No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO,
Petitioner,

v.

JANE FELIX, *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), or as *amicus*, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

In addition, ACLJ has represented numerous local governments in challenges involving displays of the Ten Commandments, both in this Court, *Pleasant Grove City v. Summum*, and in the lower courts, *e.g.*, *ACLU of Kentucky v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). ACLJ also filed an *amicus* brief in support of the State of Texas in *Van Orden v. Perry,* 545 U.S. 677 (2005).

Amicus therefore has considerable legal expertise in the subject matter underlying the petition.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). Petitioner has filed a blanket consent letter with the Clerk and Respondents' written consent is being filed with this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT AND INTRODUCTION

The petition presents this Court with the opportunity to resolve an important and ongoing legal conflict over diametrically opposed applications of the Establishment Clause. That *principal* conflict is not between decisions of the lower courts, or even between lower courts and decisions of this Court. Rather, the petition should be granted in this case to resolve a conflict between two decisions *of this very Court*, regarding, no less, the very same subject matter: a public and passive display of the Ten Commandments. While in *Van Orden v. Perry,* 545 U.S. 677 (2005), this Court upheld a display of the Decalogue on the capitol grounds of Texas, it struck down, on the very same day, displays of the Decalogue on the walls of two Kentucky courthouses in *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

These conflicting decisions not only fail to provide a coherent standard for lower courts to apply in Ten Commandments lawsuits (or other Establishment Clause challenges, for that matter) they offer state and local governments precious little guidance in how they might create a display involving the Decalogue that could withstand a legal challenge. If, as *Van Orden* acknowledges, the Ten Commandments have played an undeniable role in our Nation's heritage, 545 U.S. at 688 (plurality opinion), these governments should be free to honor that heritage without the fear of costly litigation and potential attorney's fees.

Since *Van Orden* and *McCreary* were decided, however, this Court has provided the framework for resolving the conflict between these two decisions:

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). While the facts of that case involved legislative sectarian prayer, and not a passive religious and historical display like the one at issue in this case, the principles enunciated in *Town of Greece* can and should apply with full force here.

As the rationale of that decision suggests, there is no need for this Court, not to mention the lower courts, to continue to use the fiction of the "reasonable observer" in adjudicating Establishment Clause challenges, at least with respect to passive displays that give rise to Establishment Clause litigation, such as those involving the Decalogue. That standard has become a baffling and useless analytical framework, as noted by the district court in this case: "[I]n performing the role of [the reasonable] observer, the Court is thrust into a realm of pretend and make-believe, guided only by confusing jurisprudence and its own imagination." App. 59a.

The more appropriate criteria for evaluating such challenges, as set forth in *Town of Greece*, is to look to the historical foundations of the practice at issue and whether that practice imposes unwarranted governmental coercion on others. This jurisprudential measure will not only provide state and local governments a more objective standard in determining whether a potential or actual passive Ten Commandments display comports with the Establishment Clause, but will equip governments with objective criteria with respect to *other* passive

displays and practices that acknowledge the role religion has played in our country's heritage.[2]

The petition should be granted.

ARGUMENT

I. *Van Orden v. McCreary County*

A. *Van Orden* and the Absent Reasonable Observer

In *Van Orden*, this Court upheld a passive display of the Ten Commandments on the grounds of the Texas State Capitol. In a plurality opinion, Chief Justice Rehnquist noted that the "test" derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was simply "not useful in dealing with the sort of passive monument" like the one at issue in that case. The plurality noted that *Lemon* and its "prongs" were described as providing "no more than helpful signposts" only two years after that decision was handed down, and the test had only been selectively used by this Court in deciding challenges under the Establishment Clause. *Van Orden*, 545 U.S. at 686 (plurality opinion). *See also Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting that the Court did not think *Lemon* "relevant" in deciding *Marsh v. Chambers*, 463 U.S. 783 (1983), or "useful" in *Larson v. Valente*, 456 U.S. 228 (1982)); *Cutter v. Wilkinson*, 544 U.S. 709, 717, n.6 (2005) (noting, after setting forth the *Lemon* test, "[w]e resolve this case on other grounds").

