RELIGIOUS DISPLAYS ON PUBLIC PROPERTY

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CHAPTER 3

TED CRUZ

Ted Cruz serves as the Solicitor General of Texas. Appointed by Texas Attorney General Greg Abbott in January 2003, he is the chief appellate lawyer for the State of Texas. Ted is the first Hispanic Solicitor General in Texas and, when appointed, was the youngest Solicitor General in the United States.

Ted has authored over forty U.S. Supreme Court briefs and presented twenty-two oral arguments, including four in the U.S. Supreme Court. His representation of the State of Texas includes:

- successfully defending the constitutionality of the Texas Ten Commandments monument before the Fifth Circuit and the U.S. Supreme Court,
- authoring a U.S. Supreme Court brief for all fifty States successfully defending the Pledge of Allegiance,
- serving as lead counsel for the State and successfully defending the multiple litigation challenges to the 2003 Texas congressional redistricting plan, and currently defending same before the U.S. Supreme Court,
- successfully defending the constitutionality of the Texas Sexual Violent Predator Civil Commitment law,
- arguing the school finance case before the Texas Supreme Court and winning a unanimous reversal of the trial court's ruling that the system violates the Education Clauses of Texas Constitution; and
- successfully representing Texas before the U.S. Supreme Court in a case resisting efforts by the International Court of Justice to order reconsideration of U.S. death penalty jurisprudence.

For two consecutive years, he has won the Best Brief Award by the National Association of Attorneys General (NAAG), for the best merits brief in the U.S. Supreme Court in 2003 and in 2004. As a litigator, his lifetime record in decided cases that he has argued is 16 wins and 2 losses.

In addition, he currently serves as an Adjunct Professor of Law at the University of Texas School of Law, where he teaches U.S. Supreme Court Litigation.

Ted previously served as the Director of the Office of Policy Planning for the Federal Trade Commission, as Associate Deputy Attorney General at the U.S. Department of Justice, and as Department of Justice Coordinator for the Bush Transition Team. During the Florida presidential recount, he helped assemble the Bush legal team, devise legal strategy, and draft pleadings in the Florida and U.S. Supreme Courts. From 1999 to 2000, Ted served as Domestic Policy Advisor to the Bush-Cheney campaign, advising President Bush on a wide range of policy matters, with primary responsibility for all legal policy, including Civil Justice, Criminal Justice, Political Process, Constitutional Law & Civil Rights, Immigration, Campaign Finance Reform, and Government Reform.

Ted currently serves on the Steering Committee of the Texas Review of Law & Politics, on the Texas Board of the Criminal Justice Legal Foundation, as a Director and Vice President of the Texas Lyceum, and as the Texas Chairman for Hispanic Alliance for Progress. He has appeared on over twenty national television programs, including the News Hour with Jim Lehrer, NBC News, Good Morning America, Fox News, CNN, and CNBC's Capital Report. He has been named by *Newsweek* magazine as one of 20 young Hispanic Americans on the rise, and twice named by *Hispanic Business Magazine* as one of the 100 Most Influential Hispanics in America.

Ted is the son of a Cuban immigrant, was raised in Texas, and attended Princeton University and the Harvard Law School. At Princeton, he was Chairman of the University Undergraduate Council, U.S. National Speaker of the Year and Team of the Year in college debate, and the number-one ranked collegiate speaker in North America. At Harvard, he was a Primary Editor of the Harvard Law Review, an Executive Editor of the Harvard Journal of Law & Public Policy, and a founding Editor of the Harvard Latino Law Review. He graduated Harvard *magna cum laude* and was named a John M. Olin Fellow in Law and Economics. In 1995, he served as a law clerk to Judge J. Michael Luttig on the U.S. Court of Appeals for the Fourth Circuit, and in 1996 as a law clerk to Chief Justice William H. Rehnquist on the Supreme Court of the United States. He is the only Hispanic in history to have clerked for the Chief Justice of the United States.

THE TEN COMMANDMENTS CASES:

Struggling to Ensure Neutrality, Rather than Hostility, to Religious Faith and its Contributions to our Historical Diversity

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CHAPTER 8.2

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THE TEN COMMANDMENTS CASES: STRUGGLING TO ENSURE NEUTRALITY, RATHER THAN HOSTILITY, TO RELIGIOUS FAITH AND ITS CONTRIBUTIONS TO OUR HISTORICAL DIVERSITY

I. INTRODUCTION[1]

Last Term, for the first time in twenty-five years, the Supreme Court considered the constitutionality of public displays of the Ten Commandments. In the past decade, litigation over such displays has grown more and more common, and yet the Court had not opined on their legality since 1980. On March 2, 2005, the Court heard oral argument in two Ten Commandments cases, *Van Orden v. Perry* and *McCreary County v. ACLU*. Fittingly, and unsurprisingly given the Court's erratic Establishment Clause jurisprudence, the Court in effect cut the baby in half, upholding Texas's display in *Van Orden* but striking down Kentucky's display in *McCreary*. Although there is undeniable tension between the two opinions, reading the two cases together can yield a few clear principles and a number of practical guidelines for erecting and defending constitutional displays of the Ten Commandments on public property.

II. A TALE OF TWO TEN COMMANDMENTS DISPLAYS

In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the Court upheld the constitutionality of a Ten Commandments monument that had been donated in 1961 to the "People and Youth of Texas" by the Fraternal Order of Eagles and displayed as one of seventeen monuments and twenty-one historical markers that adorn the Texas Capitol Grounds. The face of the monument contains a text of the Ten Commandments that had been selected by the Eagles and developed by representatives of Jewish, Catholic, and Protestant faith traditions. *See State v. Freedom from Religion Found.*, 898 P.2d 1013, 1017 (Colo. 1995) (en banc). The Texas monument had stood unmolested, without controversy, for four decades, until an individual plaintiff filed a federal lawsuit challenging the display in 2002.

The State of Texas defended the monument in federal court and—unlike many of the other state and local governments that been forced to defend similar monuments—was fortunate to prevail at every stage of the litigation. The district court ruled the Texas monument constitutional, and the Fifth Circuit unanimously affirmed. And, on the last day of the Term, Chief Justice Rehnquist handed down *Van Orden* as his very last opinion, upholding 5-4 the Texas monument.

On that same day, the Court struck down the display in Kentucky featuring the Ten Commandments as one among many historical texts. *See McCreary County v. ACLU*, 125 S. Ct. 2722 (2005). In that case, the Court found the counties' clear purpose to be the advancement of religion, based on both the specific history of the display (and in particular, that previous iterations had excerpted and highlighted only the religious portions of various historical documents) and on the rather extraordinary legislative history, namely that the counties had adopted resolutions expressly

> reciting that the Ten Commandments are "*the* precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously . . . to adjourn . . . 'in remembrance and honor of Jesus Christ, the Prince of Ethics'"; that the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

Id. at 2729 (emphasis added, citations omitted).

The two cases, handed down on the same day, reflect considerable dissonance. The *Van Orden* plurality is the strongest statement from the Court favoring the public acknowledgment of religion since *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding Nebraska's longstanding practice of legislative prayer), yet *McCreary* specifically disapproves such public acknowledgment. Texas Attorney General Greg Abbott, who argued and won *Van Orden* before the Court, has explained:

> The opinions are replete with tensions, if not contradictions. For example, *Van Orden* deemed the so-called *Lemon* test inappropriate for analyzing "passive monument[s]," yet *McCreary* found *Lemon*'s secular purpose inquiry of paramount importance. *Van Orden* relied on a long tradition of recognizing the role of religion, including Christianity, in our

[1] I am grateful for the skilled and careful assistance of Susanna Dokupil in preparing this text. All errors are, of course, my own.

> history to find the Texas monument constitutional, but *McCreary* held that a specific intent to recognize that role in Kentucky was unconstitutional. *Van Orden* found the context of the display significant, but *McCreary* suggests that once a religious purpose is evident, the context or effect on the observer is immaterial.

Greg Abbott, *Upholding the Unbroken Tradition: Constitutional Acknowledgments of the Ten Commandments in the Public Square*, 14 WM. & MARY BILL RTS. J. 51, 52 (2005); *see also* Greg Abbott, *Acknowledgment without Endorsement: Defending the Ten Commandments*, 9 TEX. REV. L. & POL. 229 (2005).[2]

Despite the contradictions, it is possible to glean some useful guidelines from the two opinions.

III. CREATING A CONSTITUTIONAL DISPLAY

A. Supreme Court Precedent

In evaluating the constitutionality of Ten Commandments displays prior to the *McCreary* and *Van Orden* opinions, three Supreme Court precedents governed: *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Stone v. Graham*, 449 U.S. 39 (1980). The first two addressed the constitutionality of holiday displays containing religious symbols, and the third addressed the posting of the Ten Commandments in public school classrooms.

In *Lynch*, the Court analyzed a holiday display in Pawtucket, Rhode Island that consisted of a number of traditional symbols, including a Christmas tree, Santa and his reindeer, carolers, and a crèche. *Lynch*, 465 U.S. at 671. The Court found the display constitutional under the *Lemon* test, which asks whether a state action has a secular purpose, whether its primary effect is to advance or inhibit religion, and whether it fosters an excessive entanglement between government and religion. *Id.* at 679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). Justice O'Connor, concurring, introduced a new test for analyzing religious symbols based on whether or not the display endorsed or disapproved of religion. *Id.* at 687–88 (O'Connor, J., concurring). She believed her analysis was consistent with *Lemon* and the Court's and concluded that the inclusion of a crèche among other secular seasonal symbols did not convey a message of governmental endorsement of religion. *Id.* at 687–91.

Five years later, in *Allegheny*, the Supreme Court examined two holiday displays in Pittsburgh. One, a crèche donated by a private organization, sat atop the Grand Staircase of the Allegheny County Courthouse, framed by poinsettias and a banner proclaiming "Gloria in Excelsis Deo!" 492 U.S. at 580. The other, a Christmas tree, Menorah, and a sign celebrating the lights of liberty, stood in front of the City-County Building. *Id.* at 582, 587.

The Court found the crèche unconstitutional, largely because it lacked the secular symbols present in the *Lynch* display. *Id.* at 598. Justice Blackmun, writing for the Court, found that the solitary crèche endorsed religion. *Id.* at 598–99 & n.48. Justice O'Connor agreed, also finding that the crèche, standing alone, endorsed Christianity. *Id.* at 627 (O'Connor, J., concurring). Three of the Justices voting with the majority urged that religious symbols on government property by definition unconstitutionally favored religion. *See id.* at 637–46 (Brennan, J., concurring in part and dissenting in part); *id.* at 646–55 (Stevens, J., concurring in part and dissenting in part).

Six Justices, however, found the City-County Building display constitutional. Four concluded that neither display offended the Establishment Clause because they were neither coercive nor gave a direct benefit to religion. *Id.* at 659, 663–67 (Kennedy, J., concurring in part and dissenting in part). Justice Blackmun believed that the City-County display celebrated "both Christmas and Chanukah as secular holidays." *Id.* at 615. And Justice O'Connor concluded that the combination of the Christmas tree, Menorah, and salute to liberty did "not have the effect of conveying an endorsement of religion," even though she considered the Menorah to be a religious symbol. *Id.* at 632–34 (O'Connor, J., concurring). In her judgment, the display did not endorse religion over nonreligion because

> [a] reasonable observer would . . . appreciate that the combined display [was] an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens.

Id. at 635–36.

The final precedent, *Stone v. Graham*, found unconstitutional a Kentucky statute mandating the posting of the Ten Commandments on public school classroom walls. 449 U.S. 39, 39 (1980). The display contained a notation stating that "'[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western

[2] General Abbott's two law review articles on this topic—and the text of this chapter—all draw heavily from the brief for the State of Texas filed before the Court in *Van Orden*, and, accordingly, overlap in a great many respects.

Civilization and the Common Law of the United States.'" *Id.* at 41 (quoting KY. REV. STAT. § 158.178 (1980)).

The Court struck down the Kentucky statute. Despite the State's proffered purpose, the Court found that the display had the impermissible purpose of "induc[ing] schoolchildren to read, meditate upon, and perhaps to venerate and obey the Commandments." *Id.* at 42. The Court did, however, recognize the possibility that the Ten Commandments (and other religious texts) could constitutionally be integrated into school curricula, but the Court found that this was not such a case. *See id.* Although the Court decided this case solely on the purpose inquiry and years before *Lynch* and *Allegheny*, it is also notable that there the Ten Commandments were standing alone, not offset by any other secular symbols or context.

Read together, *Lynch*, *Allegheny*, and *Stone* demonstrated that religious symbols, such as the Ten Commandments, may be constitutionally displayed on government property, so long as they are integrated into a broader context that does not impermissibly endorse religion.

B. The Texas Monument

The Texas Ten Commandments display is the only Ten Commandments monument ever expressly upheld by the United States Supreme Court.[3] In the 1950s and 60s, hundreds or even thousands of monuments virtually identical to the Texas monument were erected across America by the Fraternal Order of Eagles. *See generally Books v. City of Elkhart*, 235 F.3d 292, 295 (7th Cir. 2000). Thus, the Texas monument bears examination in some detail, as its successful defense may offer considerable assistance to other communities that find themselves embroiled in similar litigation.

1. The Monument's Context

The Texas Capitol Grounds, where the Ten Commandments monument stands, "feature seventeen monuments and twenty-one historical markers to people, events, and ideals that have contributed to the diversity, culture, and history of Texas." Abbott, *Acknowledgment without Endorsement*, *supra* Part II, at 233. In 1961, the Eagles donated the Texas monument to "the People and Youth of Texas," and (except for a short period of Grounds renovation) it has stood on the Capital Grounds ever since. State Preservation Board, Monuments Guide, The Ten Commandments, http://www.tspb.state.tx.us/spb/gallery/MonuList/10lg.htm (last visited Jan. 23, 2006).

Because context plays such an important role in analyzing the constitutionality of a religious symbol display, the State's brief before the Supreme Court portrayed the setting of the monument and its relation to other historical, cultural, and religious symbols on the Capitol Grounds in great detail. *See* Abbott, *Acknowledgment without Endorsement*, *supra* Part II, at 237–51. The Capitol Grounds, in fact, are formally designated as a National Landmark and meet the federal definition of a "museum." *See id.* at 237 n.43 (citing Letter from Edwin C. Bearss, Chief Historian, National Park Service, to Frank Cooksey, Mayor, City of Austin (Aug. 8, 198[illegible]) (informing Mayor Cooksey that the property had been designated a National Historic Landmark)).

The State Preservation Board offers brochures detailing self-guided tours of the State Capitol and its grounds. STATE PRESERVATION BOARD, THE TEXAS CAPITOL GROUNDS, A SELF-GUIDED TOUR (1999). This tour highlights the wide-ranging history and culture of Texas as seen through commemorative memorials, plaques, and seals. *See id.*; State Preservation Board, Plan Your Visit: Tours, http://www. tspb.state.tx.us/spb/plan/ Tours.htm (last visited Jan 23, 2006).

