of Independence and our legal tradition is itself a manifestly religious precept. *Id.* at 454. "Educating" citizens to this manifestly religious conception of our civic history is not a genuinely secular purpose.

The manifestly religious notion that the Ten Commandments are the foundation of the Declaration of Independence is also demonstrably false. According to the website of the National Archives, which describes in great scholarly detail the background, content, and impact of the Charters of Freedom, the foundation of The Declaration of Independence is the predominately secular philosophy of the Enlightenment:

> Here, in exalted and unforgettable phrases, Jefferson expressed the convictions in the minds and hearts of the American people. The political philosophy of the Declaration was not new; its ideals of individual liberty had already been expressed by John Locke and the Continental philosophers.

The National Archives Experience, Charters of Freedom, Declaration of Independence, available at http://www.archives.gov/national_archives_experience/charters/declaration.html (last visited Jan. 6, 2005). Consistent with Locke's philosophy, the Declaration of Independence speaks of "Governments . . . instituted among Men, deriving their just powers from the consent of the governed," not a government ruled by divine authority. References by Jefferson, a non-Christian, to "Nature's God" and the "Creator" are not references to the God of the Bible. Only by the most convoluted logic can anyone contend that the Ten Commandments inspired Jefferson's call to revolution against the king of England.

The Sixth Circuit based its decision on a careful analysis of the specific assertions and historical material presented in the Foundations Display. *McCreary County*, 354 F.3d at 451-54. The Sixth Circuit concluded that it would be constitutionally permissible to integrate the Ten Commandments into an "objective historical display," but the government could not "go out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences." *Id.* at 453. Obviously, bad scholarship by the government is not a

constitutional violation in and of itself. But when a government purports to justify the display of religious material as "education," the content of that education is not beyond constitutional scrutiny. In *Stone v. Graham,* 449 U.S. 39 (1980), this Court acknowledged that the Ten Commandments can be presented by government as playing a role in our civic life, such as when it is "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42 (citing *Abington School Dist.*, 374 U.S. at 225). No reasonable person infers from the inclusion of religion in a properly objective school curriculum that the government intends to endorse religion. But when the purported "education" does not bear the hallmarks of scholarly integrity and objectivity, and instead distorts history to valorize a religious text, the intent to endorse religion is self-evident.

The dissent in *McCreary County,* 354 F.3d at 468 (Ryan, J., dissenting), and several amici[6] contend that the Foundations Display is justified as an acknowledgment of the substantial influence of religion on American history. But this misses the point: to commemorate or celebrate the influence of a specific highly religious text on our nation's history communicates the government's intent to endorse that religious text. In the early days of the Republic certain religious principles in the Ten Commandments were reflected in the laws of the states. But a contemporary

---

[6] See briefs cited in note 3, *supra.*

government cannot rummage through our nation's past, choosing to celebrate antiquated religious laws that would now be unconstitutional. Such celebration unmistakably demonstrates the government's intent to communicate its endorsement of religion.

B. The Foundations Display communicates the government's endorsement of religion.

The second question under the endorsement test is whether, regardless of intent, "a government practice [has] the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).[7] The Foundations Display plainly has the effect of communicating religious endorsement.

1. The text of the Ten Commandments is inherently religious and highly sectarian.

The text of the Ten Commandments is inherently religious, as this Court recognized in *Stone*, 449 U.S. at 41-42. Remarkably, the Petitioners and several amici contend that

---

[7] This articulation is a refinement of the second prong of the *Lemon* test, which asked whether the government practice had the principal or primary effect of advancing or inhibiting religion. *Lemon*, 403 U.S. at 612. As interpreted by Justice O'Connor in *Lynch*, the effect test does not require the invalidation of a government act that has the effect of advancing religious interests, so long as the act does not communicate the government's own endorsement of religion. 465 U.S. at 691-92.

the Ten Commandments are non-sectarian—or even essentially secular. Brief of Petitioners at 45. But the intensely sectarian nature of the Ten Commandments is carefully demonstrated in the Brief of Amici Curiae Anti-Defamation League, et al. (filed Dec. 13, 2004 in Nos. 03-1500 and 03-1693) and the Brief for the Hindu American Foundation, et al. (filed Dec. 13,2004 in No. 03-1500). These briefs make clear that the God of the Ten Commandments is not the non-sectarian Creator referred to in the Declaration of Independence, but only the Judeo-Christian God of the Bible, and arguably only the Christian God. Brief of Amici Curiae Anti-Defamation League, et al. at 22-26 (demonstrating that the displays at issue in *Van Orden* and in this case are either homogenized or specifically Christian versions of the Ten Commandments that are offensive to many Jews).

