
**In The United States Court of Appeals
For The Fifth Circuit**

KAY STALEY

Plaintiff-Appellee

v.

HARRIS COUNTY, TEXAS

Defendant-Appellant

**On Appeal From The United States District
Court For The Southern District of Texas, Houston Division**

**BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL
DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLANT**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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CONSENT OF THE PARTIES

Pursuant to FRAP 29(a), this brief is filed with the consent of all parties.

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INTEREST OF AMICUS CURIAE

Eagle Forum Education and Legal Defense Fund (“Eagle Forum ELDF”) is a nonprofit organization that has defended principles of limited government, individual liberty, and moral virtue for over twenty years. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display items that have both religious and historical significance, such as the King James Bible that is a component of the display at issue here.

STATEMENT

This case involves a challenge to a memorial to William S. Mosher, a prominent Houston businessman and philanthropist. The memorial was erected on the grounds of the Harris County Courthouse in 1956 by a private organization, the Star of Hope Mission. *Staley v. Harris County, Texas*, 332 F. Supp. 2d 1030, 1033 (S.D. Tex. 2004). The Mission is a local Christian charity that provides food and shelter to the indigent. *Id.* Mr. Mosher was a long-time supporter of the Star of Hope Mission and its work to help the poor. *Id.*

The monument is specifically identified as a memorial to William S. Mosher that was erected by the Star of Hope Mission. *Id.* It includes an open Bible contained in a glass display that is designed to memorialize and commemorate Mr. Mosher’s philanthropic works, which were motivated by his Christian faith. *Id.* As the District Court observed, it takes some effort for the public to notice that the monument contains a display of the Bible: “a passerby would have to walk up to the monument to observe that it contains a Bible and would have to stand in front of it to read the Bible.” *Id.* Moreover, “[t]he open Bible as displayed” measures only “twelve-by-sixteen inches.” *Id.*

The memorial to Mr. Mosher is not the only display at the Harris County Courthouse. There are also wall plaques and other “historical markers” located “in the same area as the Mosher monument.” *Id.* None of these historical displays contain “any religious message.” *Id.*

It is undisputed that the Mosher memorial is neither owned nor maintained by the county. *Id.* at 1035. Nonetheless, a local lawyer, Plaintiff-Appellee Kay Staley, challenged the display – approximately forty years after it was first erected – on the ground that “she is offended by the Bible display in the Mosher memorial because it advances Christianity.” *Id.* at 1034-35. The District Court agreed that the Mosher memorial violated the Establishment Clause, ordering the county to

remove the Bible from the display and awarding plaintiff over \$40,000 in attorneys' fees. *See id.* at 1041.

SUMMARY OF ARGUMENT

The Mosher memorial does not violate the Establishment Clause. The Supreme Court has emphasized that where public displays have both religious and historical significance, they do not constitute an “establishment” of religion. In order to meet this constitutional test, all that is required is that a display not be “motivated wholly by religious considerations.” *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). That is the case here where the Bible has played an important role in the history of Western Civilization, serving not only as a sacred religious text, but also as a “powerful teacher of ethics.” *See Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003).

Indeed, applying these established principles, this Court recently rejected a similar constitutional challenge to a display of the Ten Commandments in *Van Orden v. Perry* – a decision that is binding Circuit precedent.¹ As the Court observed, displays that have both historical and religious significance do not

¹ *See, e.g., Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 367 n.6 (5th Cir. 2004) (noting the “well-established rule that circuit panels are ‘bound by the precedent of previous panels absent an intervening ... case explicitly or implicitly overruling that prior precedent’” (quoting *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999))). The case is currently before the Supreme Court, *see Van Orden v. Perry*, No. 03-1500, and Eagle Forum ELDF has filed an *amicus* brief

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violate the Establishment Clause. The same established principles the Court applied in *Van Orden* are dispositive here. There is no principled basis for distinguishing between a display of a *part* of the Bible – namely the Ten Commandments – and the whole book. Thus, for the same reasons articulated by the Court in *Van Orden*, the lower court’s ruling should be reversed.

Not only did the District Court ignore the historical significance of the Bible, but it failed to apply the objective test for evaluating purported Establishment Clause violations. The Supreme Court has made clear that public displays that include symbols with religious significance must be judged using an *objective* test based on the perception of a “reasonable observer.” Given the Bible’s historical as well as religious significance, no “reasonable observer” could perceive its display as an “endorsement” of religion. This is particularly true in light of the specific and express purpose of the monument at issue here – to honor a man who happened to be a Christian and performed philanthropic works that were motivated by his Christian faith. No constitutional principle bars a display of the Bible under such circumstances. Indeed, such a rule would cleanse the public square of all mention of religion – in direct contravention of established Supreme Court precedent.

with the Court urging that it affirm this Court’s decision, which correctly applied established
(Continued...)

