No. 03-1693

In the Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the display in a county courthouse of nine historical documents and symbols that pertain to the development of American law violates the Establishment Clause because one of the documents is the Ten Commandments.

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INTEREST OF THE UNITED STATES

This case concerns whether the inclusion of the Ten Commandments in a governmental display of historical documents that influenced the development of American law violates the Establishment Clause. There are numerous displays of the Ten Commandments and similar religious symbols on federal property, including in federal courthouses, the United States Capitol, the National Archives, the Library of Congress, national monuments, and national park lands. The United States has participated as amicus curiae in prior cases addressing the constitutionality of governmental displays of religious symbols. See *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

STATEMENT

1. In 1999, petitioners posted framed copies of the Ten Commandments in the McCreary County and Pulaski County Courthouses. Pet. App. 6a.[1] After respondents filed

[1] Harlan County posted a series of displays that included the Ten Commandments in their public school classrooms, Pet. App. 6a-7a, but the constitutionality of those displays is not at issue here.

suit challenging the displays, petitioners put up new displays that consisted of a variety of historic and contemporary documents, some of which petitioners "displayed in their entirety," and others for which petitioners "include[d] only that document's reference to God or the Bible with little or no surrounding text." *Id.* at 8a (citation omitted). The district court issued a preliminary injunction requiring the immediate removal of the displays on the grounds that they lacked a secular purpose and had the effect of endorsing religion. The court further prohibited county officials from "erect[ing] or caus[ing] to be erected similar displays." *Id.* at 97a, 115a-138a, 139a-162a.

County officials then erected new displays in each courthouse that consisted of the complete text of the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Star Spangled Banner, the Preamble to the Kentucky Constitution, the Ten Commandments, and a picture of Lady Justice. Pet. App. 9a, 184a-212a. The documents were reproduced in nine, equally sized frames; none was given special prominence. *Id.* at 60a, 177a-178a. The documents were introduced by a plaque entitled "The Foundations of American Law and Government Display," which explains that the "display contains documents that played a significant role in the foundation of our system of law and government." *Id.* at 10a (citation omitted). With respect to the display of the Ten Commandments, that prefatory document explains:

> 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 Com-

> mandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Ibid. (citation omitted).

The district court ordered petitioners to remove the displays. Pet. App. 96a-114a. The court held that the Ten Commandments are "sacred text which has a religious purpose," and the "government must dilute this religious purpose if a truly secular purpose can be said to exist." *Id.* at 101a. The court then held that "educat[ing] the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government" and including the Ten Commandments "as part of the display for their significance in providing the 'moral background of the Declaration of Independence and the foundation of our legal tradition'" are not valid secular purposes, *id.* at 102a (citation omitted). In the court's view, the prior displays "imprinted the [petitioners'] purpose from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation." *Id.* at 105a.

The district court also held that the courthouse displays had the primary effect of advancing religion. "Given the religious nature of [the Ten Commandments]," the district court explained, observers will perceive the government as "promot[ing] that one religious code as being on a par with our nation's most cherished secular symbols and documents" and of "foundational value to our shared history as citizens." Pet. App. 108a-110a.

2. a. A divided court of appeals affirmed. Pet. App. 1a-95a. The majority ruled that petitioners' "predominate purpose" for the displays, *id.* at 18a, was invalid because of the "lack of a demonstrated analytical or historical connection" between the Ten Commandments and the other documents in the display, *id.* at 27a. The court considered evi-

dence that the Ten Commandments did, in fact, influence the development of American law to be irrelevant because "th[at] evidence does not appear in the actual display of the Ten Commandments." *Id.* at 29a. The court further reasoned that the history of the displays "strongly indicated that the primary purpose was religious." *Id.* at 42a.

With respect to whether the display had the effect of endorsing religion, no majority opinion issued for the court. See Pet. App. 51a (Judge Gibbons' concurrence limited to the purpose inquiry). Judge Clay expressed his view that "the displays convey a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the other patriotic documents and symbols." *Id.* at 46a. In his view, the Ten Commandments "stick[] out in the display like a proverbial 'sore thumb,'" such that "a 'reasonable person will think religion, not history.'" *Id.* at 47a (citation omitted).

b. Judge Ryan dissented. Pet. App. 52a-95a. He would have held that the secular purposes identified by petitioners are valid, because "[t]he influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars, jurists, legislators, presidents, and, not least, the Founders themselves." *Id.* at 64a. In his view, evidence of the Ten Commandments' historical influence need not be included in the display itself because "[g]overnment 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." *Id.* at 81a. Judge Ryan also rejected the majority's conclusion that a short "history of unconstitutional displays" could be "used as a sword to strike down an otherwise constitutional display." *Id.* at 87a. With respect to endorsement, Judge Ryan stressed that

> [t]he history and ubiquity of the Ten Commandments in public buildings throughout the country * * * confirm[s] the obvious: The inclusion of the Ten Commandments in these displays did nothing more than acknowledge the indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government.

Id. at 93a-94a.

3. The Sixth Circuit denied rehearing en banc, Pet. App. 163a-164a, with Chief Judge Boggs and Judge Batchelder dissenting. *Id.* at 171a-176a. Chief Judge Boggs objected to the panel's requirement of "'analytical or historical connection' between the religious item and other, secular items in the displays." *Id.* at 172a (citation omitted). The dissent also rejected the notion that the Counties' prior displays tainted the display at issue, reasoning that governments "should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law." *Id.* at 174a.

SUMMARY OF ARGUMENT

This Court has twice considered and twice upheld the inclusion of a religious symbol in a governmental display commemorating a variety of influences on the Nation's history and culture. Petitioners' inclusion of the Ten Commandments in a display that acknowledges multifarious influences on the development of American law should likewise be upheld. Justices of this Court, decisions of lower courts, and the writings of countless historians and academics have long recognized the significant influence that the Ten Commandments have had on the development of American law. Acknowledging that influence as part of a broader display memorializing historic contributions to American law

and government serves the valid secular purpose and secular effect of educating persons about the Nation's history and celebrating its heritage. Indeed, it is commonplace for courthouses and capitol buildings to include commemorative displays of legal, political, and cultural history, and that background tradition informs how displays like petitioners are reasonably perceived. Moreover, acknowledging that a document with religious significance also played an important role in the development of secular law in no way undermines or dilutes the religious significance of that document.