The State argued before the Supreme Court that the elements of these tours commemorated diverse religious and secular aspects of Texas history and culture. Several references to religion appear in the Capitol itself. The Six Flags Over Texas display on the floor of the Capitol rotunda features the Mexican eagle and serpent—a religious symbol of Aztec prophecy[4]—as well as the Confederate seal inscribed with "Deo Vindice" ("With God as our protector"). *See* Significant Spaces Gallery, Texas Capitol Rotunda Floor

[3] Numerous Justices have noted in passing their approval of the image of Moses and the Ten Commandments appearing in the Supreme Court's own courtroom as part of a frieze of eighteen lawgivers, but the constitutionality of this frieze has never been litigated. *See* Abbott, *Upholding the Unbroken Tradition*, *supra* Part II, at 53 n.11.

[4] In the center of the Mexican flag lies a brown eagle with a snake in its beak, perched on a cactus growing from a rock surrounded by water. The Aztecs believed that Huitzilopochtli, the Sun and War God, gave their leaders this sign to mark the site where they should found their theocratic capital Tenochtitlán ("The Place of the Fruit of the Cactus"). *See* INGA CLENDINNEN, AZTECS: AN INTERPRETATION 23–24, 298 (1991). Today, that spot is the site of Mexico City. *Id.* at 15, 23, 308 & n.22. Aztec mythology in Texas predates the arrival of the Judeo-Christian tradition, and its contribution is required by statute to be taught in Texas public schools. *See, e.g.*, 19 TEX. ADMIN. CODE § 113.6(b)(20) (West 2005) ("Culture. The student [is expected to] understand[] the contributions of people of various racial, ethnic, and religious groups to Texas."); *id.* § 113.6(b)(1) ("History. The student [is expected to] understand[] the similarities and differences of Native-American groups in Texas and the Western Hemisphere before European exploration.").

http://www.tspb.state.tx.us/spb/gallery/SigSpace/rot_sm.htm (last visited Jan. 23, 2006). Likewise, visitors to the old Supreme Court Chambers on the third floor of the Capitol Building, will find "Sicut Patribus, Sit Deus Nobis" ("As God was to our fathers, may He also be to us") inscribed above the justices' bench. *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

The self-guided tour through the Capitol Grounds also includes a variety of monuments, some of which bear religious symbols. From the sidewalk facing the Ten Commandments monument, the visitor can observe the Boy Scouts of America, Pearl Harbor, and World War I monuments on the left. *See* Abbott, *Acknowledgment without Endorsement*, *supra* Part II, at 272–73. This vantage point also provides unobstructed views of the Bicentennial memorial plaque and Texas National Guard monument. *See* STATE PRESERVATION BOARD, SELF-GUIDED TOUR, *supra* part III.B.1.

Immediately above and to the right of the viewer is the frieze of the Capitol building itself, with once again the Six Flags of Texas, including the Aztec religious symbol of an eagle on a cactus with a serpent in his beak, and the Confederate flag, inscribed with "Deo Vindice" ("God will judge"). *See* Abbott, *Acknowledgment without Endorsement*, *supra* Part II, at 274. And atop the rotunda stands the Goddess of Liberty.[5] *Id.*

The State argued before the Court that an observer of all of this would believe the museum-like setting did "not neutralize the religious content . . . [but] negate[] any message of endorsement of that content." *Lynch v. Donnelly*, 465 U.S. 668, 679–80 (1984). The Ten Commandments monument does not indicate any state endorsement of the Decalogue itself, but merely acknowledges the role of the Ten Commandments in Texas history and culture.

Ironically, despite the fact that the State's brief made such considerable efforts to frame the context in a way that would survive Justice O'Connor's endorsement test inquiry, the only vote this argument garnered was Justice Breyer's. Justice Breyer's opinion—the necessary fifth vote—found the context significant. He found the monument constitutional based on "the exercise of legal judgment" and the absence of religious divisiveness. *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring).

2. The Monument's Secular Purpose

For the monument's purpose to be unconstitutional, it would have to be "motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680. Unlike the Kentucky display, the Texas monument presented no significant evidence of religious purpose. The mere fact that a monument has religious aspects does not alone "imply that the [monument] communicates government approval of Christianity." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). When the monument was erected, the legislative history contains but a single resolution commending the Fraternal Order of Eagles for their work to combat juvenile delinquency. *See* Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195, 1195–96. Thus, based on the record, the Court did not find any impermissible religious purpose behind the Texas monument.

3. Acknowledging Religion in Law and Culture

The State's brief also argued extensively that the Constitution does not require government to eschew all acknowledgment of religion. The Ten Commandments present a particularly acute case in this regard because they undeniably have both a sacred and a secular dimension. And government may constitutionally acknowledge the Decalogue's secular role even though it has a religious origin. *See* Abbott, *Acknowledgment without Endorsement*, *supra* Part II, at 255–65. The plurality in *Van Orden* agreed, making this argument a central feature of its reasoning.

The Ten Commandments have appeared on frescoes, medallions, plaques, and friezes since at least the 1870s. *See, e.g.*, *King v. Richmond County*, 331 F.3d 1271, 1273–74 (11th Cir. 2003) (involving a Ten Commandments symbol depicted in a superior court seal since at least 1872). Indeed, representations of Moses and the Ten Commandments appear in the famous frieze of eighteen lawgivers in the Supreme Court's own courtroom, on the Supreme Court building's East Pediment, on the doors to its courtroom, and repeatedly on the frame of the courtroom's bronze gates—in the Supreme Court courtroom alone, "no less than *forty-three times* all together." Abbott, *Upholding the Unbroken Tradition*, *supra* Part II, at 62. The plurality opinion identified six other representations of the Decalogue in the nation's Capital, including a statue of Moses holding the Ten Commandments alongside a statue of the Apostle Paul in the rotunda of the Library of Congress's Jefferson Building. *See Van Orden*, 125 S. Ct. at 2862–63.

The frequent allusions to the Ten Commandments in the public square illustrate a fact that the *Lynch* Court observed: that we have an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch*, 465 U.S. at

[5] *See also* STATE PRESERVATION BOARD, HISTORIC ARTIFACTS GALLERY, *at* http://www.tspb.state.tx.us/SPB /gallery/HisArt/19.htm (last visited Jan. 28, 2005) ("Standing nearly 16 feet tall and weighing approximately 2,000 pounds, the statue probably represents Pallas Athena, the Greek goddess of wisdom, justice, and arts and crafts. Athena, later called 'Minerva' in Roman mythology, served as the protectress of the democratic city-state of Athens in ancient times.").

674. Indeed, recognizing the secular role of the Ten Commandments long predates even the discovery of the New World, much less the founding of our country. At the dawn of the common law, in the Ninth Century, Alfred the Great placed the Ten Commandments at the very beginning of his Book of Dooms. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION 65 (1983). Centuries later, Lutheran jurists used the Ten Commandments as the basis for categorizing the law. Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 746 (2000). Three hundred years after that, "it continued to be widely believed, at least in the United States . . . [that] divine law, especially the Ten Commandments," was one of "the ultimate sources of positive law." *Id.* at 751.

At the time of the Founding, the Ten Commandments—even the ones we now view as defining man's relationship to God—had both a moral and civic dimension in popular perception. Thus, Thomas Hobbes in *The Leviathan* describes the so-called "first table" as laying out a secular "law of sovereignty." *See* THOMAS HOBBES, LEVIATHAN 428–513 (Liberal Arts Press 1958) (1651). Today, courts still acknowledge the role of the Ten Commandments as an important source of law. *See, e.g., Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (noting that the Ten Commandments "are regarded as a significant basis of American law and the American polity"); *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.").

Acknowledging this role is entirely consistent with the Constitution's prohibition against religious establishments. The Supreme Court has noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of the Supreme Court, and regular presidential proclamations for a National Day of Prayer. *Lynch*, 465 U.S. at 673–77. As Justice O'Connor explained:

> Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2327 (2004) (O'Connor, J., concurring). As General Abbott later observed, "[t]hat irony is not lost, as Justice O'Connor chose not to extend her reasoning in *Lynch* and *Newdow* to the Texas display, which has stood undisturbed on the Capitol Grounds for over forty years." *See* Abbott, *Upholding the Unbroken Tradition, supra* Part II, at 67.

Government may neither endorse religion nor evidence hostility toward it, but nothing in the Constitution prohibits acknowledging and commemorating the role of religion in our history and culture. The Supreme Court has expressly permitted "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The plurality opinion's reasoning for upholding the Texas monument takes this rationale and extends it from religious exercises to religious symbols. *See* Abbott, *Upholding the Unbroken Tradition, supra* Part II, at 68. The *Van Orden* precedent is thus a powerful tool in the legal arsenal for those who believe that the Constitution allows public references to religious tradition.

4. Concurring and Dissenting Views

Although the plurality (consisting of Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas) supported the constitutionality of government acknowledgments of religion, Justices Scalia and Thomas would have gone even further, arguing that the Establishment Clause, properly understood, does not prohibit the State from favoring religion generally. *Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring); *id.* at 2865 (Thomas, J., concurring). Justice Thomas would go only so far as to bar only public religious acknowledgments that resulted in actual legal coercion. *Id.* at 2865, 2867. Needless to say, these interpretations of the Establishment Clause would support a broad range of displays involving the Ten Commandments.

Justice Breyer, as discussed above, focused on the context and content of the display. Because, in his view, no single test can decide every case, he emphasized the importance of "the exercise of legal judgment," which "must take account of context and consequences measured in light of those purposes [assuring religious liberty and tolerance without divisiveness]." *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring). Justice Breyer's "legal judgment" rule closely resembles Justice O'Connor's endorsement test in its contextual emphasis. Justice Breyer additionally noted with great significance the lack of any divisiveness created in this particular context. This factor bolstered his conclusion that the Texas display did not convey a religious message. *See id*.

Justices Stevens, Ginsburg, O'Connor, and Souter, by contrast, would have set the constitutional bar much higher. Justice Stevens found the text of the Ten Commandments, as opposed to a purely symbolic representation, inherently sectarian, no matter how nondenominational the rendition. *Van Orden,* 125 S. Ct. at 2879–80 (Stevens, J., dissenting). In his view, any Ten Commandments text must always unconstitutionally prefer one religion over another. *See Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). At a minimum, he believes it prefers the Judeo-Christian tradition over polytheistic or nontheistic religions. *Van Orden,* 125 S. Ct. at 2880–81 (Stevens, J., dissenting).

Justice Stevens also rejected the "ubiquity of references to God throughout our history." *Id.* at 2883 (Stevens, J., dissenting). He drew a distinction between the speech of individual officials, which is indicative of their personal views, and a permanent display, which is the symbol of collective government approval. *Id.* at 2883–84 (Stevens, J., dissenting). According to Justice Stevens, even the public religious acknowledgments of some Founders did not reflect the views of all—only the text of the Constitution itself reflects the compromise they constructed. And that text, to his mind, is best interpreted as prohibiting the government from displaying the Ten Commandments on its property except in cases of "historic preservation or the mere recognition of religion." *Id.* at 2876 (Stevens, J., dissenting). Forty years of history in a museum setting, apparently, was insufficient to qualify for "historic preservation" in Justice Stevens's view.

Similarly, Justice Souter dissented on the grounds that the Ten Commandments are inherently religious, and a governmental body displaying them must per se have a religious purpose unless the setting plausibly indicates otherwise. *Id.* at 2892 (Souter, J., dissenting). Justice Souter believes that the government may display the Ten Commandments in a way that highlights the Decalogue's secular significance, but the Texas display, in his view, fell short because the scattered monuments lacked cohesion. *Id.* at 2894–95 (Souter, J., dissenting). Souter also decried the 'passive' distinction articulated by the plurality—he believes that displays are all meant to be seen and should be treated alike. *Id.* at 2896 (Souter, J., dissenting).

Justice O'Connor's brief dissent indicated that she agreed with Justice Souter's reasoning. *Id.* at 2891 (O'Connor, J., dissenting). She did not write her own analysis in *Van Orden,* but instead referred the reader to her opinion in *McCreary*. *See id.*

Thus, four of the Justices concluded that the Texas monument acknowledged religion without violating the Establishment Clause, one believed the display was proper in light of the context and lack of divisiveness, and four thought the display was unconstitutional.

C. The Kentucky Monument

The *McCreary* case, by contrast, involved three relatively new displays surrounded by controversy. The displays in question originated as simply the King James Version of the Ten Commandments. *McCreary,* 125 S.Ct at 2728. The counties then amended the displays to include other documents. *Id.*

Justice Souter, writing for the Court, noted the distinct expressions of religious purpose that accompanied the erection of the displays, including a story with the moral that "there must be a divine God." *Id.* The other items in the display highlighted the role of religion in history, including references to God in the Declaration of Independence, the Preamble to the Kentucky Constitution, the national motto, a page from the Congressional Record declaring 1983 the Year of the Bible, a proclamation by Abraham Lincoln designating a National Day of Prayer and Humiliation, an excerpt of a speech of Lincoln's praising the Bible, President Ronald Reagan's speech proclaiming the Year of the Bible, and the Mayflower Compact. *Id.* After this display was challenged in court, it was amended to include the Bill of Rights, the lyrics of the Star Spangled Banner, the Magna Carta, a picture of Lady Justice, and an explanation of the displays purpose as showing the Foundations of Law and Government. *See id.* at 2730–31.

Unlike the plurality opinion in *Van Orden,* the majority in *McCreary* applied the *Lemon* test, in particular its requirement of a secular purpose. *Id.* at 2732–35. The majority declined to treat the most recent display separately from the previous ones, alluding to the endorsement test's reasonable observer, who is deemed familiar with the full history and context in which a display appears. *Id.* at 2736–37.

Justice O'Connor agreed, finding that the predominantly religious purpose would necessarily convey an endorsement of religion. *Id.* at 2747 (O'Connor, J., concurring). In *Van Orden,* she dissented, referring the reader to this opinion. *Van Orden,* 125 S. Ct. at 2891 (O'Connor, J., dissenting). This referral is somewhat puzzling, as the *Van Orden* display had no such evidence of religious purpose.

Justice Scalia, joined by Chief Justice Rehnquist, Justice Thomas, and Justice Kennedy in part, dissented, explaining that the Constitution was never intended to preclude encouraging religion. *McCreary,* 125 S. Ct. at 2748–49 (Scalia, J., dissenting). His dissent goes even further, arguing that the Constitution does not even require neutrality between religions. *Id.* at 2752–53. On Justice Scalia's view, public invocations of God simply do not qualify as an establishment. *Id.* at 2756.

Significantly, Justice Scalia opined that an observer's perception of a religious purpose (in the absence of evidence of an actual religious purpose) should not invalidate an otherwise constitutional display or practice. *Id.* at 2757–58. He further critiqued what he perceived as a heightened purpose standard that the majority applied—requiring the secular purpose to predominate as opposed to simply having *a* secular purpose. *Id.* He would have found the most recent Kentucky display constitutional under the *Lemon* test because it exhibited a proper secular purpose, regardless of the purpose behind previous iterations of that display, and because it advanced an appropriate civic message. *Id.* at 2760–64.

McCreary thus revolved entirely around the issue of secular purpose (or the lack thereof), whereas *Van Orden* addressed the issue of what context was necessary to create the proper historical setting such that a symbol having both religious and secular significance could comprise a part of a larger constitutional display.