ARGUMENT

I. The Mosher Memorial Does Not Violate The Constitution Because, Like The Display Of The Ten Commandments In *Van Orden*, It Has Both Religious And Historical Significance.

The Supreme Court has consistently recognized that “religion has been closely identified with our history and government,” *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963), that “[t]he history of man is inseparable from the history of religion,” *Engel v. Vitale*, 370 U.S. 421, 434 (1962), and that “[i]nteraction between church and state is inevitable,” *Agostini v. Felton*, 521 U.S. 203, 233 (1997). “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. Indeed, there has been “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch*, 465 U.S. at 674. Thus, the Supreme Court has declared that “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

precedent.

The Supreme Court has long recognized the central role that religion has played in our society. Consequently, it has consistently upheld public practices that have both historical and religious significance. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, for example, the Court upheld the Nebraska legislature’s practice of opening legislative sessions with a prayer on the ground that it was “deeply embedded in the history and tradition of this country.” *Id.* at 786. In doing so, the Court noted the “unambiguous and unbroken history of more than 200 years” supporting such practices, which the Court concluded established “the practice of opening legislative sessions with prayer” as “part of the fabric of our society.” *Id.* at 792.

So, too, the Bible is part of the “fabric of our society” in that it has played a significant historical role in the development not only of major religions, but also systems of secular morality. *Cf. id.* at 783 (legislative prayer was a “tolerable acknowledgment of beliefs widely held among the people of this country”). Thus, as the Supreme Court observed in *Stone v. Graham*, “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” 449 U.S. 39, 42 (1980).²

² The statement in *Stone* is particularly significant given that the Supreme Court has repeatedly “recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school.” *See Wallace v. Jaffree*, 472 U.S. 38,

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Indeed, the Supreme Court has repeatedly upheld displays of symbols having religious significance to particular denominations where such displays manifest both a religious and secular meaning. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah). To exclude the Bible – part of the fabric of our society – would be inconsistent with these prior rulings. Moreover, it would cleanse from the public square an important aspect of our nation’s history.

In *Van Orden*, this Court applied these established principles under nearly identical circumstances, upholding a display of the Ten Commandments on the grounds of the Texas State Capitol. Much like plaintiff here, the plaintiff in *Van Orden* argued that the State of Texas had “accepted” the Ten Commandments monument “for the purpose of promoting the Commandments as a personal code of conduct” and that this “contravene[d] the First Amendment.” 351 F.3d at 176. The Court rejected this argument, observing that there was “no escape” from the

80 (1985) (O’Connor, J., concurring in the judgment). The Mosher memorial is even more clearly constitutional than the use of the Bible discussed in *Stone*. No one is compelled to view the Bible that is incorporated in the Mosher memorial. In fact, it takes some effort to view it at all. *See Staley*, 332 F. Supp. 2d at 1033. Even then, one may view only a couple pages of the Bible, which are selected by a private organization. *Id.* at 1034. There is simply no state “establishment” of religion here.

Commandments’ “secular and religious character.” *Id.* at 182. For, as the Court observed, while the Commandments were a “sacred text to many,” they were “also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people.” *Id.* The Court noted that “[t]he power of that counsel is evidenced by its expression in the civil and criminal laws of the free world.” *Id.* As a result, the Court concluded that “[n]o judicial decree can erase that history and its continuing influence on our laws.” *Id.* The Court therefore rejected plaintiff’s claims that the display of the Ten Commandments did not have a secular purpose, or that its secular purpose was eclipsed by its religious message, and held that the display did not violate the Establishment Clause. *Id.*³

The lower court’s ruling here stands in stark contrast to the established principles applied by this Court in *Van Orden*. As the District Court itself recognized, the Bible has both religious and secular meaning: “The King James Bible can advance both secular and religious purposes.” *Staley*, 332 F. Supp. 2d at 1036. In particular, the Bible has been a significant historical influence in the development of both religious and secular moral systems. For this reason, the Bible is *commonplace* in courthouses throughout the country. Federal rules and

³ Indeed, the Court observed: “A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the decalogue’s divine origin. Yet in context even that message does not drown its secular message.” *Van Orden*, 351 F.3d at 182.

statutes specifically acknowledge the authority of judges and court officials to administer oaths on the Bible. *See* 28 U.S.C. §§ 459, 953; Fed. R. Evid. 603; *Engel*, 370 U.S. at 437 (1962) (Douglas, J. concurring) (one of the longstanding “aids’ to religion in this country” is the fact that “[t]he Bible is used for the administration of oaths”). Indeed, it has long featured prominently in official proceedings in courts throughout the country, given that witnesses are routinely administered an oath upon the Bible before they are permitted to testify. *See Sherman v. Community Consol. School Dist. 21*, 980 F.2d 437, 446 (7th Cir. 1992) (“From the outset, witnesses in our courts have taken oaths on the Bible, and sessions of court have opened with the cry ‘God save the United States and this honorable Court.’”).