As this Court has repeatedly recognized, the political and legal history of the United States is infused with religious influences, and the Establishment Clause does not require government to ignore or minimize that reality. Governmental commemorations of history, heritage, and culture properly need not exclude references to religious influences. To hold, as the court of appeals did here, that any acknowledgment of religious history must be accompanied by elaborate disclaimers or explanations bespeaks a fundamental hostility to or suspicion of religion that has no place in Establishment Clause jurisprudence.

Finally, the court of appeals' conclusion that petitioners' prior displays and the litigation surrounding them indelibly tainted the current display is fundamentally flawed. First, the unconstitutionality of the initial display is not obvious and, in any event, the display at issue bears little resemblance to the aspects of the prior displays that troubled respondents. Second, governmental officials are presumed to adhere prospectively to their constitutional duties and, accordingly, courts should be reluctant to equate past conduct with a present invidious purpose to defy constitutional limits. The Establishment Clause inquiry should turn upon the objective purpose served by the display as a whole, not subjective motivation. While the always elusive hunt for subjective purposes does much to promote litigation, it does

little to promote Establishment Clause values in the context of passive displays in courthouses.

ARGUMENT

A COURTHOUSE DISPLAY OF THE TEN COMMANDMENTS AS ONE OF MULTIPLE INFLUENCES ON THE DEVELOPMENT OF AMERICAN LAW IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

A. Religious Faith Has Played A Defining Role In The History Of The United States

"[R]eligion has been closely identified with our history and government." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 212 (1963). In fact, the deep-seated faith of many of the Framers laid the philosophical groundwork for the unique governmental structure they adopted. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213.

The Nation's religious roots found expression as well in the system of laws adopted by the federal and state governments. In particular, it is "undeniable * * * that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World," including the United States. *Stone* v. *Graham*, 449 U.S. 39, 45 (1980) (per curiam) (Rehnquist, J., dissenting). Indeed, it is widely recognized as a matter of

> historical fact that the Ten Commandments has served over time as a basis for our national law. * * * [A]t least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and

> have formed a part of the moral background for the adoption of the national constitution.

State v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), cert. denied, 516 U.S. 1111 (1996).[2]

At the most basic level, the Ten Commandments underlay the common law prohibitions on murder, adultery, theft,

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[2] See *Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings* 61 (James M. Alden ed. 1850) ("The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes * * * of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation, which ever professed any code of laws."); *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from denial of a writ of certiorari) (the Ten Commandments "have made a substantial contribution to our secular legal codes"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part) (courthouse display recognizing Moses with the Ten Commandments as a foundational lawgiver does not violate the Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (rejecting the suggestion that "the Ten Commandments played an exclusively religious role in the history of Western Civilization"); *Griswold* v. *Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (noting the nexus between "most criminal laws" and the Ten Commandments); *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Van Orden* v. *Perry*, 351 F.3d 173, 181 (5th Cir. 2003) (noting the Ten Commandments' "extraordinary influence" on "the civil and criminal laws of this country," which "has been repeatedly acknowledged by the Supreme Court and detailed by scholars" and has had "influence upon ethics and the ideal of a just society"), cert. granted, 125 S. Ct. 346 (2004); *Freethought Soc'y* v. *Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (there is a "well documented history" that "the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity, including the prohibitions against murder and blasphemy"); *Books* v. *City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."), cert. denied, 532 U.S. 1058 (2001); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir.) (the Ten Commandments have "substantial secular attributes" and are a "foundation for law"), cert. denied, 414 U.S. 879 (1973).

blasphemy, and perjury, which American law carried forward.[3] The Sunday Closing Laws upheld by this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), likewise are directly traceable to the Fourth Commandment to keep the Sabbath day. *Id.* at 470-495; see *City Council* v. *Benjamin*, 33 S.C.L. 508, 523 (S.C. Ct. App. 1848); *Kountz* v. *Price*, 40 Miss. 341 (Miss. 1866). That same Commandment underlies the constitutional provision that excepts Sundays from the ten-day period for exercise of the presidential veto. U.S. Const. Art. I, § 7, Art. VII.[4]

At a more general level, the Ten Commandments reflect the historical reality that many early efforts at regulating human conduct had religious origins. In fact, in 1997, the House and Senate passed concurrent resolutions acknowledging that (i) "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization," (ii) "the Ten Command-

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[3] See, *e.g.*, 1 William Blackstone, *Commentaries on the Laws of England: of the Rights of Persons* 54 (1765) (Univ. of Chi. Press 1979) (with respect to *malum in se* crimes like murder, theft, and perjury, the legislature "acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts"); 6 *The Works of John Adams, Second President of the United States* 9 (Little & Brown eds., 1851) ("If 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.").

[4] See W. Walsh, *History of Anglo-American Law* 85 (1932) (W. Gaunts & Sons, 2d ed. 1993) (the 1641 Massachusetts "Body of Liberties" made the Ten Commandments "the basis of the criminal law"); Amicus Nat'l Legal Found. Br. 3-23, *ACLU* v. *McCreary County*, No. 01-5935 (6th Cir.) (chronicling the influence of each Commandment on colonial law governing blasphemy, profanity, idolatry, Sunday closings, murder, adultery, theft, perjury, defamation, and election fraud); *Hollywood Motion Picture Equip. Co.* v. *Furer*, 105 P.2d 299, 301 (Cal. 1940) ("'Thou shalt not steal' applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel.") (citation omitted); *Watts* v. *Gerking*, 228 P. 135, 141 (Or. 1924) ("'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by statute as a felony.") (citation omitted).

ments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society," and (iii) "the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society." S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997).[5]

B. Official Acknowledgment And Recognition Of The Ten Commandments' Influence On American Legal History Comport With The Establishment Clause

1. *Official acknowledgments of religion's role in the Nation's history are commonplace*

There "is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984), and "references to the Almighty [have] run through our laws, our public rituals, [and] our ceremonies" since the founding of the Country. *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).[6] The First Congress—the same Congress that drafted the Establishment Clause—adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See *Marsh* v. *Chambers*, 463 U.S. 783, 787 (1983). That Congress, the day after the Establishment Clause was proposed, also urged President Washing-

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[5] See generally D. Davis, *Religion and the Continental Congress, 1774-1789* (2000); Joseph Story, *Value and Importance of Legal Study* (Aug. 25, 1829), *reprinted in* W. Story, *The Miscellaneous Writings of Joseph Story* 533-535 (1852) (connecting natural law and a person's "duties to God," which sit "at the foundation of all other laws").

