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No. 04-20667

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

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KAY STALEY

*Plaintiff-Appellee*

v.

HARRIS COUNTY, TEXAS

*Defendant-Appellant*

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

ON PETITION FOR REHEARING EN BANC

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

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December 21, 2006

## 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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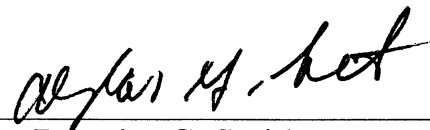
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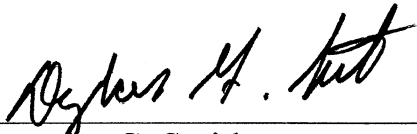


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**CONSENT OF THE PARTIES**

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) (*Staley I*). 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.*; *Staley v. Harris County, Texas*, 461 F.3d 504, 513 (5th Cir. 2006) (*Staley II*).

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.* at 506; *see also Staley I*, 332 F. Supp. 2d at 1033. "The open Bible as displayed" measures only "twelve by sixteen inches." *Staley II*, 461 F.3d at 506. The primary purpose of the display "was to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community." *Id.* at 513.

The memorial to Mr. Mosher is not the only display at the Harris County Courthouse. "Other monuments, markers, and plaques are present in and near other county buildings," *id.* at 506, including "the same area as the Mosher monument," *Staley I*, 332 F. Supp. 2d at 1033-34. None of these historical displays contains a "religious message." *Id.*; *Staley II*, 461 F.3d at 506.

It is undisputed that the Mosher memorial is neither owned nor maintained by the county. *See Staley I*, 332 F. Supp. 2d at 1035. Nonetheless, a local lawyer,

Plaintiff-Appellee Kay Staley, challenged the display – approximately 40 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. A prior panel affirmed that ruling in a 2-1 split decision, *Staley II*, 461 F.3d 504, which this Court has agreed to rehear *en banc*.

### SUMMARY OF ARGUMENT

The Mosher memorial does not violate the Establishment Clause. The Supreme Court has repeatedly upheld displays of symbols having religious significance where such displays have both religious and secular meaning. The “dual significance” of such monuments renders them constitutional. 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).

Applying these established principles, the Supreme Court recently rejected a constitutional challenge to a similar display of the Ten Commandments that this Court held constitutional. In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005),

a plurality of the Supreme Court observed that displays that have both historical and religious significance do not violate the Establishment Clause. The same established principles the Court applied in *Van Orden* are dispositive here. All of the relevant factors from *Van Orden* – the circumstances surrounding the monument’s placement on government grounds, the physical setting, and the amount of time the display stood without a challenge – demonstrate the constitutionality of the Mosher monument. *See id.* at 2870 (Breyer, J., concurring). *Van Orden* requires that the monument be upheld.

The District Court erred in concluding that the Mosher monument was unconstitutional. The Mosher monument does not fail the “purpose” prong of the *Lemon* test. First, the Supreme Court has explicitly rejected application of *Lemon* in cases such as this, finding that the test “is not useful” for dealing with the sort of passive monument at issue here. *Id.* at 2861. Second, were the test applicable, “an objective observer” would not view the Mosher monument as predominantly motivated by religious purposes. The monument’s primary purpose is to honor the life and contributions of William S. Mosher – an undeniably constitutional objective. The District Court’s speculative analysis regarding the subjective intentions of defendants is prohibited by established Supreme Court precedent.

Finally, the District Court's decision fails to adequately consider the traditional role of state and local authorities in matters touching upon religion. Due regard should be given to local authorities' traditional role in this area.

## ARGUMENT

### **I. The Mosher Memorial Does Not Violate The Constitution Because, Like The Display The Supreme Court Upheld 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 v. Donnelly*, 465 U.S. 668, 674 (1984). 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).

As a result, the Supreme Court has consistently upheld public practices that have both historical and religious significance. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), 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 and establishing them as “part of the fabric of our society.” *Id.* at 792.

So, too, the Bible is part of the “fabric of our society.” 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).<sup>1</sup>

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<sup>1</sup> 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, 81 (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 II*, 461 F.3d at 506. Even then, one may view only a couple pages of the Bible, which are selected by a private organization. *Id.* at 507 (“Star of Hope has maintained the

(Continued...)