In holding that the Mosher memorial violated the Establishment Clause, the District Court ignored this undisputed historical and secular meaning. *See Staley*, 332 F. Supp. 2d at 1036-37. In so ruling, the Court deviated not only from the historical record, but from established Supreme Court precedent. In the process, it articulated a rule that would bar the use of the Bible in every courthouse in the country despite longstanding and accepted historical practice.

Moreover, the Court’s ruling was particularly troubling given that it specifically recognized that “the *primary purpose* of the Star of Hope Mission for

erecting the stone monument *was to honor William S. Mosher.*” *Staley*, 332 F. Supp. 2d at 1036 (emphasis added). Thus, not only did the display of the Bible have *a* historical and secular meaning, but the particular purpose for which the display was erected was in fact *wholly* secular – to honor a prominent member of the community and his extensive philanthropic endeavors.

The Court nonetheless found that the memorial was unconstitutional because “Mosher was a devout Christian.” *Id.* In other words, the rule articulated by the District Court would require that any memorial to a prominent individual be stripped of all mention of religion – even if that individual’s religious belief was a motivating factor behind the works for which they are being honored. *See id.* at 1038 (holding that display was unconstitutional because “inclusion of the Bible was to honor Mr. Mosher’s Christian faith”). Thus, for example, a monument to the Reverend Dr. Martin Luther King, Jr. could not mention that his work was motivated by his Christian faith.⁴ Similarly, a memorial to Mahatma Gandhi could not mention the Hindu principles of non-violence to which his life was dedicated.⁵ This is simply *not* the law. The lower court’s test would result in a complete

⁴ For a discussion of Dr. King’s civil rights work with the Southern Christian Leadership Conference, see THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (2001).

⁵ For a discussion of Gandhi’s views, see MOHANDAS K. GANDHI, GANDHI AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (1993).

prohibition of government acknowledgment of religion – something that is *not* required, but rather is *prohibited* – under established Supreme Court precedent. *See Lynch*, 465 U.S. at 674 (noting the “unbroken history of official acknowledgment” of religion by the government).

The District Court’s attempts to distinguish this case from these established precedents simply fails. In discussing this Court’s decision in *Van Orden*, for example, the District Court *acknowledged* that the decision required that the Court uphold displays that “have a secular as well as a religious meaning.” *Staley*, 332 F. Supp. 2d at 1037. Nonetheless, the Court held that it need not follow this rule because in *Van Orden*, unlike the present case, there was ““no evidence of any religious invocations or that any minister, rabbi, or priest was ever present”” when the monument was erected. *See id.* (quoting *Van Orden*, 351 F.3d at 179). However, the absence of a member of the clergy at the dedication of the Ten Commandments monument was not a critical fact upon which the decision in *Van Orden* turned. Rather, the Court’s decision was based on the historical significance of the Ten Commandments, which provided the monument with both a secular and religious meaning. *See Van Orden*, 351 F.3d at 182. The case here is exactly the same. The established historical significance of the Bible requires that the District Court’s decision be overturned.

II. The Mosher Memorial Does Not Violate The Constitution Because No Reasonable Observer Could View The Memorial As An Endorsement Of Religion.

The lower court further erred by engaging in a highly speculative analysis regarding the subjective intentions of those responsible for erecting and maintaining the Mosher memorial. The Supreme Court has made clear that the test under the Establishment Clause is an objective one. *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (test based on an “objective observer”); *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (Court looks to “the ‘objective’ meaning of the [government’s] statement in the community”). The constitutional analysis is based on the perceptions of a *reasonable* observer. *Lynch*, 465 U.S. at 691-94 (O’Connor, J., concurring). *See also County of Allegheny*, 492 U.S. at 592.

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

780 (emphasis in original) (internal quotations omitted). Rather, the standard is based on the perceptions of an *objective* observer. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308.