D. Surviving a Constitutional Challenge

In many ways, the two opinions vividly illustrate Chief Justice Rehnquist's characterization of the Court's case law: "Our cases, Janus*like*, point in two directions in applying the Establishment Clause." *Van Orden*, 125 S.Ct at 2859. Nonetheless, careful analysis of both opinions yields several practical factors bearing on the likelihood that a future religious display will survive constitutional challenge. *See generally* Abbott, *Upholding the Unbroken Tradition*, *supra* Part II, at 68-71.

1. Age

First, older displays will generally receive greater deference than newer ones. Notably, Fraternal Order of Eagles monuments—of which there are hundreds—now have an excellent chance of surviving constitutional challenge. *See, e.g.*, *Card v. City of Everett*, 386 F. Supp. 2d 1171 (W.D. Wash. 2005) (finding an Eagles monument on city grounds amidst others indistinguishable from *Van Orden*); *Russelberg v. Gibson County*, 2005 WL 2175527 (S.D. Ind. 2005) (reversing on remand an injunction to remove an Eagles monument from the grounds of the county courthouse in light of *Van Orden*). Indeed, the *en banc* Eighth Circuit recently held that a Fraternal Order of Eagles monument in a Nebraska park was indistinguishable from *Van Orden* after both the district and appellate courts had found it unconstitutional. *See ACLU of Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005). There, the majority closely followed the plurality opinion in *Van Orden*, noting the longstanding tradition of displaying the Ten Commandments on government property and the propriety of government's acknowledging religion. *Id.* at 775–77. Significantly, only two of the judges sitting *en banc* dissented, highlighting the persuasive power of *Van Orden*'s plurality opinion.

Newer displays, however, like the one in *McCreary*, may face more difficulty, depending upon how aggressively the court applies the purpose prong. But, in the absence of demonstrated religious purpose, *Van Orden* should control.

2. Purpose

Second, purpose still matters. The majority's holding in *McCreary v. ACLU* indicates that evidence of a religious purpose is still sufficient to find a display unconstitutional in and of itself.

An overly broad reading of *McCreary* could cast doubt on the ability of new displays to survive such purpose inquiry. But, *McCreary* should not be read so broadly.

McCreary's purpose evidence was extraordinary—and unlikely to be repeated. *McCreary* focused on the numerous official statements in the record that the Court found expressly manifested a religious purpose, including, *inter alia*, a statement of legislative purpose referencing "'Jesus Christ, the Prince of Ethics,'" a statement that the Ten Commandments are "*the* precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and a story with the moral that "'there must be a divine God.'" *Id.* at 2728–29. Any such explicit statements of religious purpose may trigger a more exacting inquiry that could lead to a finding that the display is unconstitutional. *See id.* at 2732–39. Displays, even new ones, without such evidence of a constitutionally impermissible purpose, should still survive.

Indeed, the Sixth Circuit recently upheld a display essentially identical to the one in *McCreary* for precisely this reason. In *ACLU v. Mercer County*, 2005 WL 3466545 (6th Cir. 2005), the Sixth Circuit examined a Foundations of Law and Government display erected in Mercer County. Unlike in McCreary County, the Mercer display had no religious purpose: A single resident hung the display, and no clergyman solemnized the event. *Id.* at *6.

Finding no impermissible purpose, the Sixth Circuit examined the effect of the display under the endorsement test. *Id.* at *10–12. It concluded that the collection of historical documents having civil and political influence presented the Ten Commandments in the context of an overall secular message— acknowledging legal history. *Id.* at *11.

Thus, *McCreary* affirms the continuing importance of the purpose inquiry, but it does not foreclose any particular display or context on effect or endorsement grounds. That inquiry remains separate.

3. Divisiveness

Third, Justice Breyer's necessary concurrence in *Van Orden* indicates that religious "divisiveness" is, for him, a critical factor. He focused on the fact that the Eagles' monument had stood on the Capitol Grounds for forty years without controversy. *Van Orden*, 125 S. Ct. at 2870–71 (Breyer, J., concurring).

A new monument whose erection prompts much protest and dissent may, then, face greater challenges than a monument that has stood quietly, perhaps virtually unnoticed, for decades. Here, age and history may again assist. *Cf. Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 993 (D. N.D. 2005) (finding an Eagles monument constitutional that had stood on public land unchallenged—minus one verbal complaint—even longer than the one in *Van Orden*).

4. Context

Fourth, the Court may examine religious displays in certain contexts more closely than others. The plurality opinion in *Van Orden*, for example, noted that a display in a public school classroom faces stricter criteria. *Van Orden*, 125 S. Ct. at 2863–64. Justice Breyer's concurrence also noted that the government "must exercise particular care in separating church and state" where impressionable children are concerned. *Id.* at 2871 (Breyer, J., concurring).

Stone v. Graham, which found a Ten Commandments display unconstitutional in a public school, may well control in this setting. In *Stone*, however, the Court found an impermissible religious purpose in the erection of the display, 449 U.S. at 41, so a display with a secular purpose could fare better even in this delicate context.

5. Symbolic versus Textual Representation

Finally, all the Justices agreed in theory that some representations of the Ten Commandments were constitutional. None of them seriously contests, for example, the constitutionality of inclusion of Moses and the Ten Commandments in the frieze of lawgivers in the Supreme Court courtroom. *See Van Orden*, 125 S. Ct. at 2862 (plurality opinion); *id* at 2893–94 (Souter, J., dissenting).

The dissenters in *Van Orden* would find symbolic representations less problematic than displays containing the full text of the Ten Commandments, *id.* at 2893–97 (Souter, J., dissenting), perhaps reading a symbol to convey more of the secular dimension. *Cf. King v. Richmond County*, 331 F.3d 1271, 1285–86 (11th Cir. 2003) (finding constitutional a representation of the Decalogue as two rounded stone tablets in a county seal). But, even the dissenters allow that the text, when properly integrated into a historical context, may be constitutionally displayed. *Van Orden*, 125 S. Ct. at 2893–94 (Souter, J., dissenting).

IV. IMPACT OF THE NEW JUSTICES

For over two decades, Justice O'Connor has stood as the critical swing vote on most Establishment Clause cases. Her *Lynch* and *Allegheny* endorsement test has framed the modern inquiry on these issues; yet in *Van Orden* and *McCreary* no Justice other than Justice Breyer purported to apply the endorsement test.

The absence of Justice O'Connor will no doubt work considerable change in future Establishment Clause case law. And, the ascension of two new Justices to the Court will, at a minimum, change the calculus of future Establishment cases.

Chief Justice Roberts has yet to author any opinions involving religious display cases, either for the Supreme Court or for the D.C. Circuit. One may surmise that his views will be similar to those of Chief Justice Rehnquist's[6]—for whom he clerked and to whom he was close—but time will tell if that prediction proves accurate. Whatever the contours of his precise views, it is certain that they will be rigorously thought out and carefully explicated.

Justice Alito has penned one opinion dealing with the merits of a religious display during his tenure on the Third Circuit. He authored the majority opinion in *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (1999), a case examining the constitutionality of Jersey City's holiday displays. Then-Judge Alito read *Lynch* and *Allegheny* narrowly in that case, "examin[ing] the positions taken by the Justices needed to form a majority and follow[ing] the opinion that supports the majority position on the narrowest grounds." *Id.* at 103. After carefully tracing the various opinions in *Lynch* and *Allegheny*, he concluded for the majority that the display was constitutional. *Id.* at 109.

Significantly, in that case, Jersey City had added secular symbols to its display of a crèche, a Menorah, and a Christmas tree *after* a district court enjoined that display. *Id.* at 94–95. The modified display included Santa Claus, Frosty the Snowman, Kwanzaa symbols, and a sign indicating that this display was one in a series designed to highlight the cultural and ethnic diversity among the city's residents. *Id.* Then-Judge Alito's opinion for the court did not disturb the first ruling finding that the original display endorsed religion. *Id.* at 98. He upheld the subsequent display, however, suggesting that he may be unlikely to read an improper purpose into a change in display where the record does not reflect explicit evidence of impermissible purpose. Indeed, he expressly noted:

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[6] *See, e.g.*, Marci Hamilton, *The Year in Review: Law and Religion in 2005*, FINDLAW, Dec. 29, 2005, *at* http://writ.news.findlaw.com/hamilton/20051229.html

> The Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith.

Schundler, 168 F.3d at 105.

One should be careful not to read too much into then-Judge Alito's opinion in *Schundler*. Although it suggests a general jurisprudential approach—disciplined, methodical, hewing closely to precedent—his role as a Justice (and his authority to reconsider Supreme Court precedent) is considerably different from his role as a lower-court judge. Again, time will tell.

V. CONCLUSION

Out of the "Januslike" *McCreary* and *Van Orden* opinions emerge some clear principles. By following these principles, state and local governments finding themselves enmeshed in litigation over similar displays may increase their chances of obtaining a favorable ruling.

If, over time, Chief Justice Roberts and Justice Alito both follow the plurality's path, the fact-based, contextual analysis will become less important; indeed, bright line rules may emerge Until then, lower courts must follow *Van Orden* and *McCreary*. In this analysis, fact-based inquiries focusing on the age of the display, the express indicia of purpose, any divisiveness that has presented, the context of the display, the representation of the symbol, and the degree of integration may be critical.

* * *

From the time of the Founding, our Nation has recognized her religious heritage, and the Constitution has never been understood to prohibit those acknowledgments. From the national motto "In God We Trust" to the House and Senate Chaplains to the frieze of Moses and the Ten Commandments in the Supreme Court, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Lynch,* 465 U.S. at 693 (O'Connor, J., concurring).

Indeed, America was formed by those fleeing religious persecution. Seeking to forge a land where each person could live and worship God as he or she believed best, the Framers established a country predicated on a simple, yet profound, postulate—declared in the document that gave birth to our Nation:

> 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 DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

From that day forward, the United States has fought to protect the freedom of conscience of all her citizens, while at the same time acknowledging the heritage behind our Nation's founding. Our Nation was born of many faiths, and we as a people may celebrate our full diversity.

The Ten Commandments are undeniably a sacred religious text. But they are equally undeniably a foundational legal document in the development of Western civilization and legal codes. Properly understood, the First Amendment embraces tolerance—not hostility—to religious faith. "[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S., at 673. And nothing in the Constitution requires eradicating all references to the Almighty from the public square.

Between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role that religion has played in our Nation's history and heritage. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establishing religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 67.

No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether a monument bearing the Ten Commandments, which has stood for over forty years and is surrounded by sixteen other monuments on the Texas Capitol Grounds, constitutes an impermissible establishment of religion in violation of the First Amendment.

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STATEMENT OF THE CASE

In 1888, the People of Texas dedicated the Texas Capitol and its Grounds, approximately twenty-two surrounding acres. J.A., at 112. Three years later, the first monument was built on the Grounds and dedicated to the Texans who died at the Alamo. *Id.,* at 113. Today, seventeen monuments and twenty-one historical markers adorn the Capitol Grounds, *id.*, at 204, together commemorating people, events, and ideals that have contributed to the history, diversity, and culture of Texas. *See* Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473.

The Capitol and its Grounds are listed on the National Registry of Historic Places and designated as a protected National Historic Landmark.[1] J.A., at 93, 103. The State Preservation Board is charged with preserving, maintaining, and promoting the cultural resources of the Capitol and its Grounds. Meeting the federal statutory definition of a "museum," 20 U.S.C. §9172, the Capitol and its Grounds are cared for by a professional curator,[2] who is given the duties of cataloguing and preserving their historical materials. TEX. GOV'T CODE §443.006.

Visitors to the Capitol may take a guided tour of the Capitol Building, which contains historic statues, portraits, and other artifacts, and they may also take a self-guided tour of the outdoor displays on the Grounds. J.A., at 27-29, 34-35, 67-71, 93-95, 163-72. The guided tour of the Capitol Building includes numerous memorials, plaques, and seals portraying both the religious and secular history of Texas. *Id.*, at 63-64, 163-72. For example, a large Six Flags Over Texas display on the floor of the

[1] The National Historic Preservation Program exists to preserve "for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. §461.

[2] By statute, "[t]he curator of the Capitol must have at least a master's degree and four years' experience in historic collections administration with a specialization in the material culture of this state." TEX. GOV'T CODE §443.006(a).

Capitol rotunda features the Mexican eagle and serpent – a religious symbol of Aztec prophecy[3] – as well as the Confederate seal inscribed with "Deo Vindice" ("God will judge"). *Id.*, at 63-67, 165-67. Likewise, visitors to the old Supreme Court Chambers, on the third floor of the Capitol Building, will find "Sicut Patribus, Sit Deus Nobis" ("As God was to our fathers, may He also be to us") inscribed above the Justices' bench. *Id.*, at 171-72.

Those wishing to tour the Grounds have access to brochures, laying out a self-guided tour, that the State Preservation Board makes available to Capitol visitors. *Id.*, at 35, 112, 204. The self-guided tour begins in the southeast portion of the Grounds, where the first monument encountered is a memorial to John B. Hood's Texas Brigade. *Id.*, at 115, 125. The tallest monument on the Capitol Grounds (at over forty-four feet in height), it is inscribed with quotes from Jefferson Davis and Robert E. Lee, and is topped by the bronze figure of a Confederate soldier. *Id.*, at 205. Moving north, the tour continues to the Texas Peace Officers memorial and the Disabled Veterans monument. *Id.*, at 117, 128-29.

The tour then crosses over to the Capitol's northwest quadrant, which contains seven of the Grounds' seventeen monuments. This area is the largest grouping of monuments on the Capitol Grounds. Three monuments honor

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[3] In the center of the Mexican flag lies a brown eagle, eating a serpent while perched on a prickly-pear cactus, which grows from a rock surrounded by water. The Aztecs believed that their leaders were given this image in dreams by the Sun God Huitzilopochtli, as the site where they should found their theocratic capital Tenochtitlán. Founded in 1325 A.D., on a marshy island in Lake Texcoco, the city is the present-day site of Mexico City. *See* J.A., at 63, 162, 165. This religious display reflects a faith tradition found in Texas long before the arrival of the Jewish and Christian faiths. Indeed, the contribution of this Aztec mythology to Texas history and culture is such that it is taught in the Texas public schools in the fourth and seventh grades. *See*, *e.g.*, 19 TEX. ADMIN. CODE §113.6(a)(20) ("Culture. The student [is expected to] understand[ ] the contributions of people of various racial, ethnic, and religious groups to Texas."); *id.*, at §113.6(b)(1) ("History. The student [is expected to] understand the similarities and differences of Native-American groups in Texas and the Western Hemisphere before European exploration.").

veterans – a tribute to veterans of the Korean War (the largest monument in the northwest quadrant),[4] a tribute to veterans of World War I, bearing the inscription "God – Country – Peace," and a monument to Texans who died at Pearl Harbor. *Id.*, at 131-33. And four concern children – a replica of the Statue of Liberty in honor of the Boy Scouts of America (at nearly sixteen feet, the tallest monument in the northwest quadrant), *id.*, at 134; a tribute to the Texas Pioneer Woman, depicting a pioneer mother cradling a baby in one arm, *id.*, at 135; a tribute to Texas Children, portraying six children on a visit to the Capitol, one of whom wears a necklace bearing a small cross, *id.*, at 54, 136; and the Ten Commandments monument at issue in this litigation, donated by the Fraternal Order of Eagles and dedicated in 1961 "to the Youth and People of Texas," *id.*, at 87, 137.[5]

Continuing south, the tour passes monuments commemorating veterans of the Texas National Guard and the Spanish-American War, *id.*, at 139-40, and a Texas Cowboy statue paying tribute to the "rough and romantic riders of the range," *id.*, at 142, 206.