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[2] *Amicus* assumes for purposes of this brief that the Ten Commandments monument at issue constitutes "government speech."

Instead of applying any part of *Lemon*'s test to the Texas monument, and doubting "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence," the plurality undertook an "analysis . . . driven both by the nature of the monument and by our Nation's history." 545 U.S. at 686. Surveying the country's legal and cultural heritage, it held that even though the Ten Commandments are unquestionably religious, they also have "an undeniable historical meaning." *Id*. at 690.

Based on that dual significance of the Decalogue—"partaking of both religion and government"—the plurality ruled that Texas's display of the monument, standing among other monuments "representing the several strands in the State's political and legal history," was consistent with the demands of the Establishment Clause. *Id*. at 690-91.

Justice Breyer concurred in the judgment only. Like the plurality, Justice Breyer did not use *Lemon* to evaluate the monolith's legality. While he opined that the display might survive the Court's more formal establishment clause tests, *id*. at 703 (Breyer, J., concurring in the judgment), Justice Breyer preferred instead to apply "the exercise of legal judgment," an analysis that would "reflect and remain faithful to the underlying purposes of the Clauses, and . . . take account of context and consequences measured in light of those purposes." *Id*. at 700. Evaluating the underlying case-specific facts of the case in tandem with these purposes, Justice Breyer believed that the Texas display "falls on the permissible side of the constitutional line." *Id*. at 703.

Importantly, in neither the plurality decision nor Justice Breyer's concurrence did the "reasonable observer" reveal himself.[3] Nowhere was this hypothetical character used to discern what he knew (or didn't know) about the reasons Texas erected the monument in the first place; the various roles played by Cecile B. DeMille, the Fraternal Order of Eagles, and a Minnesota juvenile court judge in producing the monolith for Texas and other localities, 545 U.S. at 713-15 (Breyer, J.); who spoke at the dedication ceremony of the monument and what was said, etc. It was not necessary to decide whether this reasonable observer thought that the State of Texas was advocating the Ten Commandments as a religious code, or a moral code, or both, or none of the above. This observer's feelings of exclusion, his religious sensibilities, or his thoughts of religious endorsement at viewing the monument were simply not considered.

In short, *Van Orden* was decided without *Lemon* and the need to invoke the "reasonable observer," which, at least in the Tenth Circuit, has been characterized as "biased, replete with foibles, and prone to mistake." *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1108 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of petition for rehearing en

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[3] The "reasonable observer" standard of the endorsement test—a modification of the purpose and effects prongs of *Lemon*—was first proposed by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment) (stating that the relevant issue was whether an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools").

banc). The Texas Decalogue was allowed to stand without that fictional being saying a word or thinking a thing.

B. *McCreary County* and the Critical Reasonable Observer

In *McCreary*, *Lemon*'s "ghoul" arose from his slumber in Texas to "stalk[]" county courthouses in Kentucky. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment). In fact, the very same day *Van Orden* was decided, holding that the Texas display of the Ten Commandments passed constitutional muster, this Court ruled in *McCreary* that displays of the Ten Commandments in two Kentucky county courthouses were unconstitutional. And not only did *Lemon* play a role in the rationale of that decision—unlike in the *Van Orden* plurality—it played the determinative and decisive role. Indeed, *McCreary* not only employed *Lemon*'s secular purpose prong, it refashioned that criterion from meaning that the government must have "*a* secular . . . purpose" to the "heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." *Id.* at 901 (Scalia, J., dissenting).

While notably absent in *Van Orden*, the "reasonable observer"—a "most unwelcome[] addition" to Establishment Clause jurisprudence, *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part)—was fully present in *McCreary*, shrewdly watching the history of Ten Commandments displays as they were placed on county courthouse walls.

When the counties first displayed the Ten Commandments, standing alone in a gold frame, the observer "could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." 545 U.S. at 869.