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

Again, the District Court's decision here stands in stark contrast to this Court's ruling in *Van Orden*. While the District Court recognized that the constitutional test is an objective one, *Staley*, 332 F. Supp. 2d at 1032, it nonetheless engaged in a highly speculative analysis regarding the subjective intent of those associated with the Mosher memorial. For example, in determining that the display was designed to promote Christianity, the Court noted the fact that the "minutes of the Star of Hope Mission's board consistently refer to the Bible" and that a local Judge and court reporter who worked at the courthouse and happened to be Christians refurbished the monument in 1995 even though neither "knew Mosher or had any relationship with him, his family, or the Star of Hope Mission." *Id.* at 1036-37.

Such an approach is prohibited under established Supreme Court precedent. In determining whether the government intends to convey a message of endorsement or disapproval of religion, "a court has no license to psychoanalyze the legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment). Rather, courts must apply an *objective* analysis based on the perceptions of a *reasonable* observer. This means, among other things, that courts must look to "the legislative *purpose* of the [display], not the possibly religious *motives*" of the government officials who authorized it. *Board of*

Education v. Mergens, 496 U.S. 226, 249 (1990).⁶ Here, that purpose was indisputably to honor a man who happened to be a devout Christian. *See Staley*, 332 F. Supp. 2d at 1036 (observing that “the primary purpose of the Star of Hope Mission for erecting the stone monument was to honor William S. Mosher”). In other words, the objective purpose of the display was primarily secular.⁷

III. The District Court’s Decision Fails To Adequately Consider The Traditional Role Of State And Local Authorities In Matters Touching Upon Religion.

Finally, the District Court erred by failing to adequately consider the traditional role of state and local authorities in matters touching upon religion – a role that is expressly recognized in the text and structure of the Constitution. Here, Harris County had a legitimate interest in authorizing private organizations or individuals to erect displays in a public forum – no matter the nature of the display. Indeed, the Establishment Clause, and the Constitution as a whole, specifically

⁶ *See also Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting Court’s “reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute”); *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (noting the “fundamental principle of constitutional adjudication” that the courts may not “restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted”).

⁷ If there were any question as to this purpose, the dedication of the monument would resolve it. The dedication indicated that the monument was erected by the Star of Hope Mission – not the county government – and that it was erected for the purpose of memorializing William Mosher. *Staley*, 332 F. Supp. 2d at 1033. Such “an ‘explanatory plaque’ may confirm that in particular contexts the government’s association with a religious symbol does not represent the
(Continued...)

contemplate that matters touching upon religion will be subject to local control. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring in judgment); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I. “As a textual matter,” the primary purpose of the clause was to “prohibit[] Congress from establishing a national religion.” *Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring).⁸ The text is “consistent with the prevailing view” during the Founding period “that the Constitution *left religion to the States.*” *Id.* (emphasis added). Thus, both the text and history of the clause demonstrate that it is “best understood as a federalism provision.” *Id.* at 2331. See also AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 41 (1998) (concluding that the clause is a “federalism provision”); STEVEN D. SMITH, *FOREORDAINED FAILURE:*

government’s sponsorship of religious beliefs.” *County of Allegheny*, 492 U.S. at 619 (Blackman, J.).

⁸ See also *Wallace*, 472 U.S. at 54 n.36 (“The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age....” (quoting 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1877, at 594 (1851))).

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(1995) (religion clauses were an “exercise in federalism”).

Indeed, the Framers repeatedly emphasized the primacy of local authorities over matters touching upon religion. James Madison observed in the Virginia ratification debates, for example, that “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.” 5 THE FOUNDERS’ CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987). James Iredell similarly stated in defending the proposed Constitution that “[i]f any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Everyone would ask, ‘Who authorized the government to pass such an act?’” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 194 (Jonathan Elliot ed., 2d ed. 1881). Thus, even before the Establishment Clause was embodied in the text of the Constitution, there was a general recognition that primary authority in matters touching religion rested with the state and local authorities.

Despite these structural guarantees, there remained some concern that the federal government might usurp authority to act with respect to the establishment of religion. Accordingly, the proposed Bill of Rights contained express restrictions

on the national government. As James Madison observed in describing the proposed amendments, certain of the state conventions “seemed to entertain an opinion” that the Necessary and Proper Clause might enable Congress to “make laws of such a nature as might infringe the rights of conscience, and establish a national religion.” 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789). In order to reinforce this jurisdictional division between the states and the federal government and better secure religious liberty, when crafting the Bill of Rights the Framers sought to make this division of power express.