The self-guided tour ends at the "Great Walk," which connects the Capitol's main, south entrance with Congress Avenue and downtown Austin. *Id.*, at 37, 118-19, 145. Here visitors will find the four oldest monuments on the Grounds: a tribute to Heroes of the Alamo, which features a bronze statue of a Texan holding a muzzle-loader rifle, *id.*, at 147, 205; the Terry's Texas Rangers monument, commemorating volunteers who fought to defend the Confederacy, *id.*, at 146, 206; a memorial to Volunteer Firemen, inscribed with the names of Texan volunteers who have lost their lives fighting fires, *id.*, at 150, 206; and

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[4] A massive block of granite, it stands over eleven feet in height and measures over nineteen feet in diameter; in contrast, the Ten Commandments monument is 6'3" high (plus a 6" base), 3'6" wide, and a mere 8" deep. Tr., at 17.

[5] Several other monuments bear the insignia of the State Star or Seal, *see*, *e.g.*, J.A., at 46-48, 51, 61, 64, 129, 132, 133, 135, 150; the Ten Commandments monument bears no such imprimatur, *see id.*, at 59-60, 137.

the Confederate Soldiers monument, in which five bronze figures represent the Infantry, Calvary, Artillery, and Navy, headed by the Confederate President Jefferson Davis, *id.*, at 153, 205.

A visitor to the Capitol Grounds cannot reach the Ten Commandments monument without first passing in full view of many of the Grounds' other monuments and memorial plaques. *Id.,* at 117. Notwithstanding Petitioner's erroneous statements to the contrary, Pet'r Br., at 3, 9, 29, 33, 34, 35,[6] six monuments are in the immediate vicinity surrounding the Ten Commandments monument, and several are easily visible. *See* Parts I.A.1., I.A.2.a., *infra*. When standing on the sidewalk facing the Ten Commandments monument, the Boy Scouts of America, Pearl Harbor, and World War I monuments – all abutting the same sidewalk – are visible to the left. *See* J.A., at 51, 117; *see also* Attachments A & B. And one need only turn in place for unobstructed views of the Bicentennial memorial plaque and Texas National Guard monument. J.A., at 117.

The Tribute to Texas Children and the Pioneer Woman monuments are the two monuments physically closest to the Ten Commandments, at distances of 111 feet and 120 feet, respectively. *Id.*, at 95. Although views of these monuments are obscured by hedges for a visitor standing immediately in front of the Ten Commandments monument, a few steps north brings the Pioneer Woman into view, and a few steps east toward the Capitol would allow the visitor to see the Tribute to Texas Children. *Id.*, at 117; *see also* Attachments A & B.

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[6] Petitioner asserts incorrectly that "no other monument is visible from the Ten Commandments monument." Pet'r Br., at 3. Trial Exhibits 52, 53, and 61 show that the Statue of Liberty Replica, Pearl Harbor memorial, and World War I monument are all easily visible from the Ten Commandments monument. *See also* Attachments A & B. And the Capitol Monument Guide shows the Ten Commandments monument in close proximity to several other monuments and in the largest grouping of monuments on the Capitol Grounds. *See* J.A., at 204.

And, immediately above and to the right of the viewer is the frieze of the Capitol building itself, with the Six Flags of Texas, including the Aztec religious symbol of an eagle on a cactus with a serpent in its beak, and the Confederate flag, inscribed with "Deo Vindice" ("God will judge"). J.A., at 63-67, 154, 162, 165-67. And, atop the rotunda, stands the Goddess of Liberty. *Id.*, at 154.[7]

The Ten Commandments monument is one of the smallest monuments on the Capitol Grounds, and is dwarfed by the Capitol itself – built of the same red granite, the monument is difficult to see from many vantage points. *See* Attachment A.

The Ten Commandments monument came to the Capitol Grounds over forty years ago. In 1961, the Texas Chapter of the Fraternal Order of Eagles donated the monument "to the Youth and People of Texas," to be erected on the Capitol Grounds at the Eagles' expense. *See* Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195-96; J.A., at 97, 207. The Eagles are a service organization dedicated to promoting liberty, truth, and justice and claiming seven former United States Presidents as members.[8] To ensure that their monument would not be identified with any particular religious group, the Eagles carefully selected a nonsectarian text of the Ten Commandments that had been developed by representatives of the Jewish, Protestant, and Catholic faiths. *See*

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[7] See STATE PRESERVATION BOARD, HISTORIC ARTIFACTS GALLERY, *at* http://www.tspb.state.tx.us/SPB/gallery/HisArt/19.htm (last visited Jan. 28, 2005) ("Standing nearly 16 feet tall and weighing approximately 2,000 pounds, the statue probably represents Pallas Athena, the Greek goddess of wisdom, justice, and arts and crafts. Athena, later called 'Minerva' in Roman mythology, served as the protectress of the democratic city-state of Athens in ancient times.").

[8] The Eagles' website claims Teddy Roosevelt, Warren G. Harding, Franklin D. Roosevelt, Harry S Truman, John F. Kennedy, Jimmy Carter, and Ronald Reagan as members. *See* FRATERNAL ORDER OF THE EAGLES, SEVEN U.S. PRESIDENTS HAVE BEEN MEMBERS OF THE FRATERNAL ORDER OF EAGLES, *at* http://www.foe.com/history/uspres.html (last visited Jan. 28, 2005).

State v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995).[9]

In accepting the gift from the Eagles and granting permission to erect the monument, the Legislature officially "congratulated" the Eagles "for [their] efforts and contributions in combating juvenile delinquency throughout our nation." J.A., at 97. Texas Representative Wil Smith and State Senator Bruce Reagan dedicated the monument. *Id.*, at 91. The legislative records from the time include no reference to anything religious, or any attempt to convey any sort of religious message, and there is no evidence that any members of the clergy participated in legislative deliberations or in the dedication ceremony. *Id.*, at 91, 97-100.

The Petitioner's brief accurately describes the physical characteristics of the monument itself.[10] A division of the State Board of Control, a predecessor to the State Preservation Board, recommended that the monument be erected on the northwest Capitol Grounds between the Capitol and the Supreme Court Building. *Id.*, at 33, 101-02. In its original orientation, the monument faced the back, or north, door of the Capitol. The text of the monument, however, would not have been legible from that vantage point, because of its relatively small size and distance from the building. *Id.*, at 91, 210-12. The monument requires virtually no maintenance. *Id.*, at 93.

In 1990, during construction of the underground Capitol Extension north of the Capitol, the monuments in the northwest quadrant (including the Ten Commandments monument) were removed from their customary

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[9] The parties agreed that the district court could take judicial notice of the background facts relating generally to the Eagles' Ten Commandments monuments recounted in this case and in *Books v. City of Elkhart*, 235 F.3d 292, 294-95 (CA7 2000), *cert. denied*, 532 U.S. 1058 (2001). *See* Tr., at 32-34.

[10] There are a few typographical errors in Petitioner's transcription of the monument's text. The monument uses the word "shalt" eight times; Petitioner's brief renders three of these as "shall." Pet'r Br., at 2.

locations and stored. J.A., at 91-92. When the Extension was completed, the monuments were returned to their original locations. At the direction of the Curator, the Ten Commandments monument was turned toward the southwest instead of the southeast, so that it would face a newly-created sidewalk. *Id.*, at 50. A practical result of the change in the monument's orientation is that it is now "less conspicuous" in that its text is visible only to persons approaching the monument from the direction of the least-used, west entrance of the Capitol. *Id.*; *see also id.*, at 37, 204, 211.

In 1995 and 1996, the State Preservation Board undertook a project to restore the most historically important portions of the Capitol Grounds – areas to the Capitol's south, east, and west – to their condition as of 1915. *Id.*, at 49, 112. Monuments erected in those areas within fifty years after the restoration period – that is, after 1915 but before 1965 – were moved to the north side of the Grounds. *Id.*, at 49, 207. Monuments installed in the historic areas after 1965, like the Austin Lawyers' Wives' Star and the Realtors' Centennial Monument, were removed entirely and replaced with an explanatory plaque. *Id.*, at 77, 123, 138.[11] Since 1996, several new monuments have been added to the Grounds, all to the north of the Capitol. *Id.*, at 205-09. And, in 2001, the Legislature commissioned yet another monument to be added to the Capitol Grounds, "honoring [the] contributions of Tejanos" to Texas. Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473.

Although the Texas Ten Commandments monument had stood without incident or litigation since 1961, in January of 2002 Petitioner filed this lawsuit challenging the constitutionality of the monument. Applying this

[11] Because it is in the northeast quadrant of the Grounds – outside the traditional boundaries of the Historic Grounds, J.A., at 112 – the Disabled American Veterans of Texas monument, which was erected in 1980, was not removed during the 1995-96 renovation. *Id.*, at 208.

Court's decisions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the district court upheld the monument, *Van Orden v. Perry*, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002), and the court of appeals unanimously affirmed, *Van Orden v. Perry*, 351 F.3d 173 (CA5 2003). To resolve the growing conflict among the courts of appeals, this Court granted certiorari. *Van Orden v. Perry*, 125 S.Ct. 346 (2004).

SUMMARY OF ARGUMENT

For over four decades, a granite monument depicting the Ten Commandments has stood on the Texas Capitol Grounds. Defined by statute as a "museum" and maintained by a professional curator, the Grounds feature seventeen different monuments to people, events, and ideals that have contributed to the diversity, culture, and history of Texas. The reasonable observer on the Capitol Grounds could no more miss this museum-like context than could a visitor standing on the National Mall in Washington, D.C. One of the smallest monuments, the Ten Commandments monument is located behind the Capitol and surrounded by six other monuments.

Under *Lynch* and *Allegheny*, the overall history, context, and surroundings are critical to determining a display's constitutionality. If, aware of that full background and history, the reasonable observer would not perceive the monument to be a government endorsement of religion, then the monument is constitutional. As the court of appeals unanimously found, the Texas monument easily meets that standard.

The effect of the monument, in the eyes of the reasonable observer, is merely a governmental acknowledgment of the substantial contribution of the Ten Commandments to the development of Western civilization and legal codes, a commemoration of one influence, among many, on who we are as a People. Although unquestionably a religious text, the Decalogue has also indisputably had a significant secular impact on our history and culture. And the monument's

location on the Grounds, sitting between the Texas Capitol and Supreme Court, further communicates an acknowledgment of the Ten Commandments' secular impact on our legal institutions.

No history or evidence demonstrates an impermissible purpose. Rather, the Ten Commandments monument serves at least two secular purposes. First, it was accepted from the Fraternal Order of Eagles in 1961 for the purpose of commending their work with youth. Second, the monument was placed on the Grounds for the purpose of acknowledging the Ten Commandments' historical impact on American and Texan law and culture.

Moreover, the Ten Commandments' "history and ubiquity" further supports the monument's constitutionality. The Texas monument's forty-plus-year history on the Grounds, together with our rich national tradition of official acknowledgments of the Ten Commandments' impact on law, ensure that the reasonable observer would not conclude that the Ten Commandments monument on the Texas Capitol Grounds conveys a message of religious endorsement.

Countless monuments, medallions, plaques, sculptures, seals, frescoes, and friezes – including, of course, this Court's own courtroom frieze – commemorate the Decalogue. Nothing in the Constitution requires these historic artifacts to be chiseled away or erased. The Texas monument has neither the purpose nor effect of endorsing religion, and so, consistent with this Court's precedents, it should be upheld.

ARGUMENT

I. THE TEXAS TEN COMMANDMENTS MONUMENT, IN CONTEXT, WOULD NOT BE PERCEIVED AS AN ENDORSEMENT OF RELIGION, AND SO DOES NOT OFFEND THE ESTABLISHMENT CLAUSE.

The Court has long struggled with how best to judge the constitutionality of government displays with religious

content. The much-maligned *Lemon* test by its terms asks (1) whether the challenged state action has a secular purpose, (2) whether the primary effect of the state action advances or inhibits religion, and (3) whether the state action would result in excessive government "entanglement" with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[12]

Petitioner in *McCreary County v. ACLU*, No. 03-1693, and many of the *amici* in that case, and in this one, have urged this Court to alter or abandon *Lemon* altogether. The State of Texas does not dispute that it is well past time to dispatch that troubled test, but the Court need not do so to affirm the court of appeals in this case. Indeed, the Texas monument is altogether constitutional under existing Supreme Court precedent, and the monument can be upheld without altering settled law.

Since *Lemon*, the Court has distilled its first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *Allegheny*, 492 U.S., at 600-01; *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring). The Texas monument fully satisfies that standard.

"Endorsement" in the Court's discussions is not self-defining; it connotes "favoritism" or "promotion" and "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S., at 593-94 (internal citation omitted). The endorsement test does not preclude governmental acknowledgment of religion, nor does it prohibit explicit governmental references to religion. *See id.*, at 601. Government "need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes

[12] The Court has not made use of *Lemon*'s third "entanglement" prong in government display cases, and Petitioner has agreed that entanglement is not an issue in this case. *See* 351 F.3d, at 177.

unduly into the affairs of the other." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion).

Instead, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593. In determining whether a government display has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *Id.*, at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id*., at 631 (O'Connor, J., concurring in part and concurring in the judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

Repeatedly, the Court has observed, "religion has been closely identified with our history and government," *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963); the "history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962); and we "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, 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*, 465 U.S., at 674.

A governmental display will thus offend the Establishment Clause only when it is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("The message conveyed is one of endorsement of a particular

religious belief, to the detriment of those who do not share it.").

The question is not whether *any* nonadherent *might* perceive the display to reflect official disapproval of her religious choices. "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Elk Grove United Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2321 (2004) (O'Connor, J., concurring in the judgment); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (declining to "employ Establishment Clause jurisprudence using a modified heckler's veto"). Instead, the question is whether the reasonable, objective observer – one acquainted with the display's origins, context, and "its place in our Nation's cultural landscape" – would perceive the display as an official endorsement of religion. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment); *see also Pinette*, 515 U.S., at 779-80 (O'Connor, J., concurring in part and concurring in the judgment) (reasonable observer knows "the history and context of the community and the forum in which the religious display appears"); *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment) ("[C]ourts should assume that the 'objective observer,' . . . is acquainted with the Free Exercise Clause and the values it promotes.").

A. The Texas Monument, in Context and Considering Its History, Would Not Be Perceived by the Reasonable Observer as Impermissibly Endorsing Religion.