[6] See *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2317 (2004) (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954)); *id.* at 2320 ("From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.").

ton "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.'" *Lynch*, 465 U.S. at 675 n.2 (citation omitted). Since the time of Chief Justice Marshall, this Court has opened its sessions with "God save the United States and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). In 1865, Congress authorized the inscription of "In God we trust" on United States coins. Act of March 3, 1865, ch. 100, § 5, 13 Stat. 518. In 1956, Congress made "In God we trust" the National Motto, see 36 U.S.C. 302, and directed that it be inscribed on all currency, 31 U.S.C. 5112(d)(1).

Because of the Decalogue's influential role in the development of American law, reproductions and representations of the Ten Commandments have been commonly employed across the Country to symbolize both the rule of law itself, as well as the role of religion in the development of American law. Moses with the Ten Commandments appears, alongside other historic lawgivers, in a frieze within the chamber of this Court, as well as on the east facade of the Supreme Court building. A statue with Moses holding the Ten Commandments appears in the rotunda of the Library of Congress, while the main reading room includes a painting of a woman raising her hands in prayer, with the Ten Commandments by her side. The National Archives has embossed on the marble floor of the main display room a bronze seal that includes a depiction of the Ten Commandments. Similar displays of the Commandments appear at the Ronald Reagan International Trade Building in Washington, D.C., as well as other federal buildings and courthouses across the Country. An informal and non-exhaustive survey reveals that displays of the Ten Commandments appear in courthouses, capitols, and other public buildings across the Country. See App., *infra*; see also Pet. App. 175a; Pet. 8-13 (discussing numerous lower court cases addressing displays

of the Ten Commandments by state and local governments). Indeed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment). And "[e]radicating such references would sever ties to a history that sustains this Nation even today." *Ibid.*

2. *The Establishment Clause permits official acknowledgment of the Ten Commandments' contribution to the Nation's legal heritage*

a. *Similar displays that acknowledge religious influences have been upheld*

This Court has twice considered and twice sustained governmental displays that integrate overtly religious symbols and secular symbols of the Nation's heritage and culture. In *Lynch* v. *Donnelly*, *supra*, the Court held that the Establishment Clause permits a city to include a nativity scene as part of a display that comprised "many of the figures and decorations associated with Christmas," 465 U.S. at 671, including a Santa Claus house, a Christmas tree, cutout figures of a clown, elephant and teddy bear, and a talking wishing well, *id.* at 671, 685 n.12; *id.* at 695 n.1 (Brennan, J., dissenting). Erecting the display to "depict the historical origins of [a] traditional event long recognized as a National Holiday," the Court concluded, serves a valid, secular goal. *Id.* at 680. In so holding, the Court refused to "focus[] almost exclusively on the creche," considering it sufficient that the display as a whole "principally take[s] note of a significant historical religious event long celebrated in the Western World." *Ibid.*

The Court further held that inclusion of the creche in the display did not have the effect of advancing religion because any benefit to "one faith or religion or to all religions[] is indirect, remote and incidental," and "display of the crèche is no more an advancement or endorsement of religion than the

Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683. The court stressed that the creche is a "passive symbol," indistinguishable from "a host of other forms of taking official note of * * * our religious heritage," *id.* at 686, that do not violate the Establishment Clause, *id.* at 685-686. While such a display "advances religion in a sense," the Court explained that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683. To hold otherwise and to forbid passive "acknowledgment of the religious heritage" of the Nation "would be a stilted overreaction contrary to our history and to our holdings." *Id.* at 686.

Likewise, in *County of Allegheny*, *supra*, the Court sustained the inclusion of a Menorah as part of a holiday display that included a Christmas tree and a sign saluting liberty. 492 U.S. at 614. A plurality held that, considered as a whole, the display did not amount to an "endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619. Justice O'Connor concurred, explaining that "[a]lthough the religious and indeed sectarian significance of the menorah is not neutralized," the "particular physical setting" in which the menorah appeared "changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 635 (internal quotation marks and citations omitted). Justice Kennedy, along with the Chief Justice, Justice White, and Justice Scalia, also concluded that the display was constitutional, because "the city and county sought to do no more than celebrate the season * * * and to acknowledge * * * the historical background and the religious, as well as secular, nature of

the Chanukah and Christmas holidays." *Id.* at 663 (internal quotation marks omitted).

Moreover, in *Stone*, *supra*, the Court recognized that the Ten Commandments may constitutionally be employed, even in the school context, when "integrated into the * * * curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. In *Stone*, the Court held unconstitutional a state statute that required the posting of the Ten Commandments by themselves on the wall of public school classrooms. But, as the Court later explained, *Stone* "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987); see *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (although the posting of the Ten Commandments in *Stone* "plainly had some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system," the state law there was unconstitutional because those secular purposes were "dominated by religious purposes") (citations omitted); *City of Elkhart* v. *Books*, 532 U.S. 1058 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) ("[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application.").

b. *Petitioners' display serves a legitimate secular purpose*

For the same reasons this Court upheld the display of a creche in *Lynch* and a menorah in *County of Allegheny*, petitioners' integrated display of the Ten Commandments is consistent with the Establishment Clause. As in those cases, petitioners' recognition of religious influences on legal history serves a valid secular purpose and does not have the

effect of advancing or inhibiting religion. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 222-223 (1997).

Governmental action runs afoul of the Establishment Clause's purpose inquiry only if it is "entirely motivated by a purpose to advance religion." *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985); see *Lynch*, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). No such showing was made here. Petitioners' display of nine separate historical documents and symbols that have played a role in the development of American law and government—the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Bill of Rights, the Preamble to the Kentucky Constitution, the National Motto, Lady Justice, the Star Spangled Banner, and the Ten Commandments—serves the valid secular purpose of memorializing and educating the public about the roots of the Nation's legal system. Both the district court (Pet. App. 101a-102a) and the court of appeals (*id.* at 17a-18a) found that petitioner designed its display, *inter alia*, "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." That, in fact, is precisely how the explanatory plaque that accompanies the display describes its purpose, labeling the collection "The Foundations of American Law and Government Display." *Id.* at 10a. The prefatory plaque further explains that the Ten Commandments are included because they "have profoundly influenced the formation of Western legal thought and the formation of our country" and they provide "the moral background of the Declaration of Independence and the foundation of our legal tradition." *Ibid.* (citation omitted).[7]