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 v. Perry*, 351 F.3d 173 (5th Cir. 2003), 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.” *Id.* at 176. This Court rejected that argument, observing that there is “no escape” from the Commandments’ “secular and religious character.” *Id.* at 182. The Court noted that although the Commandments are a “sacred text to

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monument and turned the pages of the Bible.”). There is simply no state “establishment” of religion here.

many,” they are “also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people.” *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.*<sup>2</sup>

The Supreme Court affirmed this Court’s decision in *Van Orden*. See *Van Orden v. Perry*, 125 S. Ct. 2854 (2005). Writing on behalf of the plurality, Chief Justice Rehnquist observed that the Supreme Court has *repeatedly* upheld public displays of religious symbols that also have some historical meaning, and stated that a contrary rule would “evinced a hostility to religion by disabling the government from in some ways recognizing our religious heritage.” *Id.* at 2859. The plurality ignored the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), finding that the *Lemon* test was “not useful for dealing with the sort of passive monument” at issue in *Van Orden* and that the analysis should instead be “driven both by the nature of the monument and by our Nation’s history.” *Van Orden*, 125 S. Ct. at 2861. Applying these principles, the Court concluded that “[s]imply having religious content or promoting a message consistent with

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<sup>2</sup> 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.

a religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 2863. Rather, the “dual significance” of the monument – both religious and secular – rendered it constitutional. *See id.* at 2864.

The District Court’s ruling in this case stands in stark contrast to the principles applied by the Supreme Court in *Van Orden*. Indeed, the facts of the two cases are strikingly similar. The monument at issue in *Van Orden* was erected by a private group – the Fraternal Order of Eagles – approximately four decades ago. The monument stood alone, and its “primary content” was “the text of the Ten Commandments.” *Id.* at 2858. There were, however, several other monuments and historical markers present on the Capitol grounds, many of which had no religious significance. As Justice Breyer noted in his concurrence, the secular message was evident because the organization had donated the display and “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” *Id.* at 2870 (Breyer, J., concurring).

The facts of this case are substantially identical to those in *Van Orden*. The monument at issue here was erected by a private group – the Star of Hope Mission – 50 years ago. *Staley II*, 461 F.3d at 506. The Star of Hope designed and paid for the Mosher monument. *Id.* “The open Bible as displayed measures twelve by sixteen inches,” *id.*, making it much smaller than the

6-by-3½ feet monolith in *Van Orden*. Other monuments, markers, and plaques are present in the same area as the Mosher monument. *Id.* Like the monument in *Van Orden*, the secular message is evident: “to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community.” *Id.* at 513.

The District Court and panel majority’s decision simply cannot be reconciled with the Supreme Court’s holding in *Van Orden*. According to the panel, “Justice Breyer’s concurrence in *Van Orden* is the controlling opinion from which we must draw in this case.” *Id.* at 512 n.8. Yet it is obvious that all of the factors emphasized by Justice Breyer – described by the panel here as “circumstances surrounding the display’s placement on state grounds, the display’s physical setting, and the amount of time the display stood without a challenge” – also require upholding the Mosher monument. *See id.* at 512 (citing *Van Orden*, 125 S. Ct. at 2870 (Breyer, J., concurring)). They are, in fact, nearly identical.

Like the Ten Commandments, the Bible as a whole has both religious and secular meaning. The District Court correctly found that “[t]he King James Bible can advance both secular and religious purposes.” *Staley I*, 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

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. *See Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 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.’”).

The Supreme Court has clearly and decisively rejected the District Court’s holding that the Constitution forbids “a Bible [from being] displayed in a prominent public setting.” *Staley I*, 332 F. Supp. 2d at 1040. *See, e.g., Stone*, 449 U.S. at 42 (giving examples where “the Bible may constitutionally be used”). As Justice Breyer emphasized in *Van Orden*, “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of religion.” 125 S. Ct. at 2868 (Breyer, J., concurring).

It is beyond serious question that the Bible can serve a permissible function as part of a memorial, as it does here. As the panel dissent observed, a Bible is found within the Washington Monument, “at least two interior memorial stones

feature Bible passages . . . and the apex of the east face bears the inscription *Laus Deo*, or ‘Praise be to God.’” *Staley II*, 461 F.3d at 520-21 (Smith, J., dissenting). Likewise, the Jefferson Memorial and the Lincoln Memorial each contain inscriptions with religious references. *Id.* at 520. Furthermore, at oral argument, counsel for the plaintiff conceded that “a hypothetical *identical Biblical* monument, dedicated to the Reverend Martin Luther King, Jr., and obviously emphasizing the religious aspects of his life and service, would pass constitutional muster if it lacked a sectarian history.” *Id.* at 522 (emphasis in original).