1. The context is not as Petitioner describes.

As an initial matter, Petitioner's brief seriously misrepresents the actual context of the Texas monument. Repeatedly, Petitioner makes factual statements that are unsupported by the record and contrary to reality. These misstatements include:

- Asserting, no less than six times, that "no other monument is visible from the Ten Commandments monument." Pet'r Br., at 3; *id.*, at 9, 29, 33, 34, 35. This assertion is simply wrong. *Four* separate monuments are easily visible from the monument, and two others (the two closest, standing 111 and 120 feet away) are visible if one takes but a few steps to see beyond a hedge. *See* Part I.A.2.a., *infra*; *see also* Attachment A.
- Asserting, four times, that "[n]o other monument on the Capitol's grounds expresses a religious message." Pet'r Br., at 4; *id.*, at 9, 29, 34. This assertion is also incorrect. The closest monument to the Ten Commandments monument, the Tribute to Texas Children, displays a young girl wearing a cross. J.A., at 54. The Veterans of World War I memorial, right down the sidewalk, is inscribed "God – Country – Peace." *Id.*, at 132. The Aztec symbol of the eagle on cactus, which Petitioner dismisses as being "inside the Capitol," Pet'r Br., at 36, is also displayed on the frieze outside the Capitol, almost directly above the Ten Commandments monument. J.A., at 154, 162. Alongside that seal on that same frieze, is the Confederate flag, inscribed with "Deo Vindice" ("God will judge"). *See Id.*, at 63-67, 154, 165-67. Above them both, is the Goddess of Liberty. *See* note 7, *supra; J.A.*, at 154.
- Asserting that the monument is "directly in front of the Texas State Capitol," "prominently displayed" on "the 'Great Walk.'" Pet'r Br., at 30. This, too, is false. The monument is *behind* the Capitol, between its back door and its least-used western entrance. J.A., at 37-38, 87. The Great Walk is, indeed, in front of the Capitol, leading up to its main southern entrance. *Id.*, 112-20, 145 ("The promenade leading from Congress Avenue to the Capitol's south entrance is called the Great Walk.").

But the monument is nowhere near the Great Walk. *Id.*, 112-20. Instead, what Petitioner describes as the "Great Walk" is in fact a driveway where Capitol staff park their cars.[13]

- Asserting that "[n]ot every monument removed during the construction was replaced after being taken down," but "the State Preservation Board decided to place the Ten Commandments monument back in its prior location, but turned it to face in a different and more prominent direction: directly facing the corner of the two sidewalks that intersect in front of the Texas State Capitol and the Texas Supreme Court." Pet'r Br., at 5. This is wrong in several respects. First, the Board replaced every monument after the 1993 construction. *See* Part I.B.3., *infra*; J.A., at 49, 77, 112. Second, the new position is not more "prominent." As noted, it is not "in front" of the Capitol, and there is no "*the* sidewalk" connecting the Capitol and the Supreme Court. There are multiple sidewalks, and the monument is on the least used pathway. *Id.*, at 37-38, 87. And third, the monument was turned *away* from the Capitol, rendering it "less conspicuous" and orienting it to face the newly-constructed sidewalk that had not existed before. *Id.*, at 50.
- Asserting repeatedly, and incorrectly, that the monument is "large," "prominent," and even "uniquely prominent." Pet'r Br., at i, ii, iii, 1,

[13] Petitioner may have confused the Great Walk with the Oval Walk. The former is "one of the most significant features of the Capitol grounds," lined with trees and the oldest and largest Capitol monuments, J.A., at 144, 145; the latter is a paved pathway around the Capitol, *id.*, at 113. In any event, the Ten Commandments monument is not adjacent to the Oval Walk either – it abuts a sidewalk and then a driveway used for parking (across which is found the Oval Walk). *See* Attachment B.

2, 6, 18, 22, 27, 29, 30, 44. The facts and the record are to the contrary. *See, e.g.,* J.A., at 87 ("Well, it's certainly one of the smallest monuments that we have. It's not in the most prominent location. . . . It's at the north door, which is less used."); *see also* Attachment A.

- Asserting that "[a]n individual must pass through gates, many of which are guarded, to gain access to the State Capitol grounds." Pet'r Br., at 31. While this might be true at other state Capitols, it is not true at the Texas Capitol. Although there are ceremonial gates at several points around the Capitol, one may enter the Grounds from many directions without passing through gates or encountering guards. *See, e.g.*, Attachment A.
- And asserting that "Texas chose the Protestant, King James version of the Ten Commandments for its monument." Pet'r Br., at 42. Texas did not "choose" any version, as the record is clear that the Eagles themselves selected the text. J.A., at 97. The text is not in fact the King James version; indeed, as Petitioner omits to acknowledge, the Eagles chose the text only after convening representatives of Catholic, Protestant, and Jewish faiths and charging them with arriving upon a nonsectarian version of the Commandments. *See Freedom from Religion Found.*, 898 P.2d, at 1017; Tr., at 32-34.

The consequences of Petitioner's misimpression about the facts of the monument and its surrounding context are not merely that his recitation of the case was less than accurate. Indeed, his entire legal argument is explicitly predicated upon a series of false premises, without which it cannot survive.

He postulates a "large," "uniquely prominent" religious monument, "in front" of the Capitol on "the Great Walk," situated "by itself" so that "no other monuments [are] visible when standing before it." Pet'r Br., at 1, 44,

30, 29. That monument does not exist, at least not in Texas. And so his lengthy exegesis as to whether a Ten Commandments monument, in that hypothetical context, might be constitutional, has little bearing on this Court's inherently fact-specific and context-sensitive analysis under the Establishment Clause. *See Lynch*, 492 U.S., at 629 (O'Connor, J., concurring) ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice. . . . ").

2. The actual context does not convey endorsement.

a. The museum setting of the Capitol Grounds precludes a perception of religious endorsement.

The reasonable observer does not focus exclusively on the religious component of a governmental display, but instead views the display in its full context. *See Lynch*, 465 U.S., at 679-80. In *Lynch*, the Court upheld the Rhode Island City of Pawtucket's display of a crèche in its "proper context of the Christmas Holiday season." *Id.*, at 680. This "overall" setting did not diminish the crèche's religious significance, but it ensured that the display's effect would not reasonably be perceived as endorsement, in the same way that "a typical *museum setting*, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.*, at 692 (O'Connor, J., concurring) (emphasis added). The Capitol Grounds, as a whole, form the proper context in which to determine the effect of the Ten Commandments monument upon a reasonable observer.[14] And this overall, museum setting precludes any reasonable perception of official endorsement of the monument's religious content.

[14] This is especially true in this instance because it would be virtually impossible for a person to enter the Capitol Grounds and encounter the Ten Commandments monument without first passing several other monuments. *See* J.A., at 117.

The Capitol and its Grounds constitute, as a whole, a National Historic Landmark. J.A., at 103-11. The State Preservation Board is charged with preserving this landmark, and to that end it employs professional curators with degrees in history and museum science. *Id.*, at 21, 28-29. The Board offers educational programs, including guided tours of the Capitol building and brochures. *Id.*, at 20-24, 112, 204. Indeed, the Capitol and its Grounds literally qualify as a museum as defined by federal statute. *Id.*; 20 U.S.C. §9172.

Just as an observer standing on the National Mall in Washington, D.C. – surrounded by its many monuments to our Nation's heritage – could not miss the museum-like setting, neither could the reasonable observer standing on the Texas Capital Grounds. The entire Grounds are meticulously maintained and clearly set apart from the surrounding city. *See* J.A., at 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/6.htm (last visited Jan. 28, 2005).[15] The Grounds are dominated by the Capitol itself and the aptly-named Great Walk leading up to the Capitol's south entrance, *see* J.A., at 118-19, 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/6.htm (last visited Jan. 28, 2005), along with the Great Walk's four towering monuments. *See* J.A., at 146-47, 150, 153, 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/4.htm (last visited Jan. 28, 2005).

The Ten Commandments monument – one of the smallest on the Grounds[16] – occupies a far less prominent

[15] *See also* Trial Exhibit 44 (an unnarrated video tour of the Capitol Grounds).

[16] The Ten Commandments monument is slightly more than one-third the height of the Boy Scouts of America monument – visible just down the sidewalk – and its width is roughly one-sixth the diameter of the nearby Korean War monument (its depth is only one-twenty-ninth that diameter). Surveying the entire Capitol Grounds, Hood's monument is

(Continued on following page)

position, along with its six surrounding monuments, to the Capitol's northwest. J.A., at 87, 204; *see also* Attachment A. No matter the route taken, the Ten Commandments monument cannot be reached without passing in full view of other monuments on the Grounds, and, contrary to Petitioner's repeated assertion, *see* Pet'r Br., at 3, 9, 29, 33, 34, 35, no fewer than four additional monuments are easily visible to a visitor standing on the sidewalk in front of the Ten Commandments monument.[17]

This overall context is so unmistakable that Petitioner stipulated to the fact that the "Ten Commandments monument is one element of a legally-protected National Historic Landmark." J.A., at 93. Petitioner thus correctly states that no observer could fail to understand "that the government is responsible for [the monument] being on government property." Pet'r Br., at 31. He is wrong, however, to assert that a reasonable observer would perceive in the monument a message of religious endorsement.

In *Allegheny*, the Court found a message of endorsement in a large crèche, sitting alone on the main and most beautiful part of a county courthouse, highlighted by a floral frame, bearing the exclusively religious admonition "Glory to God in the Highest," with a sign indicating its ownership by a religious organization. 492 U.S., at 598-600. The display challenged here, by contrast, is one of seventeen monuments on the Texas Capitol Grounds commemorating people, ideals, and events that have helped to shape Texan identity. *See* Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. It is one of the smallest of those seventeen monuments, J.A., at 87, sits in a relatively inconspicuous position by the least-used entrances to the Capitol, *id.*, at 37, 87, is not highlighted

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over thirty-seven feet taller than the Ten Commandments monument, and the Capitol itself (at 310 feet) towers above. *See* Attachment A.

[17] The Boy Scouts of America, Pearl Harbor, and World War I monuments are all visible along the same sidewalk, and the National Guard monument is visible behind the Ten Commandments monument. *See* J.A., at 51, 117, 204; Trial Exhibit 64; Attachments A & B.

among the monuments in any way, *id.*, at 212, bears a notation indicating its dedication by a private service organization, *id.*, at 137, and is inscribed with a text that, while religious in origin and content, has had an important secular impact on our law and culture.

In its museum-setting context, this monument would not convey to the reasonable observer any official endorsement of religion. This is simply not a context in which the State is reasonably understood to be taking sides. The many monuments commemorating veterans do not communicate disapproval of pacifists; the Tribute to Children does not reflect negatively on older Texans; the Hiker and horse-riding Cowboy monuments send no message concerning motorized transport; and the Volunteer Firemen monument reflects no official disapproval of those who pursue firefighting as a paid profession. The monuments, memorials, and commemorative plaques on the Capitol Grounds are not reasonably perceived as creating "insiders" and "outsiders" in the Texas political community. *See Lynch*, 465 U.S., at 688 (O'Connor, J., concurring).

Indeed, several monuments on the Capitol Grounds commemorate aspects of the Confederacy, a topic which, understandably, can arouse significant passions and resentments. But, even in that sensitive context, the reasonable observer would not perceive those monuments as a governmental statement of current allegiance to the Confederacy, or a present desire to secede from the Union. Instead, the reasonable observer would rightly understand that the Confederacy is part of the history of Texas, and our Nation, and these century-old monuments simply acknowledge and commemorate that fact. Just so, the Ten Commandments monument is not a government endorsement of the Decalogue, but rather an acknowledgment and commemoration of the role of the Ten Commandments in our history and culture.

All of these monuments and memorials send a clear civic message acknowledging historically important people, ideals, and events. These displays "document the struggles

and the successes that Texans have experienced in the past" and serve to inspire Texans as they "face the challenges of today." Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. Like the Grounds' other monuments, the Ten Commandments monument is reasonably perceived as sending a message acknowledging the historic significance of its subject matter.

b. The monument's placement between the Texas Capitol and Supreme Court highlights its civic message.

The Ten Commandments constitute an ancient legal code with historically distinct religious, moral, and civic dimensions. The message sent by their display may thus prove even more highly dependent upon context than for other religious symbols – the Decalogue's display may well deliver qualitatively different messages in a church, in a school, or in a courthouse. *Cf. Stone v. Graham*, 449 U.S. 39, 41 (1980) (Ten Commandments posted in school); *City of Elkhart v. Books*, 121 S.Ct., 2209, 2212 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (Ten Commandments monument near municipal building). Here, the Ten Commandments monument sits on the Capitol Grounds on a line between the Texas Capitol and Supreme Court. J.A., at 95, 204, 211-12. "Considered in that setting, the monument does not express the [State's] preference for particular religions or religious belief in general. It simply reflects the Ten Commandments' role in the development of our legal system." *Books*, 121 S.Ct., at 2212 (Rehnquist, C.J., dissenting from denial of certiorari).

Petitioner's argument that a large crèche permanently installed in place of the Ten Commandments monument would send a message of endorsement, *see* Pet'r Br., at 40, whether right or wrong, only highlights the importance of context to the endorsement analysis. A depiction of the birth of Jesus, commonly associated with the Christmas holiday, would indeed seem out of place permanently situated between the State's key legal institutions. Not so

for a monument bearing an ancient legal text, commonly associated with the idea of fundamental principles and historically understood to have had a significant impact on the development of our law. Such a monument has a natural home sitting between buildings housing the Texas Legislature and Texas Supreme Court.

Thus the reasonable observer, knowing the context of the specific and deliberate location of the Ten Commandments monument on a line between the Capitol and the Supreme Court, would rightly perceive that it is the civic aspect of the Ten Commandments' contributions to legal history and development that is being singled out and acknowledged.

3. The monument's content is reasonably perceived to deliver a civic message, not a religious one.

a. The monument contains civic symbols.

The monument does not rely exclusively on its context to negate any possible message of religious endorsement; its design also highlights the Ten Commandments' civic significance. The reasonable observer viewing the monument cannot miss the distinctive symbols introducing the monument's text. Centered at the monument's top, an eye within a triangle emanates rays of light. Below this eye hovers an eagle, wings outstretched, grasping the stars and stripes of the American flag. Below the eagle, written in the monument's largest letters, are the words, "the Ten Commandments." Underneath is written, "I AM the LORD thy God." The following text is in smaller font, with the Commandments justified to the left. J.A., at 137.

How would the reasonable observer interpret this combination of symbols and words? The striking "all-seeing eye" would doubtless seem familiar – as Petitioner notes, the eye at the monument's head is "similar to the symbol on the one-dollar bill." Pet'r Br., at 31. But the similarity between the monument's array of introductory symbols and those of our most basic unit of currency does

not end there. Along with an eye within a triangle emanating rays of light, set in a circle to the left, the back of our one-dollar bill contains a depiction of an eagle, wings outstretched, surrounded by stars and stripes, set in a circle to the right. These represent the sides of the Great Seal of the United States. J.A., at 179-83. In between these symbols, in the largest lettering on the bill, is the word "ONE," reflecting the note's content and value. Just above that word, in smaller font, are printed the words "IN GOD WE TRUST." *See* BUREAU OF PRINTING AND ENGRAVING, *at* http://www.moneyfactory.com/document.cfm/5/43/135 (last visited Jan. 28, 2005).[18]

This line-up of words and symbols on the dollar bill – all-seeing eye, eagle with stars and stripes, the words "ONE" and "IN GOD WE TRUST" – is strikingly similar to the prefatory line-up on the monument – all-seeing eye, eagle with stars and stripes, the words "the Ten Commandments" and "I AM the LORD thy God." The reasonable observer would not likely find this confluence of words and symbols insignificant. Instead, she would reasonably perceive in the design the message the monument's designers no doubt intended to send: like the motto on our currency, the Ten Commandments are presented here for their civic, and not for their religious, significance.