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[7] Petitioners' purposes also included a desire "to erect a display containing the Ten Commandments that is constitutional," "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government," and to acknowledge the Ten Commandments'

Memorializing the confluence of secular and religious influences that gave birth to the American legal system is a valid secular purpose. *Lynch* made clear that the Establishment Clause does not proscribe the government from "taking official note of * * * our religious heritage," 465 U.S. at 686, or depicting with a religious symbol "the historical origins" of attributes of the Nation's character, *id.* at 680. Such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," *id.* at 686, is consistent with the Establishment Clause because it simply takes note of the historical *facts* that "religion permeates our history," *Edwards* v. *Aguillard*, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and that religious faith played a singularly influential role in the settlement of this Nation, in the founding of its government, and particularly in the development of its laws. "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

While the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970), the Clause was never intended to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," *County of Allegheny*,

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significance in providing "the moral background for the Declaration of Independence and the foundation of our legal tradition." Pet. App. 17a (citation omitted). The court of appeals properly ruled (*id.* at 18a-21a) that the latter two purposes were facially constitutional because "*Stone* established no per se rule that displaying the Ten Commandments in an educational setting is unconstitutional" (*id.* at 20a). And the court correctly characterized the first purpose as a desire "simply to comport governmental conduct * * * with the law." *Id.* at 19a.

492 U.S. at 623 (O'Connor, J., concurring), or to compel official disregard of or stilted indifference to the Nation's religious heritage in passive governmental displays pertaining to American history and culture. "[T]o do so would exhibit not neutrality but hostility to religion." *Ibid.*

Indeed, this Court itself has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch*, 465 U.S. at 675; *Marsh*, 463 U.S. at 792; *Walz*, 397 U.S. at 672; *Schempp*, 374 U.S. at 213; *Zorach*, 343 U.S. at 313. The Establishment Clause does not deny petitioners the equivalent capacity to acknowledge officially the pivotal role that religion has played in developing the Nation's laws and governmental institutions.

The court of appeals nevertheless ruled that petitioners' "actual purposes were religious." Pet. App. 23a. That conclusion rests on four flawed premises.

First, by "focusing" its purpose inquiry "almost exclusively on the" Ten Commandments the court of appeals "plainly erred." *Lynch*, 465 U.S. at 680. The court repeatedly found fault, not with the display as a whole, but with petitioners' perceived rationale for including the Ten Commandments in the display. Pet. App. 27a, 32a-33a. But a "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. The relevant consideration is whether the display *as a whole* serves a valid secular purpose. *Ibid.* (holiday display as a whole "principally [took] note of a significant historical religious event long celebrated in the Western World"); *id.* at 691 (O'Connor, J., concurring) (district court erred in attempting to "ascertain the city's purpose in displaying the creche separate and apart from the general purpose in setting up the display").

Likewise, in *County of Allegheny*, the Court analyzed the "combined display of the tree, the sign, and the menorah," rather than focusing on the presence of the Menorah or the specific reasons for its inclusion. 492 U.S. at 616. Moreover, the Court stressed that the inclusion in the display of an "explanatory plaque," like the one posted by petitioners here (Pet. App. 9a-10a), confirmed that the display served "not [as] an endorsement of religious faith but simply a recognition of cultural diversity." 492 U.S. at 619; see *id.* at 625 (O'Connor, J., concurring) (religious symbol "had to be viewed in light of the total display of which it was a part"); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 656-657 (2002).

Indeed, the court of appeals' isolated scrutiny of petitioners' purpose for displaying the Ten Commandments erroneously imports a "least religious means" test into the Establishment Clause, a proposition this Court soundly rejected in *Lynch*. See 465 U.S. at 681 n.7 (summarily dismissing the argument that "the city's objectives could have been achieved without including the creche in the display") (citation omitted); see also *County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring) (existence of "a more secular alternative symbol" is "irrelevant" and "too blunt an instrument for Establishment Clause analysis") (citation omitted).[8]

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[8] For the same reasons, the court of appeals' objection (Pet. App. 32a, 34a) that petitioners' display omitted "other influences" on the law is misplaced. The Establishment Clause imposes no such all-or-nothing mandate. The County of Allegheny could have chosen from a host of symbols, other than the menorah, that would have served equally well to commemorate liberty or the holiday season. It certainly did not exhaust the universe of potentially relevant non-religious symbols. Nevertheless, the fact that the County chose the menorah did not suggest to this Court that the County was "utterly ignoring (and implicitly denying) all other influences," *id.* at 32a, on the season. The question under the Establishment Clause is not whether other symbols might have been chosen or could be added to the display. Rather, the controlling question is whether the display as a whole serves a secular purpose. A display memorializing

Second, the court's insistence that the display itself must detail the "analytical or historical connection" between the religious symbol and other components of the display (Pet. App. 27a) and include "evidence" of the Ten Commandments' historical influence (*id.* at 29a) lacks any foundation in law or logic. No such exegesis was required in *Lynch* or *County of Allegheny*. In *Lynch*, the connection between a talking wishing well, clown cut-outs, and a creche was not explained, beyond the posting of a sign reading "Seasons Greetings." 465 U.S. at 671, 685 n.12. In *County of Allegheny*, the only connection between the Christmas tree and the Menorah was a city sign advising passers-by that "the city of Pittsburgh salutes liberty." 492 U.S. at 582 (plurality opinion). And American currency lacks any explanation at all of the linkage between "In God We Trust" and the outline of Monticello or the profile of President Lincoln. Petitioners' lengthy discussion of the unifying purpose of its display—documentation of historic influences on the development of law, including an explanation of the Ten Commandments' role—far exceeds the level of explanation and integration offered in those cases and "confirm[s]" the secular purpose of the overall display that its visible content and "context already reveal[]." *Id.* at 619.

Furthermore, the court of appeals' approach, which treats the inclusion in a display of a religious symbol—and only the religious symbol—as so inherently suspect as to require some sort of curative instruction bespeaks a level of hostility to religion that is antithetical to the very purpose of the Establishment Clause. Simply "because it's religious" is an insufficient reason to subject acknowledgments of religious history in a broadly diverse display to special disabilities. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122

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some of the important influences on the development of American law does exactly that, even if it does not exhaustively document every possible religious or secular influence on the law.