It cannot be the case that all of these monuments – and certainly not an *identical* Biblical monument – are constitutional while the Mosher monument is not. The panel dissent aptly dispatched such flawed reasoning by pointing out that “[t]he identity of the honoree is a distinction without a difference.” *Id.* at 522. “If a county could choose to honor a prominent spiritual and civil rights leader with a monument highlighting the Bible as a sign of his faith, there is no reason why they could not similarly honor a layman whose faith inspired a lifetime of philanthropy.” *Id.*

In holding that the Mosher memorial violated the Establishment Clause, the District Court ignored the monument’s historical and secular meaning. 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 systematically exclude all religion from the public square.

The District Court and panel rulings are particularly troubling given that each recognized that “the primary purpose of the monument originally was to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community.” *Id.* at 513; *Staley I*, 332 F. Supp. 2d at 1036 (“the *primary purpose* of the Star of Hope Mission for erecting the stone monument *was to honor William S. Mosher*”) (emphasis added). Thus, not only did the display of the Bible have *an* historical and secular meaning,<sup>3</sup> that secular purpose predominated. Furthermore, the panel itself observed that the monument stood “without complaint for thirty-two years,” *id.*, strongly demonstrating that objective members of the community did not view the monument as predominantly religious.

The panel nonetheless found the memorial unconstitutional because (1) the judge who later restored the monument ran a political campaign (in the mid-1990s, nearly 40 years after the monument was erected) invoking religious themes; (2) there is a presumed lack of connections between the “refurbishers” and Mosher

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<sup>3</sup> See *Lynch*, 465 U.S. at 680 (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly by religious considerations*.”) (emphasis added).

or the Star of Hope; (3) the refurbishments included the addition of red neon lights around the Bible; and (4) the judge and his court reporter made the refurbishment decisions instead of a museum curator. *See id.* at 514.

These factors are either irrelevant or so subjective as to set no standards at all. As the panel dissent observed, “[a] religious purpose appearing for the first time nearly forty years after the foundation of a monument can hardly classify as ‘predominant.’ . . . [T]he objective observer does not forget the purpose underlying previous iterations of the same display.” *Id.* at 517-18 and n.7 (Smith, J., dissenting). Regardless of the tenor of any state judge’s political campaign, the predominant purpose of the Mosher memorial remains as it was in 1956: “to honor the life of a Houston businessman and philanthropist.” *Id.* at 519.

Although the panel majority relies on dubious factual findings concerning Judge Devine’s supposed lack of “connections” to Mosher or the Star of Hope, *see id.*, such disputes are relevant only if one assumes that a judge may not choose to refurbish a monument simply because it needs to be refurbished. There is no logical reason why Judge Devine’s supposed failure to meet with the Mosher family or the Star of Hope (or anyone else) would necessarily convert a secular function (refurbishing a monument *already located on his courthouse grounds*) into a religious one. Nor does the use of neon lights transform a permissible display into an unconstitutional establishment of religion. Last, the absence of a

museum curator simply is not probative of any question before this Court. In fact, it is utterly unsurprising, “given that *no* decision with respect to [the monument’s] installation or refurbishment required the judgment of a professional curator.” *Id.* at 520 (emphasis added).

The panel’s attempts to distinguish this case from the display in *Van Orden* fail. Each of the displays was donated by a private group. Each has secular and historical significance in addition to its religious meaning. *See Van Orden*, 125 S. Ct. at 2864 (the “dual significance” of the monument renders it constitutional). Each has been in place for decades – strongly suggesting that the public does not view either as a government effort to promote religion. *See id.* at 2870-71 (Breyer, J., concurring). The Supreme Court’s decision in *Van Orden* requires that the Mosher memorial be upheld.

## **II. The Predominant Purpose Of The Mosher Memorial – To Honor The Life And Contributions Of William S. Mosher – Is Constitutionally Permissible.**

The District Court further erred in holding that the monument fails the “purpose” prong of *Lemon*’s three-part analysis. *See* 403 U.S. at 612-13. As discussed above, a plurality of the Supreme Court has rejected the application of the *Lemon* test in cases such as this, finding that the test is “not useful for dealing with the sort of passive monument” at issue here. *See Van Orden*, 125 S. Ct. at

2861. Instead, this Court’s analysis should be “driven both by the nature of the monument and by our Nation’s history.” *Id.*

The Eighth Circuit, sitting *en banc*, has already followed the Supreme Court’s lead in abandoning the *Lemon* test under such circumstances. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (“Taking our cue from Chief Justice Rehnquist’s opinion for the Court and Justice Breyer’s concurring opinion in *Van Orden*, we do not apply the *Lemon* test.”). As in *Van Orden*, the court in *City of Plattsmouth* conducted an analysis to determine whether the monument at issue had an independent historical significance aside from its religious symbolism. *See id.* at 776-77. Like the Supreme Court in *Van Orden*, the Eighth Circuit found the monument permissible because it communicated both a secular and a religious message, and “[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 778 (quoting *Van Orden*, 125 S. Ct. at 2863). Such is the case here. For reasons discussed above, the Mosher monument has both religious and historical significance and is therefore constitutionally permissible.