The words "IN GOD WE TRUST" have an undeniably religious meaning. Printed next to our national symbols on our legal tender, however, they are rightly understood not as an endorsement of religion, but as a civic acknowledgment of our religious heritage. *See Lynch*, 465 U.S., at 676. The Ten Commandments also have an undeniably religious aspect. Inscribed beneath these same national symbols, and situated near the State's key legal institutions, however, the monument bearing this text is rightly understood not as an endorsement of religion, but as a

[18] Above the eye on the Great Seal and dollar bill are also written the words "annuit coeptis," commonly translated as "God has favored our undertakings." *See* J.A., 181-82. Dollar bills have contained these symbols since 1957.

civic acknowledgment of this religious text's impact on our heritage.

b. The monument's text is not reasonably perceived to reflect official state policy.

The monument's text is framed with symbols highlighting the Decalogue's civic dimension. Turning to the text of the Ten Commandments themselves, the reasonable observer would not believe that the State of Texas was endeavoring to endorse these propositions as official State policy. It is not at all clear how, standing in the midst of the Capitol Grounds's many stone monuments, an observer would reasonably understand the State to be officially endorsing the command, "Thou shalt not make to thyself any graven images." J.A., at 137. Nor is it clear how an observer would reasonably understand the State to be endorsing the command to "Remember the Sabbath day, to keep it holy." *Id.* For example, no one would reasonably think that the State has adopted a position, one way or the other, on whether the Dallas Cowboys should continue playing professional football on Sundays or whether the Texas Longhorns should continue playing college football on Saturdays (notwithstanding the seriousness, and even religious fervor, with which Texans approach their football, it would be a stretch to describe the game as "holy").

Indeed, the distinction between acknowledgment and endorsement is clearer here than it was concerning the national motto, pledge, or the crèche displayed in *Allegheny*. When the government says, "IN GOD WE TRUST," or that we are a Nation "under God," *see Newdow*, 124 S.Ct., at 2306, or "Glory to God in the Highest," *see Allegheny*, 492 U.S., at 598, it makes an affirmative, first-person pronouncement with religious content. In contrast, the reasonable observer could not mistake the words "I AM the LORD thy God" as an affirmative, first-person pronouncement of the State of Texas – instead, the Ten

Commandments speak for themselves.[19] This is more reasonably understood as an acknowledgment of an historically significant "cultural phenomenon" than an official government "suggest[ion] that people praise God." *See Allegheny*, 492 U.S., at 601.

Petitioner notes that no one could doubt that a law imposing the first four commands would violate the Establishment Clause. *See* Pet'r Br., at 24. But, rather than proving an effect of religious endorsement, Petitioner's observation strengthens the argument that the reasonable observer would not think that Texas was endorsing these commands in a manner that could have any impact on her personal standing in the community. The reasonable observer is not likely to mistake these commands for official statements of Texas policy, any more than the reasonable observer would deem the artistic portrayal of the Last Supper in the National Gallery of Art[20] as an official command to partake in Holy Communion. Instead, she is likely to take the commandments for what they are: a religious text and an ancient legal code that, as a whole, have had an historically significant impact on our law and culture. That is simply the "common sense of the matter." *Zorach*, 343 U.S., at 312.[21]

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[19] Each of the preceding (presumably constitutional) examples is directory and seeks to characterize the nature and identity of the entire polity ("in God *we* trust," "I pledge allegiance to . . . one nation under God"). In contrast, the language of the Ten Commandments is an historic text, not a governmental edict or characterization of identity.

[20] *See* NATIONAL GALLERY OF ART, THE COLLECTION, *at* http://www.nga.gov/cgi-bin/pinfo?Object=12135+0+none (last visited Jan. 28, 2005).

[21] Following the Ten Commandments' text are three additional symbols: two small stars and the superimposed Greek letters Chi and Rho. J.A., at 137. The reasonable observer would perceive in these Jewish and Christian symbols an acknowledgment of the Ten Commandments' historical connection with both of these faith traditions. And, by displaying side-by-side symbols from two separate faiths, the monument diminishes any perception that one particular faith is being singled out or favored.

4. The monument's history reinforces its civic message.

The reasonable observer would also be familiar with the monument's history. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment). This observer would thus be aware that a private service organization had asked the State and was granted permission, over forty years ago, to erect the monument on the Capitol Grounds. J.A., at 97. She would know that the monument's text had been developed, on behalf of this service organization, by representatives of the Jewish, Protestant, and Catholic faiths to ensure that it would not be identified with any particular religious group. *See Freedom from Religion Found., Inc.*, 898 P.2d, at 1017; Tr., at 32-34. She would know that the monument had stood in Austin – a hotbed of litigation and home to the late Madalyn Murray O'Hair, founder of American Atheists – for some forty years without generating any controversy or litigation. *See* 351 F.3d, at 181.[22] Nothing in the monument's history could lead her to conclude that it was intended to or did in fact send a message of religious endorsement. On the contrary, the monument's history reinforces the perception of the same message suggested by its context and content – a message highlighting the Ten Commandments' historically significant civic impact.

B. The Monument Serves the Secular Purposes of Honoring the Eagles and Acknowledging the Ten Commandments' Historical Impact on the Development of Western Law and the Culture and Diversity of Texas.

For Petitioner to prevail on purpose grounds, he must demonstrate that the erection of the Ten Commandments

[22] *See also Lynch*, 465 U.S., at 693 (O'Connor, J., concurring) ("It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit.").

monument was "motivated *wholly* by religious considerations." *Lynch*, 465 U.S., at 680 (emphasis added). And, he must show that those considerations were constitutionally impermissible. A government's purpose need not "be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (internal citation omitted). Instead, the Court's purpose test "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* In short, Petitioner must demonstrate that the State's actual purpose in accepting the monument was to endorse religion. *See Wallace*, 472 U.S., at 56; *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring).

The State, on the other hand, needs only a single legitimate secular purpose for the display to satisfy this requirement. *See Lynch*, 465 U.S., at 681 n.6. The Court's inquiry into the State's purposes is by design deferential and limited, *see Wallace*, 472 U.S., at 74-75 (O'Connor, J., concurring in the judgment), and the Court is reluctant to attribute unconstitutional motives to the State, *see Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Even in the absence of any expressed secular purpose, the State should not be deemed to have acted with an improper purpose unless "it is beyond purview that endorsement of religion or a religious belief 'was and is the [display's] reason for existence.'" *Wallace*, 472 U.S., at 75 (O'Connor, J., concurring in the judgment) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968)).

1. A monument can be both religious and secular.

Texas does not dispute that the Ten Commandments are a sacred religious text, believed by several major religions to have been scripted by the hand of God Himself. But,

in addition, the Ten Commandments have had an important and undeniable secular impact as well.

In contrast, Petitioner advances an oddly unitary view of the commandments: "They are not secular; they express a religious faith and vision." Pet'r Br., at 10. As a matter of logic, the former does not flow from the latter. It is true that they are not *exclusively* secular; but that does not mean that they have not had important secular ramifications over the centuries. *See* Part I.B.4, *infra.*

And, under this Court's precedents, the burden is placed on Petitioner to prove that the State's exclusive purpose was religious endorsement, and not on the State to prove that its exclusive purpose was secular. *See Lynch*, 465 U.S., at 680 (purpose test satisfied where there was "insufficient evidence to establish . . . a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message").

As Justice O'Connor explained in *Lynch*, there,

> "[t]he [district] court *found as facts that the crèche has a religious content*, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional, and that the city did not seek to counteract any possible religious message. These *findings do not imply that the crèche communicates government approval of Christianity*." 465 U.S., at 693 (emphasis added).

Just so, neither do the undeniable religious aspects of the text of the Ten Commandments "imply that the [monument] communicates government approval of Christianity."

2. The monument was accepted in 1961 for the secular purpose of honoring the Eagles.

Petitioner erroneously suggests that it is "impossible" to find an actual purpose that is secular because there is "no record" of the legislative history. Pet'r Br., at 20. His

quotation of the parties' stipulation omits the second half: Although it is true that there is no record of "any discussion" or floor debates, "[t]he legislative history . . . is comprised entirely of the House and Senate Journal Entries." J.A., at 91. And those entries speak for themselves:

> "RESOLVED, . . . that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas." Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195-96; J.A., at 97.

On its face, the record demonstrates a secular purpose in displaying the monument: to honor the contributions of the Eagles for their work with youth. The District Court reasonably found, and the Fifth Circuit rightly affirmed, that this resolution demonstrated a secular intent "to recognize and commend a private organization for its efforts to reduce juvenile delinquency." 351 F.3d, at 178.

In an attempt to get around this demonstrably secular purpose, Petitioner is forced to argue that the Legislature's joint resolution was, in fact, a sham. And, here, the lack of additional legislative history renders Petitioner's burden all but insurmountable. Unlike other cases where various lower courts have found impermissible religious purposes, in this case, there is no evidence of public speeches or proclamations by government officials of any intent to further religion; there is no evidence of any involvement of clergy whatsoever in the dedication of the monument; and there is no evidence of any desire to exclude any religious group at all from acceptance in the public sphere. *Cf. Books*, 235 F.3d, at 306.

As a result, Petitioner is reduced to asserting that the Legislature's stated purpose "strains credulity" for two reasons. Pet'r Br., at 21. First, Petitioner argues, there is "almost no reference to juveniles. . . . The monument itself says nothing about the issue." *Id.* This contention is

refuted by the face of the monument itself, which proclaims that it was "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES 1961." J.A., at 137.

Second, Petitioner contends, the Legislature's purpose was a sham because "accepting a gift from an organization is a dubious way of honoring it." Pet'r Br., at 21. But, as the Fifth Circuit recognized, Texas has a record of accepting monuments as a means of honoring the monuments' donors. Ten years before accepting the Ten Commandments monument from the Eagles, the Texas Legislature authorized the installation of the Statue of Liberty Replica in order to "honor the Boy Scouts of America," who had offered the monument to the State. Tex. S. Con. Res. 4, 52d Leg., R.S., 1951 Tex. Gen. Laws 1495, 1495. This purpose was not a sham in 1951, nor was it a sham in 1961.

From these two false factual postulates, Petitioner then suggests an incorrect legal metric: "acknowledging the Fraternal Order of Eagles . . . [can] hardly be said to be *the* reason that the State posted the Ten Commandments. . . . " Pet'r Br., at 22 (emphasis added). The State need not demonstrate that it was *the* reason; *a* reason will suffice. Petitioner, on the other hand, must demonstrate that the monument was "motivated *wholly* by religious considerations." *Lynch*, 465 U.S., at 680 (emphasis added). That, he cannot do.

3. Returning the monument after Capitol renovations were complete, and turning it to face a newly constructed sidewalk, did not demonstrate an impermissible religious purpose.

Petitioner argues that the relevant timeframe is not 1961, but rather 1993, because in that year, after a two-year Capitol renovation project, the Preservation Board returned the monument to its location and changed the direction in which it faced. *See* Pet'r Br., at 22. This argument is without merit.

When the Ten Commandments monument was originally installed in 1961, only one sidewalk connected the Supreme Court building and the Capitol, leading from the Court to the Capitol's north entrance. The monument, placed on a line between these buildings, abutted the driveway circling the Capitol, but not this sidewalk. *See* J.A., at 91, 102. In 1990, construction began on a new underground Capitol Extension, which required excavation of much of the Grounds' northwest quadrant. Along with the other monuments in the area, the Ten Commandments monument was therefore placed in storage for its protection until the project's completion, and returned to its original location in 1993. *See* J.A., at 91-92. As part of the Capitol Extension project, an additional sidewalk was installed leading from the Court to the Capitol's west entrance. *See* J.A., at 50, 204. Had the monument been replaced in 1993 with the identical orientation, it would have been positioned near this new sidewalk, but facing away from it. Therefore, the Board made the unremarkable decision to rotate the monument to face the new sidewalk. *Id.*

None of this evinces any impermissible intent whatsoever. The desire to complete a Capitol construction project – and the desire to restore the status quo ante after completion by returning the monuments that were temporarily removed – is indisputably secular. Indeed, there is no evidence that the State Preservation Board even considered religious matters, much less was motivated "wholly" by such concerns.

Petitioner's sole basis for his inference to the contrary is his statement that "other monuments that were removed at the same time were never put back on display." Pet'r Br., at 22. That statement, however, is incorrect. No monuments were permanently removed in connection with the Capitol Extension project. What Petitioner is no doubt thinking of is the restoration project of 1995-1996, two years later. At that time, when the State Preservation Board was restoring the most historic portions of the Grounds, Petitioner is correct that some monuments were removed. But, in the interest of historical fidelity, the

Board then decided to retain every monument that was erected before 1965, and remove every monument erected thereafter. *See* J.A., at 49, 77, 123, 138. That historical renovation project, likewise, reveals no impermissible religious purpose.

4. The monument also serves to acknowledge the Ten Commandments' impact on law and culture.

Petitioner does not deny that the Texas Legislature's intent to acknowledge the Eagles "may have coincided with the acceptance of the gift," but he insists that the monument's placement on the Capitol Grounds also reflects a purpose related to "the content of the monument, the Ten Commandments." Pet'r Br., at 22. Respondents agree that the monument's placement provides evidence of a governmental purpose with respect to the monument's content. But its placement on the Grounds does not suggest an intent to endorse, favor, promote, or take sides on questions of religious belief. Instead, it suggests an intent to recognize that the Ten Commandments have made a contribution to our society that is worthy of appreciation. *Cf. Lynch*, 465 U.S., at 693 (O'Connor, J., concurring) (Government acknowledgments of religion can serve to encourage "recognition of what is worthy of appreciation in society.").

Indeed, the Texas Legislature has described the Grounds' monuments as commemorating "people, ideals, and events that compose Texan identity." Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. Placing the Ten Commandments monument on the Capitol Grounds thus reflects a purpose to acknowledge and commemorate the culturally significant role the Ten Commandments have played in shaping Texan identity. In addition, evidence that the monument was deliberately installed on a line between the Texas Supreme Court and Capitol suggests an intent to highlight the Ten Commandments' impact on the State's legal institutions. *See* J.A., at 33-34, 91, 101.

While the Ten Commandments are undeniably religious in origin, they have also undoubtedly had a significant impact on our law and culture. Acknowledging that impact is a legitimate secular purpose. *See, e.g,* JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE 4 (1987) ("Little doubt exists that, despite the great variety of views on the dating, numbering, and exact meaning of the Ten Commandments, they have been the most influential law code in history."). Texas's recognition of the Ten Commandments' role in the development of our legal systems is a matter of history, not religion.