(2001) (Scalia, J., concurring) (citation omitted). Government need not—indeed, may not—treat religion "as subversive of American ideals." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

Nor does the Sixth Circuit's insistence on elaborate exegesis make practical sense. Petitioners' collection of historic documents pertaining to the law was displayed in a courthouse. That is a site frequented by adults, who are capable of discerning a secular common theme from a display that contains multiple historical documents and that is prominently labeled "The Foundations of American Law and Government Display." Pet. App. 10a. Indeed, the courthouse setting lends itself to a focus on the Ten Commandments' character as a code of conduct, as opposed to its undeniable religious character. Cf. *King* v. *Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from the[] final six commandments."). In fact, as a matter of common practice, government buildings like courthouses and statehouses routinely display historic documents, art, and similar displays about the law, government, traditions, and culture of the citizenry.[9] Most persons thus are not surprised to find displays like petitioners' in government buildings and they perceive such displays as a civics analog to museum presentations.[10] In that context, acknowledging religious influences on history on equal terms with other influences demonstrates neutrality, not endorsement, and further curricular explanation or integration is not

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[9] The McCreary County courthouse contains 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. Pet. 6. The Pulaski County courthouse likewise posts numerous historical documents throughout the building. *Ibid.*

[10] See *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring); *id.* at 683 ("the exhibition of literally hundreds of religious paintings in governmentally supported museums" does not constitute the endorsement of religion); *County of Allegheny*, 492 U.S. at 595 (Blackmun & Stevens, JJ.) (same).

constitutionally required. Cf. *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'") (citation omitted). Courts have few tools to parse displays and determine whether those components of a secular display with religious, as well as secular, significance are given too much prominence. It would be akin to faulting a public museum's display of early European paintings for having too many religious subjects. Instead, when a display has an overall secular theme, courts should not treat religious references as so inherently abnormal or unnatural as to "stick[] out * * * like a proverbial sore thumb." Pet. App. 47a (citation omitted). Treating only those components of a secular display that have both religious and secular aspects as uniquely disfavored and treating facts about the Nation's and government's religious origins as uncomfortable past that must be ignored or at least minimized would stand the First Amendment on its head.[11]

Third, the court of appeals reasoned (Pet. App. 23a) that an illicit religious purpose must be at work because the court disagreed (at great length, see *id.* at 27a-32a) with petitioners' view that the Ten Commandments influenced the writing of the Declaration of Independence (*id.* at 29a). That misses the point. Whatever the precise nexus between the

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[11] For the same reason, Judges Clay's and Martin's fear (Pet. App. 169a) that upholding petitioners' display would open the door to a display consisting of "a crucifix or the Lord's Prayer, so long as surrounded by the Magna Carta, the Declaration of Independence, the Star Spangled Banner and, perhaps, excerpts from the Internal Revenue Code" is misplaced. The fact that a display is uncommonly silly or disunified does not render it an establishment of religion. Indeed, there is no sound basis for assuming that a reasonable observer would perceive such a display as a covert endorsement of the Lord's Prayer, rather than simply as a confusing melange of images. On the other hand, a pervasively religious display would not lose that character by the random insertion of a secular document or symbol.

Ten Commandments and the Declaration of Independence, the only relevant inquiry under the purpose prong of the Establishment Clause inquiry is whether the display was "entirely motivated by a purpose to advance religion." *Wallace*, 472 U.S. at 56; see *Lynch*, 465 U.S. at 680. Given that (i) petitioners entitled their display "The Foundations of American Law and Government Display"; (ii) petitioners explained to the public that the Ten Commandments were included in that display because they "have profoundly influenced the formation of Western legal thought and the formation of our country," and "provide the moral background of the Declaration of Independence and the foundation of our legal tradition," Pet. App. 10a; and (iii) numerous Justices of this Court, judges, academics, and historians have acknowledged the influence of the Ten Commandments on American law, see pp. 7-10, *supra*, the court's debate over the Ten Commandments' particularized impact on the Declaration of Independence does nothing to dispel petitioners' secular purpose for displaying the Ten Commandments here.[12]

Fourth, the court of appeals concluded that petitioners' predecessor displays and the attendant litigation "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint" (Pet. App. 41a), and "strongly indicated that the primary purpose was religious" (*id.* at 42a). That rationale is mistaken on multiple levels.

As an initial matter, the predicate assumption that petitioners' first courthouse display of the Ten Commandments

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[12] Having said that, there is substantial force to petitioners' assertion that the Ten Commandments influenced the Declaration of Independence. As the Court has recognized, "[t]he fact that the Founding Fathers believed devotedly that there was a God"—the First Commandment—"and that the unalienable rights of man"—the rights to life, liberty, property, and the pursuit of happiness reflected in the Sixth, Seventh, Eighth, Ninth, and Tenth Commandments—"were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213.

was so clearly unconstitutional as to reflect an impermissible and indelible religious motivation is wrong. While a closely divided, per curiam opinion of this Court previously had struck down a display of the Ten Commandments in public school classrooms, *Stone* v. *Graham*, *supra*, that holding does not necessarily extend to courthouses because the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools." *Edwards*, 482 U.S. at 583-584; compare *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992) (prayer at secondary school graduation unconstitutional), with *Marsh*, *supra* (upholding prayer in state legislatures). Thus the constitutionality of a display of the Ten Commandments in non-school settings—especially in courthouses where historic symbols of law are commonplace and where the Ten Commandments' character as a code of conduct is accentuated—remains an open question. Petitioners, moreover, acted against a legal backdrop in which three Justices of this Court had expressed the view that "a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an *equivocal message*, perhaps of respect for Judaism, for religion in general, or for law." *County of Allegheny*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part) (emphasis added). In addition, the Court had upheld prayer in state capitols, *Marsh*, *supra*, and has repeatedly stated that acknowledgments of the Nation's religious history in the National Motto ("In God We Trust"), on currency, and in the opening cry of court sessions ("God Save the United States and this Honorable Court"), are constitutional. See, *e.g.*, *Newdow*, 124 S. Ct. at 2317-2319 (Rehnquist, C.J., concurring in the judgment); *Lynch*, 465 U.S. at 674-679. Furthermore, a number of courts have upheld government displays of the Ten Commandments.[13]

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[13] See *Van Orden*, 351 F.3d at 178-180; *Freethought Soc'y*, 334 F.3d at 263-267; *Anderson*, 475 F.2d at 33-34; *Freedom from Religion Found.*, 898