Even assuming, *arguendo*, that the *Lemon* test applies to the present case, the District Court erred in concluding that “the primary purpose of the monument” is “religious.” The purpose prong, as modified by *McCreary County v. ACLU of*

*Kentucky*, 125 S. Ct. 2722 (2005),<sup>4</sup> prohibits government from acting with the “ostensible and predominant purpose of advancing religion.” *Id.* at 2733. The Court’s analysis must focus on the viewpoint of the *objective* observer, a person who is familiar with the entire history surrounding the monument. *See id.* at 2734-35, 2737. 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)). Accordingly, the test precludes 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.

The facts amply demonstrate that a reasonable, objective observer would not view the Mosher monument as predominantly motivated by religious purposes. Even the panel majority conceded that “[t]he evidence is clear and indisputable

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<sup>4</sup> *McCreary* introduced a “heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion.” 125 S. Ct. at 2757 (Scalia, J., dissenting). Previously, the Supreme Court had repeatedly held that government action would be invalidated under *Lemon*’s “purpose prong” *only* where the action was “*entirely* motivated by a purpose to advance religion.” *Wallace*, 472 U.S. at 56 (emphasis added); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Lynch*, 465 U.S. at 680.

that the Star of Hope erected the monument to honor the life and contributions of Mosher . . . a well-respected citizen whose life reflected the Christian values that inspired his contributions to the community.” *Staley II*, 461 F.3d at 513.

Moreover, one need not speculate about the “community ideal of reasonable behavior” or the collective “social judgment” regarding the monument. *See Pinette*, 515 U.S. at 779-80 (O’Connor, J., concurring in judgment). The very fact that the monument stood “without complaint” for more than three decades demonstrates that the public did not see the monument as predominantly religious. *See Van Orden*, 125 S. Ct. at 2870-71 (Breyer, J., concurring) (“[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals . . . are likely to have understood the monument as amounting . . . to a government effort to favor a particular sect . . .”). “The collective wisdom of a community over an extended period of time provides more reliable evidence of the purpose of a public display than do the musings of ‘the uninformed, the casual passerby, the heckler, or the reaction of a single individual.’” *Staley II*, 461 F.3d at 517 (Smith, J., dissenting) (quoting *Van Orden*, 351 F.3d at 178).

The panel majority sidestepped these facts with several “analytically dubious maneuvers.” *Id.* For example, rather than looking at the monument’s purpose over the past 50 years, the Court partitioned the monument’s lifetime into distinct periods. The Court then found that the “primary purpose of the monument had

now become religious” during a two-year period in the mid-1990s. *See id.* at 514-15. This reasoning directly conflicts with that in *McCreary*, where the Supreme Court took *all* phases of the disputed displays into account. Indeed, *McCreary* indicates that the objective observer does not forget the purpose underlying previous iterations of the same display. *See* 125 S. Ct. at 2737, 2739. “[R]easonable observers have reasonable memories.” *Id.* at 2737. If it were otherwise, the *McCreary* Court would have focused only on the most recent version of the display and would likely have decided that case differently because the defendants had offered legitimate secular purposes for their third (and final) iteration. *See id.* at 2739 & n.18.

The panel falls far short of explaining how, applying *McCreary* correctly, a state judge’s political campaign would cause a reasonable observer to ignore several decades of the monument’s history – including its indisputable original purpose of honoring Mosher – and conclude that the monument’s predominant purpose had now become religious. Rather, a reasonable observer would surely look to the monument’s long history and conclude that its primary purpose remains today as it was in 1956: to honor the life and contributions of William Mosher.

The panel also erred by engaging in a speculative analysis regarding the subjective intentions of those responsible for refurbishing and maintaining the Mosher memorial. The Supreme Court has made clear that the test under the

Establishment Clause is an objective one. *Santa 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). Nonetheless, in determining that the purpose of the display had “become” religious, the Court considered such factors as “Judge Devine’s political platform” and an alleged lack of “connections” between “the refurbishers and Mosher or Star of Hope.” *Staley II*, 461 F.3d at 514-15. The District Court went even further, noting that the “minutes of the Star of Hope Mission’s board consistently refer to the Bible,” and citing this as proof of the government’s purportedly improper purpose. *Staley I*, 332 F. Supp. 2d at 1036-37.

The courts’ approach is prohibited under established Supreme Court precedent. In making such determinations, “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) (emphasis in original).<sup>5</sup>

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<sup>5</sup> 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

(Continued...)