The Ten Commandments have been linked with the common law at least since Alfred the Great placed them at the beginning of his Book of Dooms in the Ninth Century. *See* LAWS OF KING ALFRED, *reprinted in* F.L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 62-93 (1963); *see also* HAROLD J. BERMAN, LAW AND REVOLUTION 65 (1983). Seven hundred years later, the most prominent jurists of the Protestant Reformation produced systematic legal treatises "basing the various branches of the law on the Ten Commandments." Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 745-46 (2000).[23] The Decalogue's strong influence on centuries of

[23] Professor Berman writes: "As Roman Catholic jurists had systematized the canon law on the basis of the sacraments, so Lutheran jurists used Melanchthon's topical method in basing the various branches of the law on the Ten Commandments. Thus Johann Oldendorp, whose principal treatise three centuries later was in the library of our Supreme Court Justice Joseph Story, founded criminal law on the commandment 'Thou shalt not kill,' property law on the commandment 'Thou shalt not steal,' family law on the commandment 'Thou shalt not commit adultery,' the law of contract and delict on the commandments 'Thou shalt not bear false witness' and 'Thou shalt not covet.' . . . These were 'topics' not only in the sense of categories or headings but also in the sense of general principles – theologically based moral principles in light of which subordinate species of legal rules were to be interpreted. This was a new method of legal synthesis which transcended the earlier divisions among co-existing legal systems within the same polity." *Id.*; *see also* John Witte, Jr., *The Civic Seminary: Sources of Modern Public*

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Western law was in turn reflected in the legal and political theories of the religious refugees arriving on the New World's shores in the Seventeenth Century – and they deliberately enacted many, and sometimes all, of the Ten Commandments into their nascent Colonies' legal codes. *See generally Amicus* Br. of Wallbuilders, Inc. in *McCreary County v. ACLU*, No. 03-1693. Three hundred years later, at the dawn of the Twentieth Century, "it continued to be widely believed, at least in the United States . . . [that] divine law, especially the Ten Commandments," was one of "the ultimate sources of positive law." Berman, *The Western Legal Tradition*, *supra*, at 751.

Thus, over a millennium of history belies Petitioner's passing strange comment that "the Ten Commandments are not a special source for the American legal rules." Pet'r Br., at 25. Indeed, the courts have routinely concluded to the contrary. *See, e.g., Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (CA3 2003) (Ten Commandments "are regarded as a significant basis of American law and the American polity"); *Books*, 235 F.3d, at 302 ("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."); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (CA10 1973) (Ten Commandments are "a foundation for law" and "historically important"); *Freedom from Religion Found., Inc.*, 898 P.2d, at 1024 ("[T]he Ten Commandments

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Education in the Lutheran Reformation of Germany, 12 J.L. & RELIGION 173, 176 (1995-1996) ("Lutheran theologians introduced the concept of the magistrate as the ["father of the community"], called by God to enforce both tables of the Decalogue in the community."); John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 451 (1993-1994) ("[E]arly modern jurists" believed that the "laws which [authorities] promulgate must encapsulate and elaborate the principles of God's moral law, particularly as set out in the Ten Commandments."); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1162-63 (1994) ("Protestants looked to the Bible, and especially the Ten Commandments, as the ultimate source of the content of natural law.").

has served over time as a basis for our national law."); *see also City of Elkhart v. Books*, 121 S.Ct., at 2211 (Rehnquist, C.J., dissenting from denial of certiorari) (Ten Commandments "have made a substantial contribution to our secular legal codes").[24]

At the time of our Nation's founding, the Ten Commandments were widely understood to have three distinct uses or dimensions – religious, moral, and civic. *See* Witte & Arthur, *The Three Uses of the Law*, *supra*. Indeed, "[t]wo philosophers of Anglican connection, Thomas Hobbes and John Locke, used the Commandments almost exclusively for their civic and moral significance." Paul Grimley Kuntz, *The Ten Commandments on School Room Walls?*, 9 U. FLA. J.L. & PUB. POL'Y 1, 11-13 (1997). Nor was the moral and civic dimension historically understood to apply only to the so-called "second table" of the Decalogue. In his seminal work, *Leviathan*, Thomas Hobbes interpreted the "first table" as laying out an entirely secular "law of sovereignty." *See* THOMAS HOBBES, LEVIATHAN: Part III, ch. 42 (Liberal Arts Press 1958) (1651); *see also* PAUL GRIMLEY KUNTZ, THE TEN COMMANDMENTS IN HISTORY 136-38 (2004).

The importance and intersection of each of these dimensions in our Nation's early culture is reflected in the Ten Commandments' prominent role in the New England Primer, "the most widely read school book in America for 100 years." R.F. BUTTS & L.A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 69 (1953) (noting that some 3,000,000 copies of the Primer were sold between 1700 and 1850).

In 1777, the Primer included the following exchange:

> "Q. 39. What is the duty which God requires of man? A. The duty which God requires of man is

[24] *See also, e.g., Bertera's Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200-01 (Pa. 1967); *Comm'rs of Johnston County v. Lacy*, 93 S.E. 482, 487 (N.C. 1917); *Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299, 301 (Cal. 1940); *Hardin v. State*, 46 S.W. 803, 808 (Tex. Crim. App. 1898); *see also Amicus* Br. of American Center for Law and Justice, *McCreary County v. ACLU,* No. 03-1693, at Appendix A.

> obedience to his revealed will. Q. 40. What did God at first reveal to man for the rule of his obedience? A. The rule which God at first revealed to man for his obedience was the moral law. Q. 41. Where is the moral law summarily comprehended? A. The moral law is summarily comprehended in the ten commandments." INTERNET SACRED TEXT ARCHIVE, THE NEW ENGLAND PRIMER, 1777 edition, *at* http://www.sacred-texts.com/chr/nep/1777/ (last visited on Jan. 28, 2005) (from "the shorter catechism").

The Primer then addressed each of the Ten Commandments in turn. *See id.*

Americans at the time of the founding were thus intimately familiar with the Ten Commandments, and would have associated the Decalogue not only with divine law, but also with moral and natural law. When Jefferson's compatriots read "the Laws of Nature and of Nature's God," *see* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), they would likely have thought of the Ten Commandments.

Of course, part of the Framers' genius was in recognizing that, because this "duty which we owe to our Creator . . . is precedent both in order of time and degree of obligation, to the claims of Civil Society," a prohibition on governmental establishment of religion was necessary. *See* James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785), reprinted as an Appendix to *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 64 (1947). And a robust protection against religious establishment – to protect the freedom of conscience of every man and woman – is entirely consistent with public acknowledgment of the role the Ten Commandments have played in Western culture and legal development.

Indeed, a statue erected in front of the Ronald Reagan International Trade building in Washington, D.C. depicts a female "liberty of worship" resting upon the Ten Commandments. *See* CARRIE DEVORAH, HUMAN EVENTS ONLINE, EXCLUSIVE PHOTO ESSAY: GOD IN THE TEMPLES OF GOVERNMENT, *at* http://www.humaneventsonline.com/

article.php?id=2441 (posted Nov. 24, 2003). As a matter of history, that is perhaps not an unfair characterization of the relationship between the Establishment Clause and the Decalogue.[25] The Liberty of Worship statue reflects no purpose offensive to the Establishment Clause; neither does the Ten Commandments monument installed on the Texas Capitol Grounds.

Given their impact on our law and our culture, it is entirely fair to say that the Ten Commandments have helped to shape Texan and American identity. As the Fifth Circuit found, 351 F.3d, at 180-81, placement of the Ten Commandments monument on the Texas Capitol Grounds reflects an intent to acknowledge this historical fact. That is a permissible purpose under the Establishment Clause, constituting a second, independent ground sufficient to satisfy the Court's purpose requirement. *See Lynch*, 465 U.S., at 680, 681 n.6; *see also id.*, at 691 (O'Connor, J., concurring) (observing that the statute struck down in *Stone* "*plainly* had some *secular objectives*, such as . . . *illustrating* [*the Ten Commandments'*] *connection to our legal system*." (emphasis added)).

[25] Petitioner's argument that Texas has a Ten Commandments monument rather than a Hammurabi's Code monument only because the Ten Commandments have a religious message, *see* Pet'r Br., at 25, misjudges cause and effect. Texas has a Ten Commandments monument because the Ten Commandments had a unique impact on American and Texan law and culture. The Ten Commandments undoubtedly had this impact on our society in part because, in addition to their civic and moral use, they had an important religious dimension. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S., at 213.

II. THE "HISTORY AND UBIQUITY" OF THE TEXAS TEN COMMANDMENTS MONUMENT, AND OF TEN COMMANDMENTS MONUMENTS ACROSS THE NATION, ALSO DEMONSTRATE THAT THE TEXAS MONUMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

This Court has consistently upheld the constitutionality of recognizing the impact and significance of religion on American culture and society. For example, the Court has acknowledged that its own proceedings open with the cry, "God save the United States and this Honorable Court." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Similarly, in *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of this Court, and regular presidential proclamations for a National Day of Prayer.[26] 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id*., at 693 (O'Connor, J., concurring).

Between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or

[26] The extent to which expressly religious acknowledgments have been deemed acceptable by this Court is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*: "'[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation . . . . To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nation-wide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.'" 465 U.S., at 675 n.3 (quoting Proclamation No. 2629, 9 Fed.Reg. 13,099 (1944)).

acknowledge the important foundational role religion has played in our Nation's laws and history. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establish religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

A. The Monument's History on the Grounds Justifies Its Continued Preservation.

The State's intent to honor the Eagles and to acknowledge the Ten Commandments' impact on our law and culture are legitimate secular purposes justifying the monument's installation between the Texas Capitol and Supreme Court in 1961. The State's desire to preserve an historic monument constituting one part of a protected national landmark serves as an additional, legitimate, and entirely secular purpose for maintaining the Ten Commandments monument on the Texas Capitol Grounds.

Texans have been justifiably proud of their Capitol since its dedication in 1888. *See* J.A., at 119-20. Almost one hundred years later – and twenty-five years after installation of the Ten Commandments monument – the Secretary of the Interior recognized the national significance of the Capitol and its Grounds, designating the entire property a National Historic Landmark in 1986. *See id.*, 103-11. The following year the Texas Legislature created the State Preservation Board and charged it with, among other duties, preserving, maintaining, and restoring the Capitol and its Grounds. *See* TEX. GOV'T CODE §443.007.

The parties stipulated that the "Ten Commandments monument is one element of a legally-protected National Historic Landmark," J.A., at 93, and the State Preservation Board's executive director testified that his agency views the monument as an historic artifact that he is responsible for maintaining, *see id.*, at 70, 73-74. The State's purpose in

maintaining the Ten Commandments monument is thus the same as its purpose in maintaining all of the monuments situated on the Capitol Grounds: historic preservation. This is a legitimate governmental purpose. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).

In fact, the State views every commemorative marker installed on the Capitol Grounds as historically significant. During the 1995-1996 restoration of the Grounds' oldest portions, two monuments falling outside the restoration period were removed from their location within those areas – a Bicentennial Fountain contributed by the Texas Association of Realtors in 1975, *see* J.A., at 123, and a Bicentennial Star that had been dedicated by the Austin Lawyers Wives' Club in 1976, *see id.*, at 138. The monuments are now gone, but, in each monument's place, the Board erected a memorial plaque containing a picture and description of the monument, and the reason for its removal. *See id.*, at 77, 123, 138.

Legitimate secular purposes motivated the State's acceptance of each of the seventeen monuments situated on the Texas Capitol Grounds. But no matter what the State's purpose might have been in permitting display of, for example, the Confederate Soldiers monument in 1903, its preservation today is a legitimate state purpose. Similarly, the State has a legitimate purpose in preserving the Ten Commandments monument, which has stood on the Capitol Grounds for more than one-third of the Capitol's one hundred and seventeen years. *See, e.g., Newdow*, 124 S.Ct., at 2323 (O'Connor, J., concurring in the judgment) (noting that fifty years is a considerable span of time in our Nation's history). And the preservation of longstanding historic monuments is entirely consistent with the Establishment Clause.

B. Official Acknowledgment of the Ten Commandments' Historical Impact Has Long Featured Prominently in our Nation's Cultural Landscape.

The civic message communicated by the monument's context, content, and history is reinforced by the ubiquity

of official acknowledgments of the Ten Commandments' historical impact. Acknowledging the Ten Commandments' role in the development of our law has long been a prominent feature of American culture.

Petitioner argues that there is no "long and ubiquitous history" of Ten Commandments monuments on government property. Pet'r Br., at 41 (citation omitted). With respect to Texas, at least, he is wrong. Since 1961, aside from the brief period during which the Capitol Extension was under construction – and for more than one-third of the Capitol's existence – the Ten Commandments monument has stood on the Capitol Grounds twenty-four hours a day, seven days a week. And monuments just like the one in Texas were erected in communities across America in the 1950s. *See Books*, 235 F.3d, at 295. Petitioner asserts that these represent only a "few hundred monuments scattered around the country." Pet'r Br., at 41 (citation omitted). Of course, there are only fifty States, and the fact that fewer than fifty legislatures "scattered around the country" engaged in the opening prayers did not prevent this Court from finding such prayers "ubiquitous" in *Marsh*, 463 U.S., at 788.[27]

In any event, Petitioner defines the relevant practice too narrowly, because official Ten Commandments displays have not been limited to the granite monuments donated by the Eagles. The Ten Commandments have also been officially displayed and depicted on plaques, medallions, sculptures, seals, frescoes, and friezes across our Nation. *See, e.g.,* United States Amicus Br., *McCreary County v. ACLU*, No. 03-1693, at Appendix. Such depictions date back at least to the 1870s. *See, e.g., King v. Richmond County*, 331 F.3d 1271, 1273-74 (CA11 2003) (Ten Commandments depicted in superior court seal since at least 1872); *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (CA3 2004) (Ten Commandments plaque donated to county

[27] The United States's amicus brief in *McCreary County v. ACLU*, No. 03-1693, contains an appendix with an informal survey indicating that Ten Commandments monuments can be found in at least twenty States.

in 1918); *Freethought Soc'y of Greater Philadelphia*, 334 F.3d, at 249 (Ten Commandments plaque donated to county in 1920).

Ten Commandments displays abound in the courthouses of our Nation's capitol city. Most famously, of course, the frieze on the south wall of this Court's own courtroom portrays Moses "holding two overlapping tablets, written in Hebrew," on which "Commandments six through ten are partially visible." *See* OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, COURTROOM FRIEZES: NORTH AND SOUTH WALLS, *at* http://www.supremecourtus.gov/about/north&southwalls.pdf (updated Aug. 18, 2000). Elsewhere in this Court's stately building, the Ten Commandments are depicted on the East Pediment, in the Great Hall, and on the support frame of the courtroom's bronze gates. *See* OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, ARCHITECTURAL INFORMATION SHEETS, *at* http://www.supremecourtus.gov/about/archdetails.html (updated Aug. 18, 2000).

Likewise, outside the E. Barrett Prettyman Federal Courthouse down the road stands a twenty-four foot granite trylon bearing a depiction of the Ten Commandments. *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, HISTORY OF THE E. BARRETT PRETTYMAN FEDERAL COURTHOUSE, *at* http://www.dcd.uscourts.gov/court-history.html (last visited Jan. 28, 2005); CARRIE DEVORAH, HUMAN EVENTS ONLINE, EXCLUSIVE PHOTO ESSAY: GOD IN THE TEMPLES OF GOVERNMENT: PART II, *at* http://www.humaneventsonline.com/article.php?id=2664 (posted Nov. 24, 2003). And inside that building, a figure of Moses holding the Ten Commandments is mounted on marble cladding behind the bench of the Ceremonial Courtroom. *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, HISTORY OF THE E. BARRETT PRETTYMAN FEDERAL COURTHOUSE, *at* http://www.dcd.uscourts.gov/court-history.html (last visited Jan. 28, 2005).