Beyond that, context-sensitive nuance and fine line-drawing are the hallmarks of this Court's Establishment Clause jurisprudence. For that reason, a single district court ruling that a prior display crossed the "blurred, indistinct, and variable barrier" between constitutional and unconstitutional acknowledgments of the Nation's religious heritage, *Lynch*, 465 U.S. at 679, is too tenuous a basis on which to predicate a charge of enduring unconstitutional motivation. It certainly does not amount to the clear evidence generally required to overcome the presumption that government officials, who are sworn to uphold the Constitution, will not deliberately flout their obligations. To hold otherwise would have the unhealthy consequence of punishing the good faith efforts of government officials to navigate difficult constitutional shoals.[14]

The Sixth Circuit further erred in placing weight on petitioners' desire "to display the Ten Commandments." Pet. App. 40a. Putting aside the debatable proposition that such a purpose is inherently "religious" (*ibid.*), the Establishment Clause focuses on "the legislative *purpose* of the [display], not the possibly religious *motives* of the" government officials who authorized it. *Mergens*, 496 U.S. at 249; see *McGowan*, 366 U.S. at 469 (opinion of Frankfurter, J.). A creche that forms part of a city's display consistent with *Lynch* should not be unconstitutional because the mayor's

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P.2d at 1025. To be sure, the interim display adopted immediately after the filing of this suit raises additional issues. But that is also the least relevant display because it says nothing about petitioners' original reason for displaying the Ten Commandments, nor does it resemble the policy at issue now. Instead, it appears to reflect only petitioners' response to the filing of a lawsuit.

[14] See *National Archives & Records Admin.* v. *Favish*, 124 S. Ct. 1570, 1581 (2004); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that these school officials will act in good faith."); cf. *Agostini*, 521 U.S. at 226 (refusing to "presume that * * * a full-time public employee * * * will depart from her assigned duties and instructions and embark on religious indoctrination").

first instinct was to display a creche, rather than a talking wishing well, at Christmas time. The avowed purpose of the display at issue here, as corroborated by its actual content and design, is to document historical influences on the development of the law, and that is the secular and constitutionally proper purpose that matters under *Lynch* and *County of Allegheny*.

Nothing in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), is to the contrary. There, the Court struck down a policy of student-led prayer at football games. The Court concluded that allowing the students to vote on retaining the invocation policy and selecting the speaker simply perpetuated the prior practice of prayer by the Student Chaplain before football games. *Id.* at 309. The Court did not hold, however, that past practice indelibly taints all of the officials' future decisions. Instead, the Court concluded that the new "invocations" policy lacked any secular purpose. *Ibid.* (noting that the new policy had a religious title ("Prayer at Football Games") and that the school did not hold a new election, pursuant to the new policy, "to replace the results of the previous election, which occurred under the former policy"). Furthermore, the Court also found that the new policy had the effect of advancing religion. *Ibid.*

That bears no resemblance to this case. When displayed in a courthouse, the Ten Commandments are not, like the school prayer in *Santa Fe*, inherently religious—their signification is, to use Justice Stevens' word, "equivocal." *County of Allegheny*, 492 U.S. at 652. In addition, petitioners worked profound changes in the content and design of their display so that the links between the policies were broken and, whatever their underlying subjective motivations, the objectively discernible purpose of the presentation changed from a display of the Ten Commandments to a display of varied historic influences on the development of law. See

3/30/01 Tr. 4 (district court finds that "the newly posted display differs * * * fundamentally from the other one").

Indeed, in the context of passive governmental displays in non-school settings, an inquiry into the subjective purpose of governmental actors rather than the objective purpose served by the display is of dubious value. The public expects to see in courthouses and capitol buildings representations, symbols, and displays pertaining to the history, heritage, and culture of the people and their government. The predominantly adult observers of such displays understand them to be commemorative, chosen for their historical or sociological linkage to the particular setting, rather than as specific endorsements of the underlying message. Government officials may have a variety of reasons for including or excluding certain symbols. Even an affirmative desire to include symbols with both religious and secular significance in a manner that is consistent with this Court's cases and the Nation's history would not trench upon Establishment Clause values. In fact, the reasonable observer is aware that "[g]overnment policies of * * * acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part). That is particularly true when, as here, the religious acknowledgment is neutrally displayed in the company of numerous secular emblems.

Accordingly, the Establishment Clause inquiry for such displays should focus on whether the display itself—based on its design, content, or emphasis—objectively expresses favoritism for or an endorsement of religion or particular religious beliefs. Such passive displays, after all, do not attempt to compel, direct, or regulate primary behavior. They are entirely non-coercive. And "[i]n a pluralistic society a variety of motives and purposes are implicated" in virtually every governmental acknowledgment of religion. *Lynch*, 465

U.S. at 680. Given the Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute," *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983), the high jurisprudential costs of questioning motives are not offset by any discernible constitutional gain in having the lawfulness of identical governmental displays turn upon unarticulated and imperceptible subjective purposes that are neither communicated to nor felt in any concrete way by anyone who encounters the passive display. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968) (it is a "fundamental principle of constitutional adjudication" that the judiciary may not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted").

c. Petitioners' display has the valid secular effect of acknowledging the Ten Commandments' historical influence on American law

The "crucial" consideration in analyzing whether petitioners' display comports with the Establishment Clause is whether it "ha[s] the effect of communicating a message of government endorsement or disapproval of religion" to an objective observer. *Lynch*, 465 U.S. at 692; see *Santa Fe*, 530 U.S. at 308. The objective observer, moreover, "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).[15]

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[15] The court of appeals did not issue a majority holding on the effect prong of the Establishment Clause. Nevertheless, because the relevant facts are not in dispute, the Court may wish to resolve the issue itself rather than return petitioners to yet another round of litigation over their display. Neither the district court nor the court of appeals grounded their Establishment Clause ruling in the fact that petitioners chose to use a Protestant version of the Ten Commandments, rather than a Catholic, Jewish, or ecumenical version. If the Court were to consider that factor

No reasonable observer could discern an endorsement of religion from petitioners' display. The Ten Commandments appear alongside and on equal footing with numerous secular documents and symbols. Taken together, the display tells a story about the varied historic influences on and images of American law. Lest there be any confusion on that front, petitioners took the extra step of including an explanatory plaque and caption that advise observers that the display documents "The Foundations of American Law and Government." Pet. App. 10a.[16] That is precisely the type of exhibit that a reasonable observer would expect to find in a courthouse. Thus the context and the "history and ubiquity" of the Ten Commandments' usage as a symbol of law, *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), confirm the secular theme. The endorsement analysis also must take into account this Court's repeated assurances that the "many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," *Marsh*, 463 U.S. at 792.[17]

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relevant to the Establishment Clause question, it would be beneficial if the Court, prior to remanding, could make clear that display of some versions of the Ten Commandments (whether ecumenical or containing only Roman Numerals) would not have the effect of endorsing religion.