When the counties first altered the contents of their displays, by adding other documents in smaller gold frames, the observer "could not forget" this second display, even after the counties created a third one. *Id*. at 870. The Court opined that "reasonable observers have reasonable memories." *Id*. at 866.

With respect to the third and final displays (incorporating copies of historical documents like Magna Carta and the Mayflower Compact), the disbelieving observer could not "swallow the claim that the Counties had cast off the [religious] objective so unmistakable in the earlier displays." *Id*. at 872. He was, moreover, "perplex[ed]" and "puzzled" by the choices made by the counties in what to display alongside the Decalogue. *Id*. Even though the counties in the third display tried to emphasize the dual religious-historical-significance of the Decalogue by including other historical texts, the doubting observer would nonetheless "probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *Id*. at 873. In other words, the "reasonable observer," once convinced that a government agency had failed to comply with the Establishment Clause on its first attempt, would harbor a lingering prejudice in which that first try would "taint" all future efforts with irremediable unconstitutionality.

It was these thoughts, perceptions, confusions, and suspicions of the make-believe (and omnipresent!) reasonable observer that led the Court to conclude that the displays at issue had an impermissible "predominantly religious purpose," and therefore failed judicial scrutiny under the Establishment Clause.[4] *Id*. at 881. While *McCreary* acknowledged "that the Commandments have had influence on civil or secular law," *id*. at 869, *Lemon* and its reasonable observer trumped that history.[5]

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[4] Because the breadth of the reasonable observer's knowledge is uncertain—somewhere between omniscient and a "casual passerby," *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)—it is little wonder, as noted by the Court itself in *McCreary*, that the lower court judges in that case couldn't agree on what the "reasonable observer" would conclude. 545 U.S. at 858, n.8. One judge didn't reach the issue; another said that the reasonable observer would conclude there was an endorsement of religion based on the context of the display; and the third said the "reasonable observer would only see that the County had merely acknowledged the foundational role of the Ten Commandments rather than endorsed their religious content." *Id*. (citations omitted). Obviously, it is "unrealistic to expect different judges . . . to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think." *Pinette*, 515 U.S. at 769, n.3 (plurality opinion).

[5] *See* Jay A. Sekulow & Erik M. Zimmerman, *Posting the Ten Commandments is a "Law Respecting an Establishment of Religion"?: How* McCreary County v. ACLU *Illustrates the Need to Reexamine the* Lemon *Test and Its Purpose Prong*, 23 T.M. Cooley L. Rev. 25, 54 (2006) (noting that "the Court's opinion in *McCreary County* was the latest in a long line of conflicting, confusing, and inconsistent decisions caused by the Court's application of the *Lemon* test").

C. The Conflict

The conflict between these two cases—their holdings and rationales—and their ensuing conflicting consequences, cannot be denied. *See Van Orden*, 545 U.S. at 697 (Thomas, J., concurring) (noting that the inconsistency between *Van Orden* and *McCreary* "only compounds the confusion" of current Establishment Clause jurisprudence); *American Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (observing that, after *McCreary* and *Van Orden*, "we remain in Establishment Clause purgatory").

As one scholar noted, regarding these decisions:

> The Court did not, in fact, resolve the conflicting appellate rulings in the two Commandments cases. Rather, the Court's fractured *McCreary* and *Van Orden* decisions not only echoed the dueling opinions of the Fifth and Sixth Circuit panels—with equally heated rhetoric on both sides—but also left lower-court judges scratching their heads in puzzlement.

Peter Irons, *Curing a Monumental Error: The Presumptive Unconstitutionality of Ten Commandments Displays*, 63 Okla. L. Rev. 1, 19 (2010).[6]

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[6] *See* Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 Wm. & Mary Bill Rts. J. 33, 33 (2005) (lamenting that the decisions in *Van Orden* and *McCreary* have "done nothing to clear away the fog obscuring religious display cases or Establishment Clause jurisprudence generally").