In attempting to secularize the Ten Commandments, Petitioners overlook a crucial distinction between the religious icons and symbols at issue in *Lynch* and *Allegheny* and the religious text of the Ten Commandments at issue in *Stone*. Religious icons and symbols are open to a broader range of interpretation than religious texts, which necessarily express specific religious precepts. As explained in the FFRF's amicus brief in *Van Orden*, the figure of Moses as part of an allegorical display can represent a traditional symbol of law-giving, *Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part), but the text of the Ten Commandments expressly states "I AM the LORD thy God; Thou shalt have no other gods before me." Outside of an objective scholarly context, the display of this text will inevitably suggest endorsement.

The Petitioners and certain amici suggest that the display of the text of the Ten Commandments has the same effect as the display of an image of Moses. For example, according to the Brief of Amici Curiae The States of Indiana, Alabama, et al. (Filed Dec. 8, 2004 in No. 03-1500), if this Court concludes that the Foundations Display is unconstitutional, then every governmental display or monument that contains religious symbols or images will be at risk. This is nonsense. The States of Indiana, Alabama, et al. have reduced the endorsement test to a simplistic absurdity in an effort to advocate a bright-line rule that permits the display of virtually *any* religious material. This Court, and reviewing courts throughout the nation, are capable of distinguishing between a display of an intensely sectarian text that plainly endorses religion, such as that in *Stone*, and a monumental sculpture that celebrates historical law-givers, such the one on the East Pediment of the Supreme Court building. Under the endorsement test, this Court can declare the Foundations Display of the Ten Commandments unconstitutional without placing the artwork of the Supreme Court building at any risk.

2. The Foundations Display does not negate the message of religious endorsement that attends the display of the text of the Ten Commandments.

The Petitioners contend that the Foundations Display, viewed as a whole, does not communicate a message of government endorsement of the Ten Commandments. Petitioners correctly state that under the effects prong of the

endorsement test, the display must be evaluated in context and from the viewpoint of the reasonable observer. Brief of Petitioners at 16-17 (citing *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring)). For the Petitioners, apparently, all that matters is that the Ten Commandments is only one document among eleven on display.

The Foundations Display does not provide a context that negates the message of governmental endorsement. On the contrary, that context amplifies the message of endorsement by asserting that our nation is founded on the specific religious precepts in the Ten Commandments. As the Seventh Circuit recognized in *Books v. City of Elkhart*, the association of secular symbols of civil government with the Ten Commandments enhances the message of endorsement. 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (Stevens, J., statement respecting denial of certiorari) (endorsing reasoning of Seventh Circuit opinion).

The Foundations Display does not merely suggest a link between the Ten Commandments and civil government by placing civic symbols near the Ten Commandments. The introductory document, entitled "The Foundations of American Law and Government Display," expressly asserts that "The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *McCreary County*, 354 F.3d at 443. There could hardly be a clearer message of governmental endorsement: the aptly named Foundations Display valorizes the Ten Commandments as the very foundation of the government itself. This goes well beyond a constitutionally permissible acknowledgement of the

religious sensibilities of the majority; it is a statement that ours is a Christian nation, devoted to, and divinely guided by, the God of the Bible. Others are free to worship or not as they choose, but only those who worship that God alone will see their religious convictions expressed on the walls of government buildings.

CONCLUSION

The FFRF requests that the Court expressly adopt the endorsement test, that it affirm the decision of the Sixth Circuit in the *McCreary County* case, and that it reverse the decision of the Fifth Circuit in the *Van Orden* case.

Respectfully submitted,

James A. Friedman*
James D. Peterson
LaFollette Godfrey & Kahn
One East Main Street, Suite 500
Madison, WI 53701-2719
(608) 257-3911
*Counsel of Record

Dated: January 7, 2004