[16] See *County of Allegheny*, 492 U.S. at 619 (Blackmun, J.) ("[A]n 'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs."); *id.* at 635 (O'Connor, J.) (sign accompanying menorah display negated any reasonable impression of endorsement); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he presence of a sign disclaiming government sponsorship or endorsement on the Klan cross * * * would make the State's role clear to the community.").

[17] The presentation of the Ten Commandments (i) in a courthouse frequented by adults, (ii) alongside secular documents, (iii) accompanied by an explanatory plaque, and (iv) in a manner that does not peculiarly profile or call attention to the religious document or even the religious character of the document, distinguishes this case from *Stone*.

Judge Clay reasoned (Pet. App. 45a) that the display had the effect of endorsing religion because posting the Ten Commandments with other American historical documents "accentuates the religious nature of the Ten Commandments" and will suggest that petitioners put the Commandments "on a par with our nation's most cherished secular symbols and documents." The short answer is that this Court drew precisely the opposite conclusion about the effect of religious symbols in multi-component displays in *Lynch* and *County of Allegheny*, where the Court concluded that the surrounding symbols would negate any message of endorsement and would convey an overarching secular message about celebration of the holidays and their history. *County of Allegheny*, 492 U.S. at 616; *id.* at 634-635 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 681-686.

Judge Clay further reasoned (Pet. App. 46a) that the absence of "any analytical connection between the Ten Commandments and the other patriotic documents and symbols" meant that the display "convey[ed] a message of religious endorsement." That rationale fares no better under the effects prong than it did under the purpose prong. See pp. 19-21, *supra*. First, the analytical connection is exactly the one that numerous Justices, judges, historians, and scholars have found—the Ten Commandments influenced the development of American law. Second, and in any event, the conclusion does not follow from the premise. Even if the display were thematically disjointed, there is no logical reason to presuppose that observers would immediately jump to the conclusion that the display is a cleverly disguised religious message. The more likely reaction is simply that the display is a muddle.

Finally, Judge Clay suggested (Pet. App. 49a) that the litigation history "bolstered the reasonable observer's perception of the state endorsement of religion." That cannot be right. It is one thing to impute to the reasonable observer an

awareness of her surroundings and familiarity with the nature of the forum in which a display occurs. *Pinette*, 515 U.S. at 780 (1995) (O'Connor, J., concurring in part & concurring in the judgment). But it is quite another thing to charge the observer with familiarity with the Federal Supplement. If the display has the impermissible effect of endorsing religion, then it violates the Establishment Clause regardless of whether a lawyer brings suit. And if the display does not have that effect, then litigation—whether precedent or subsequent—cannot change that. *Lynch*, 465 U.S. at 684-685. Litigants cannot, simply by bringing suit, bootstrap an otherwise constitutional display into an unconstitutional establishment of religion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Alabama: A small plaque of the Ten Commandments hangs inside the State Capitol. See National Briefs, Miami Herald at 19 (Sept. 10, 2003), *available at* 2003 WL 62530915.

Alaska: The city council chambers in Fairbanks has a depiction of the Ten Commandments. http://atheism.about.com/b/a/074472.htm?terms=fairbanks.

Arizona: A monument of the Ten Commandments sits on state park land in Wesley Bolin Plaza, just east of the Arizona state capitol in Phoenix. See Arizonans to Rally for Ten Commandments; Hundreds Expected to Gather, Pray to Call for an End to Judicial Tyranny, U.S. Newswire (Sept. 22, 2003), *available at* 2003 WL 55662538.

Arkansas: The Ten Commandments are posted in a courtroom in Maumelle County. See Maumelle candidates fail to leap out front, Arkansas Democrat Gazette at 17 (Nov. 3, 2004), *available at* 2004 WL 96720618.

California: There is a depiction of Moses holding the Ten Commandments over the western entrance to the Los Angeles Superior Court. See http://mayitpleasethecourt.net/journal.asp?blogId=33; http://www.heydaybooks.com/public/books/ccreview1.html.

Colorado: There is a Ten Commandments monument on the lawn of the State Capitol in Denver. There is a similar monument on the lawn in front of city hall in Grand Junction. See http://www.casperstartribune.net/articles/2003/10/28/news/casper/7a6415c2e299679a2c564c072113f7e6.txt.

Delaware: A framed copy of the Ten Commandments hangs on the wall in the council chamber in the Sussex County administrative office building.

District of Columbia: Both the United States Court of Appeals for the District of Columbia Circuit and the

Supreme Court have Ten Commandments displays in their courtrooms. The National Archives has a display of the Ten Commandments on the floor of its entryway. See Affidavit of David Barton, *Doe* v. *Harlan Cty Sch. Dist.*, Civ. No. 99-508 (E.D. Ky. 2001), *available at* http://wallbuilders.com/resources/search/detail.php?ResourceID=41. Displays also appear in the U.S. Capitol and the Ronald Reagan International Trade building.

Florida: In the lobby of the Polk County Administrative Building is a 7-foot, 6-inch monument depicting the Ten Commandments and other documents. See http://www.thomasmore.org/news.html?NewsID=121.

Georgia: The seal of the clerk of the Superior Court in Richmond County contains an outline of the Ten Commandments. See *King* v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003). The courthouses in Barrow County and Hart County have framed copies of the Ten Commandments outside their courtrooms. See Across Georgia, Augusta Chron. at B03 (Nov. 8, 2004), *available at* 2004 WL 96282513.

Idaho: The City of Post Falls has a monument on the lawn in front of its City Hall. There appear to be monuments bearing the Ten Commandments on the lawn on the eastside of the courthouse in Coeur d'Alene and in a park near the City Hall in Hayden. See Erica Curless, Commandments abound in Idaho; Low-key monuments in public spaces seem unlikely to inspire lawsuits, The Spokesman-Review, at A1 (Sept. 2, 2003), *available at* 2003 WL 57389325.

Illinois: There is a mural in the State Supreme Court library that depicts stone tablets with Hebrew written on them.