Congress went through several drafts in creating what ultimately became the Establishment Clause. James Madison initially proposed that the Constitution be amended to provide that “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” *Id.* at 451. The House Committee of the Whole subsequently debated language that provided that “no religion shall be established by law, nor shall the equal rights of conscience be infringed.” *Id.* at 757. Madison indicated that this provision meant that “Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.” *Id.* at 758. According to Madison, “the people feared one sect might obtain a pre-eminence, or two combine together, and

establish a religion to which they would compel others to conform.” *Id.* At the same time, however, some “thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments.” *Id.* at 757 (remarks of Roger Sherman). Thus, the debates demonstrate that Congress believed that the federal government had limited authority to act in matters touching upon religion. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Nonetheless, in order to dispel any concerns, Congress sought to make this division of power express.

Early commentary on the Constitution confirmed this understanding of the new amendment. In his *Commentaries on the Constitution*, Justice Story stated, for example, that under the Establishment Clause “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833). The clause, according to Story, was merely designed to “prevent any national ecclesiastical establishment.” *Id.* § 1871. Similarly, William Rawle, in his influential treatise on the Constitution, concluded that “[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It would be difficult to conceive on what

possible construction of the Constitution such a power could ever be claimed by congress.” WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., 1987). Such views have been further confirmed by modern scholarship, which has described the Establishment Clause as an “exercise in federalism” and as making “explicit jurisdictional policies that were already implicit in the constitutional order.”⁹

The Establishment Clause therefore reflects a fundamental division of power between the states and the federal government that runs throughout the Constitution. As the Supreme Court has observed, it is “incontestible” that the Constitution “established a system of ‘dual sovereignty.’” *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

⁹ See, e.g., SMITH, FOREORDAINED FAILURE, *supra*, at 17-18 (“The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism.”); David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (noting the “federalistic motivation for the establishment clause”); Donald L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson’s “Wall of Separation” Metaphor*, 16 CONST. COMMENT. 627, 650 (1999) (Establishment Clause “merely made explicit the jurisdictional policies that were already implicit in the constitutional order”); Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) (“[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.”); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (Establishment Clause “acts as a sort of ‘federalism-based’ guarantee that
(Continued...)”).

While the states “surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’” *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)). This fundamental aspect of our constitutional system is “reflected throughout the Constitution’s text.” *Id.* at 919. In particular, residual state sovereignty is “implicit . . . in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones.” *Id.* See also *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers.”).

Because the Constitution is “an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.” *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)). Indeed, this has been “the Court’s consistent understanding.” *Id.*

This aspect of our constitutional structure represents a “unique contribution of the Framers to political science and political theory.” *Printz*, 521 U.S. at 921

merely delineates the proper roles of the federal and state governments with respect to religious establishments”).

n.11 (quoting *Lopez*, 514 U.S. at 575). The “separation of the two spheres is one of the Constitution’s structural protections of liberty.” *Id.* at 921. “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *New York*, 505 U.S. at 181-82 (quoting *Ashcroft*, 501 U.S. at 458).

In implementing this division of authority, “[t]he Constitution requires a distinction between what is truly national and what is truly local.” *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). Areas of fundamentally local concern such as marriage, *Trammel v. United States*, 445 U.S. 40, 50 (1980), domestic relations, *id.*, and criminal law, *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995), were reserved to the state and local authorities.

Religion – and in particular decisionmaking by local governmental bodies concerning the public display of symbols that have religious meaning – is just such a uniquely local matter. Indeed, “it is common knowledge that the Constitution’s framers thought that religion was a matter for the states, not for the national government” SMITH, FOREORDAINED FAILURE, *supra*, at 119. Under our Constitution, “the whole power over the subject of religion is left exclusively to the

State governments, to be acted upon according to their own sense of justice and the State constitutions.” *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) (quoting STORY, *supra*, § 1878). *See also* AMAR, *supra*, at 34 (observing that the Establishment Clause “calls for the issue [of establishment] to be decided locally”). While no state or local authority may “establish” a religion, the Constitution recognizes that in matters that touch upon religion, state and local authorities are the primary decisionmakers.

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

In ruling that the Mosher memorial violated the Establishment Clause, the District Court failed to give adequate consideration to these structural principles informing the Constitution. Due regard should be given to local authorities’ traditional role in matters of religion, particularly where, as here, the issue before the Court implicates local control over state or municipal property. *Cf. New York*,

505 U.S. at 161 (federal government may not “commandeer” or direct local authorities).

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court reverse the District Court’s decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2005, I caused two copies of the *amicus* brief of Eagle Forum Education and Legal Defense Fund (with electronic copy on diskette) to be served by First Class Mail, postage prepaid, on:

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I hereby certify that the brief of *Amicus* Eagle Forum Education and Legal Defense Fund complies with FRAP 32(a)(7). It is produced in 14 point Times New Roman type, and contains 5,639 words, as counted by the word processing program Microsoft Word 2000.

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