Thus, not only does this Court hear arguments every Term with Moses bearing the Ten Commandments and looking down over the Justices' left shoulders, but the one

time in recent history when the Court was forced to move chambers – during the anthrax scare of 2001 – the Court removed to a courtroom where, again, Moses bearing the Ten Commandments looked down upon it.

These many examples reflect a rich national tradition of depicting and displaying the Ten Commandments on government property. But official acknowledgment of the Ten Commandments' impact on our law and culture has not been limited to physical representations of the Decalogue. The "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Lynch*, 465 U.S., at 674, is mirrored by the history of official acknowledgment of the role of the Ten Commandments in American law and culture. Presidents,[28] Congress,[29] and the courts[30] have acknowledged the Ten Commandments' secular impact.

An objective observer might not be familiar with every official reference acknowledging the Ten Commandments's role in our Nation's history. But he should be aware that such acknowledgments have been featured prominently in our Nation's cultural landscape. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment). Given this

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[28] *See, e.g.,* Harry S Truman, Public Messages, in SPEECHES AND STATEMENTS BY THE PRESIDENT, Jan. 1 to Dec. 31, 1950, at 157 (U. S. Government Printing Office 1965) ("The fundamental basis of this nation's laws was given to Moses on the Mount."); John Quincy Adams, LETTERS OF JOHN QUINCY ADAMS TO HIS SON 61, 70-71 (Auburn: James M. Alden, 1850) ("The law given from Sinai was a civil and municipal code as well as a moral and religious code; it contained . . . 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."); John Adams, 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 9 (Charles Francis Adams ed., 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.").

[29] *See* S. Con. Res. 13, 105th Cong. (1997); H.R. Con. Res. 31, 105th Cong. (1997) ("[T]he Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization.").

[30] *See* page 33, *supra*.

centuries-old chorus of governmental voices acknowledging the Ten Commandments' secular impact on our law and culture, a visitor coming upon the monument situated between the Texas Capitol and Supreme Court would reasonably perceive the State to be sending a similar message – a message acknowledging the civic impact the Ten Commandments have had on our Nation and on the State of Texas.

The Ten Commandments monument on the Texas Capitol Grounds thus serves secular purposes and would not reasonably be perceived as an endorsement of religion or of any particular religious belief. It therefore satisfies the test this Court laid out in *Allegheny*, 492 U.S., at 592-94.[31]

III. THE TEXAS TEN COMMANDMENTS MONUMENT SURVIVES ANY OTHER TEST APPLIED TO ASSESS ITS CONFORMITY WITH THE ESTABLISHMENT CLAUSE.

A. The Monument Does Not Discriminate.

Petitioner argues that, under the rule of *Larson v. Valente*, 456 U.S. 228 (1982), Texas should be required to

[31] In her concurrence in *Newdow*, Justice O'Connor evaluated four factors to determine whether the phrase "under God" in the Pledge of Allegiance constituted an instance of "ceremonial deism." *See* 124 S.Ct., at 2323-26. These factors were: 1) history and ubiquity; 2) absence of worship or prayer; 3) absence of reference to a particular religion; and 4) minimal religious content. *See id.* The monument fares well under these factors, as: 1) official references to the Ten Commandments are ubiquitous, and have been throughout our history; 2) the monument involves no worship or prayer; 3) the monument bears a deliberately nonsectarian version of the Ten Commandments; and 4) the Ten Commandments, while religious in origin, have had an undeniable and unique civic impact. While the monument satisfies these factors, they were designed to evaluate claims of "ceremonial deism." For monuments acknowledging the historical and cultural contributions of religious faiths, the endorsement test remains the proper rubric. Indeed, the last two *Newdow* factors, in particular, do not fit well in an analysis of governmental acknowledgments of religion because, by definition, such acknowledgments will reference religion and have some religious content.

meet strict scrutiny to justify its display of the Ten Commandments monument. *See* Pet'r Br., at 19. This Court has already considered and rejected the argument that *Larson*'s strict scrutiny should be applied to governmental displays containing religious elements.[32] In *Lynch*, the court of appeals read *Larson* to require strict scrutiny of Pawtucket's display of a crèche, which, according to the lower court, discriminated between Christian and other religions. *See Lynch*, 465 U.S., at 687 n.13. This Court disagreed with that application of its precedent: "It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." *Id.* If displaying a "specifically Christian" crèche, *see Allegheny*, 492 U.S., at 603, is not discriminatory in the sense contemplated in *Larson*, then displaying the Ten Commandments, which are identified with more than one faith tradition, cannot be discriminatory in that sense. *Larson* contemplated, in contrast, "substantial evidence of overt discrimination against a particular church." *Id.*, at 679. That is in no way present with the Texas monument.[33]

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[32] The Court also declined to apply *Larson*'s strict scrutiny test in *Allegheny*, which involved displays of both distinctively Christian and distinctively Jewish symbols (a crèche and menorah, respectively), and *Pinette*, which involved another distinctively Christian display (a cross).

[33] Petitioner's argument that the monument's version of the Ten Commandments reflects an impermissible preference for Protestants over Jews and Catholics, *see* Pet'r Br., at 13, fails for two reasons. First, the claim that the monument bears a particular Protestant version is wrong as a factual matter. The version of the Ten Commandments inscribed on the monument is deliberately nonsectarian, created by Jewish, Catholic, and Protestant representatives. *See Freedom from Religion Found., Inc.*, 898 P.2d, at 1017. And second, variances in religious approaches to a text are not relevant when a government displays that text for civic reasons and with a civic message. The myriad governmental acknowledgments of the Ten Commandments' role in our Nation's history have never been intended or understood as specific doctrinal pronouncements. *See, e.g., Books*, 121 S.Ct., at 2212

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B. The Monument Does Not Coerce.

In the display cases most analogous to this one, the Court has asked the purpose and effect questions addressed above. *See Lynch*, 465 U.S., at 679-82, and *Allegheny*, 492 U.S., at 592. The Court has also had occasion to ask, in the context of governmental speech, whether the challenged activity "coerce[s] anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 586 (1992). The Texas monument survives this test as well.

The Ten Commandments monument sitting passively behind the Texas Capitol does not coerce anyone to do anything. Petitioner has made no allegation or argument to the contrary. By definition, this forty-year-old inert granite slab passes any coercion test the Court might choose to apply. *See, e.g., Allegheny*, 492 U.S., at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[W]here the government's act of recognition or accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment.").

C. The Texas Monument Is Not Unconstitutional Under *Stone v. Graham*.

Petitioner places great reliance on this Court's *per curiam* decision in *Stone*, 449 U.S., at 41, regarding the State of Kentucky's purpose for posting the Ten Commandments on schoolroom walls. That decision is inapposite here, because Texas has its own, distinct secular purposes for permitting the installation of the Ten Commandments monument on its Capitol Grounds. Moreover, in *Stone*, the Court was exercising particular vigilance due to the case's public school setting. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Wallace*, 472 U.S., at 81 (O'Connor, J., concurring in judgment). The special

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(Rehnquist, C.J., dissenting from denial of certiorari) (monument reflects Ten Commandments' role in development of our legal system).

concerns posed by government speech in the school setting are not relevant here, and the Court's customary deference to a State legislature's articulated purposes is appropriate.

As the Court observed in *Stone*, *even under the heightened protections of the school setting*, if "the Ten Commandments are integrated into the school curriculum, . . . the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S., at 42. Here, the Texas monument meets even that heightened test, because it is a historical monument displayed in context, surrounded by other monuments to persons, events, and ideals that have contributed to the culture and diversity of Texas.

IV. THE MONUMENT PRESENTS A FAR LESSER THREAT OF ESTABLISHMENT THAN DISPLAYS AND PRACTICES CONDONED BY THIS COURT.

A majority of this Court last spoke with one voice in determining whether a governmental display violates the Establishment Clause in *Lynch*. And in that case, the Court applied an *a fortiori* analysis:

> "[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, . . . expenditure of public funds for transportation of students to church-sponsored schools, . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, . . . noncategorical grants to church-sponsored colleges and universities, . . . and [] tax exemptions for church properties. . . . It would also require that we view it as more of an endorsement of religion than the

> Sunday Closing Laws . . . the release time program for religious training . . . and the legislative prayers upheld in *Marsh*. . . . We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause." *Lynch*, 465 U.S., at 681-82 (citations and footnotes omitted).

Using the same analysis, the Texas Ten Commandments monument cannot be viewed as providing a greater benefit to or endorsement of religion than these practices and programs upheld against Establishment Clause challenges. For example, in *Lynch*, the Court determined that the distinctively Christian crèche displayed by the City of Pawtucket was "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." *Id.*, at 683. Therefore, the Court upheld government display of the crèche.

Likewise, in *Allegheny*, the Court upheld a government display of a Chanukah menorah – a distinctively Jewish religious symbol commemorating "the miracle of the oil as described in the Talmud" – that was placed just outside the City-County building in downtown Pittsburgh, "next to a Christmas tree and a sign saluting liberty." *Allegheny*, 492 U.S., at 578, 614 (opinion of Blackmun, J.). This menorah – at eighteen feet almost three times as tall as the Ten Commandments monument challenged here – was "lit during a religious ceremony complete with traditional religious blessings." *Id.*, at 642 (Brennan, J., concurring in part and dissenting in part). The Court nevertheless found that, in context, it neither endorsed nor impermissibly advanced religion. *See id.*, at 679 (Kennedy, J., concurring in the judgment in part and dissenting in part); *id.*, at 635-36 (O'Connor, J., concurring

in part and concurring in the judgment); *id.*, at 620 (opinion of Blackmun, J.).[34]

And in *Marsh*, the Court upheld the Nebraska Legislature's "practice of opening sessions with prayers by a state-employed [Presbyterian] clergyman" who opened the Legislature's sessions with prayers offered "in the Judeo-Christian tradition." 463 U.S., at 786, 793. This Court reasoned that, due to its long history in the American political landscape, such legislative prayer had "become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792.[35]

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[34] The Court's rejection of the crèche displayed in *Allegheny* does not suggest a different result. That large crèche sat alone on the Grand Staircase, the main and most beautiful part of the Allegheny County Courthouse. It was highlighted by a floral frame, contained the exclusively religious admonition "Glory to God in the Highest," and was accompanied by a sign indicating its ownership by a religious organization. *Id.*, at 598-600. The display challenged here, by contrast, is one of the smallest of seventeen monuments on the Capitol Grounds, *see* J.A., at 87, and sits in a relatively inconspicuous position, situated hundreds of feet from the two least-used entrances to the Capitol, *see id.*, at 37, 87.

[35] The comparison with *Marsh* is particularly appropriate here, where a visitor to the Texas Capitol, before wandering past the Ten Commandments monument outside, might well observe the House open its daily session with a prayer from its own chaplain. *See* Tex. H.R. Rule 6 §1(3), Tex. H.R. 5, 78th Leg., R.S. (2003). And a visitor who proceeded past the monument to the Texas Supreme Court would discover that it, too, opens its proceedings with an unmistakably religious petition: "God save the State of Texas, and this Honorable Court." This is, of course, the state analogue of the invocation opening sessions of each of the Federal Courts, including this Court. *See Marsh*, 463 U.S., at 786. No visitor could reasonably believe that the passive Ten Commandments monument sitting along one of the sidewalks between the State Capitol and Supreme Court represented a greater threat of religious establishment than the active supplications to God offered within the Capitol's

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The crèche upheld in *Lynch* centered around a physical representation of the Baby Jesus – a symbol with overwhelmingly religious connotations. The menorah upheld in *Allegheny* was over eighteen feet high. And the prayers upheld in *Marsh* involved the active and affirmative invocation of the deity on behalf of government officials. The passive Texas monument, at one-third the size of the menorah, displayed in a museum setting and laden with historic and secular meanings far beyond its religious connotations, *a fortiori* comports with demands of the Establishment Clause.

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The Framers considered and rejected a rule that would have prohibited any governmental activity "touching religion." *See* 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789); *see also Lee*, 505 U.S., at 612-13 (Souter, J., concurring). Forcing the State Preservation Board to remove only one of the seventeen monuments on the Capitol Grounds, because that monument contains a text with religious significance, would be an act of discrimination and hostility. "[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S., at 673.

Our Nation was born of many faiths, and we as a people may celebrate our full diversity. A Native-American totem pole erected in a Seattle park, *see* SEATTLE PARKS AND RECREATION, CITY OF SEATTLE, PIONEER SQUARE, *at* http://www.cityofseattle.net/parks/parkspaces/Pioneer%20Square.htm (updated Aug. 3, 2004); a legislative designation of "Buddha Day" in Hawaii, *see* Haw. Rev. Statutes §8-4; a symbol of Aztec mythology in the Rotunda of the Texas Capitol, *see* J.A., at 164-65; a Ten Commandments monument on the Texas Capitol Grounds – none of these offends the Establishment Clause. Each acknowledges and

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stately chamber and the Supreme Court's imposing courtroom, both a stone's throw away. *See* J.A., at 91, 211.

celebrates the diverse influences of our religious heritage. And each is consistent with the Constitution.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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ATTACHMENTS

Attachment A

Aerial photograph of the northwest quadrant of the Capitol Grounds from the State Preservation Board website at http://www.tspb.state.tx.us/ spbgallery/CurrPhoto/3.htm; *see also* J.A., at 94 (joint stipulation of the parties that "the State Preservation Board maintains a website which includes a photograph of the Ten Commandments monument").

Starting from the American flag at the bottom of the photograph, to the right is a light post and then the World War I monument (in the shade of a tree). Continuing up along the straight sidewalk, past the first intersection going off to the right, stands the Boy Scouts Statue of Liberty monument on the right. Directly across the sidewalk is the Pearl Harbor Veterans monument (in the shade of a tree). All the way at the end of the sidewalk, next to the driveway with parked cars, is the Ten Commandments monument.

Curving along the driveway to the left, one comes to the Tribute to Texas Children (on the grass, to the right of the red truck), which stands 111 feet from the Ten Commandments monument. *See* J.A., at 95. And, to the right of the children, facing the Tyler rose garden, stands the tribute to the Texas Pioneer Woman (120 feet from the Ten Commandments Monument). *Id.*

Attachment B

Trial Exhibit 61: Photograph of the northwest quadrant of the Capitol Grounds, taken from the perspective of the Capitol. The left-most monument is the Ten Commandments monument, next to the light post. Moving along the straight sidewalk beside the monument, past the wide walkway to the Supreme Court and near the top of the photograph, one finds the boy Scouts of America Statue of Liberty monument on the left and, directly across the sidewalk, the Pearl Harbor Veterans monument. A little further up the sidewalk, on the right, is the World War I Veterans monument (partially obscured from the Capitol vantage point by a tree). Further up to the left, and also obscured by a tree, is the Korean Veterans monument, the largest monument in this area. *See* J.A., at 131 (which also shows the World War I monument, the Pearl Harbor monument, and the Boy Scouts monument).

The right-most monument in the photograph (in the same green triangular lawn as the Ten Commandments) is the Tribute to Texas Children (surrounded, in this photograph, by white string). It stands 111 feet from the Ten Commandments monument. To the left of the Texas Children monument is the Texas Pioneer Woman monument (facing the sidewalk and the Tyler rose garden), 120 feet from the Ten Commandments monument. *Id.*, at 95.