Indiana: The Washington County courthouse has a display of the Ten Commandments.

Iowa: There is a monument of the Ten Commandments in a plaza by the city hall in Cedar Rapids.

Kansas: There is a stone monolith in front of a municipal building in Junction City. See http://www.kstatecollegian.com/article. php?a=3321.

Kentucky: Displays at issue in this case.

Louisiana: A framed copy of the Ten Commandments hangs on the wall of an East Baton Rouge Parish courtroom. The Week In Review, Baton Rouge Advoc. 4B (Aug. 31, 2003), *available at* 2003 WL (225) 389-3950.

Maine: There is a mural depicting Moses carrying stone tablets in the district court in Rumford, Maine.

Maryland: There is a monument on the courthouse lawn in Cumberland, Maryland. See http://www.inthefaith.com/archive/001451.php; http://www.showmenews.com/2004/Oct/20041023Feat004.asp. There is also a monument in a park in Frederick. http://www.demossnewspond.com/aclj/releases/2004%20Releases/10 command011604.htm.

Massachusetts: There is a depiction in the central panel of a frieze on the north wall in the Boston public library. See http://www.sargentmurals.bpl.org/site/murals/24_description. html last visited (Nov. 24, 2004).

Minnesota: There is a bronze plaque bearing the Ten Commandments on the entrance to the Crow Wing County courthouse in Brainerd. http://www.mfc.org/contents/article.asp?id=1123.

Mississippi: There is a statue of Moses holding the Ten Commandments atop the Hinds County Courthouse. See http://home.millsaps.edu/~beckea/Buildings2.html.

Missouri: There is monument of the Ten Commandments on the grounds of the State Capitol in Jefferson City. See http://atheism.about.com/b/a/021266.htm.

Montana: There is a granite monolith bearing the Ten Commandments on the capitol grounds in Helena. See http://www.helenair.com/articles/2004/09/22/montana/a01092 204_ 04.txt.

Nebraska: There is a depiction of the Ten Commandments on a light fixture in the chamber of the State Supreme Court. See http://court.nol.org/tour/tour.htm. On the outside of the state capitol in Lincoln is a relief showing Moses carrying the Ten Commandments. See http:// www.wilhelm-aerospace.org/Architecture/modern/art-deco/ nebraska-capitol/ten-commandments.JPG. Fremont has a monument of the Ten Commandments in a public park. www.journalstar.com/articles/ 2004/02/19/local/10045545.txt.

Nevada: There is a stone sculpture bearing the Ten Commandments in the Lovelock Courthouse. There is also a displayed at a senior center owned by the City of Las Vegas.

New Jersey: There is a Ten Commandments monument in a public park in Trenton.

New Mexico: A monument of the Ten Commandments sits on the lawn in front of the Curry County courthouse in Clovis, New Mexico. See Curry Courthouse Displays Commandments Monument, http://amarillo.com/stories/082903/ usn_currycourthouse.shtml; Sanford Brickner, Know Your Rights: Court Case Spotlights Religious Liberty, Santa Fe New Mexican C3 (Sept. 5, 2003), *available at* 2003 WL 57263786.

New York: A state courthouse in Brooklyn has a carved medallion on the facade depicting Moses carrying the commandments. http://www.courts.state.ny.us/history/elecbook/ 2ddept/pg13.htm.

North Carolina: The back wall of the main courtroom in the Haywood county courthouse has a sculpture of the Ten

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

North Dakota: There is a monument bearing the Ten Commandments in a public plaza in Fargo. See http://news.minnesota.publicradio.org/features/2004/10/12_ap_tencommandments. A monument of the Ten Commandments sits outside the Morton County Courthouse in Manden, North Dakota. http://www.kqcd.com/showNews.asp? whatStory=2137.

Ohio: There is a monument of the Ten Commandments outside the Lucas County courthouse in Toledo. See http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=16102&c=38.

Oklahoma: There is a monument of the Ten Commandments on the lawn of the Haskell County courthouse. See http://www.amarillo.com/stories/111004/usnten.shtml.

Pennsylvania: The Ten Commandments appears in a mural in the Pennsylvania Supreme Court courtroom in Harrisburg. See Jonathan Gelb, Commandment Fight Expands to Chester County's Web Site, Phila. Inquirer, at B7 (Feb. 26, 2003); see also http://www.slate.com/id/2075609/slideshow/2075609/fs/0//entry/2075617/. Both the Allegheny County courthouse and the Chester County courthouse have plaques of the Ten Commandments on their facades. See *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247 (3d Cir. 2003); see also http://www.post-gazette.com/localnews/ 20030627plaquereg4p4.asp.

Tennessee: A plaque bearing the Ten Commandments hangs on the outside of the Washington County courthouse. See Melanie B. Smith, A busy time for the Big 10: Ten Commandments courthouse controversy not solely in Alabama, The Decatur Daily (Aug. 30, 2003). There is also a plaque containing the Ten Commandments in the foyer of the

Sullivan County courthouse, *ibid.*, and there is a framed copy of the Ten Commadments in the foyer of the Monroe County Courthouse, *ibid.* We have been advised that courthouses in approximately 45 of the 95 counties in Tennessee have similar displays.

Texas: There is a monument of the Ten Commandments on the state capitol grounds. See *Van Orden* v. *Perry*, 351 F.3d 173 (5th Cir. 2003).

Utah: There is a monument of the Ten Commandments in a public park in Pleasant Grove. See http://www.thomasmore.org/news.html?NewsID=214.

Washington: A monument of the Ten Commandments sits on the lawn in front of the police department in Everett, Washington. See BC-Washington Digest, Can. Press (July 24, 2003), *available at* 2003 WL 60142300; see also Ten Commandments: North News, Seattle Post-Intelligencer, at B1(June 2, 2001), *available at* 2001 WL 3560440.

West Virginia: A plaque of the Ten Commandments hangs on a wall in one of the courtrooms in the Clay County courthouse. See http://www.afa.net/clp/ReleaseDetail.asp?id=75.

Wisconsin: The City of La Crosse has a monument of the Ten Commandments in Cameron park. See http://www.lacrossetribune.com/articles/2003/07/15/news/00lead.txt.

Wyoming: Cheyenne has a monument of the Ten Commandments in a public park. See www.billingsgazette.com/index.php?id=1&display=rednews/2003/11/25/build/wyoming/42-cheyennetencommandments.inc.