Given the fact that neither the plurality in *Van Orden* nor the Court in *McCreary* tried to reconcile these diametrically opposed holdings, much less their reasoning, such perplexity is hardly surprising. Undoubtedly, "appellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments . . . have their hands full after *McCreary* and *Van Orden*." *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

While some lower courts have emphasized *Van Orden* in adjudicating challenges to public displays of the Ten Commandments, *see*, *e.g.*, *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc)—and to the Pledge of Allegiance, for example, *see Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005)—others have emphasized *Lemon*, such as the court below and the Sixth Circuit. *See*, *e.g.*, *ACLU of Kentucky v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005). And the Ninth Circuit used *both Lemon* and *Van Orden* in evaluating a war memorial cross. *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011).

Courts have therefore been left with trying to discern whether the facts underlying a Ten Commandments display, or another passive display, are more like the facts in *Van Orden*, or more like the ones presented in *McCreary*. As the Ninth Circuit observed in a Ten Commandments case, "[b]ecause the Supreme Court issued *McCreary*, broadly espousing *Lemon*, contemporaneously with *Van Orden*, narrowly eschewing *Lemon*, we must read the latter as carving out an exception for *certain* Ten Commandments

displays." *Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008) (emphasis added). That is hardly a bright-line rule.

If the hallmarks of a sound constitutional jurisprudence are coherency, consistency, and clarity, then this Court's Establishment Clause teachings, at least with respect to passive religious displays, are in desperate need of correction. *Cf. Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring in the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity"); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of certiorari) (noting it is "difficult to imagine an area of the law more in need of clarity").

And that lack of clarity is not without its consequences. State and local governments that wish to honor our country's heritage by displaying the Decalogue (or *allowing* the display, in the case of Petitioner) in a constitutional fashion must undertake the all but impossible task of navigating the Scylla of *Van Orden* and the Charybdis of *McCreary/Lemon*. And failure to succeed can come at a very real cost. So long as the attorney's fees are permitted under 42 U.S.C. § 1988 for successful Establishment Clause challenges, local governments will not just have to look to this Court's conflicting precedents, but limited financial resources, in determining whether to proceed with such a display or to defend one in court. For many of these localities, the safer course will be to "purge from the public sphere all that in any way partakes of the religious," rather than gamble on what a court

would opine a reasonable observer would think. *Van Orden*, 545 U.S. at 699 (Breyer, J.).[7]

II. *Town of Greece* Resolves the Conflict Between *Van Orden* and *McCreary*

A. The Historical Foundations Criterion

The conflict between *Van Orden* and *McCreary*, and their respective frameworks for evaluating Establishment Clause claims, was effectively resolved in this Court's recent decision in *Town of Greece*. That ruling, which has been described as a "watershed decision," *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, J., concurring in part), provides two criteria for adjudicating future Establishment Clause claims—and not just with respect to legislative prayers, specifically, but, more generally, with respect to passive displays, like those involving the Ten Commandments, and other government actions that implicate the Clause: historical foundations and coercion.

In *Town of Greece*, this Court was presented with the issue of whether sectarian invocations at the beginning of town council meetings comported with the Establishment Clause. The Second Circuit reasoned that because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity," the town

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[7] The defendant counties in *McCreary*, for example, were ordered to pay over $400,000 in attorney's fees and costs on account of what the reasonable observer concluded in that case. *ACLU of KY, et al. v. McCreary Cnty., et al.*, Case No. 6:99-cv-00507-JBC (E.D. Ky. March 13, 2009) (ECF Doc. 195).

council's prayers were unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012).

In reversing that decision, however, this Court—like the plurality opinion and Justice Breyer's concurrence in *Van Orden*—did not suggest that the Second Circuit misapplied *Lemon*, or any of its prongs, or that the "reasonable observer" would conclude differently. In fact, except for being cited once in dissent, *Lemon* is nowhere invoked, or even mentioned, in *Town of Greece*. 134 S. Ct. at 1841 (Breyer, J., dissenting).[8] The Court thus eschewed divining the mind of a hypothetical "reasonable observer" to determine endorsement and adopted a different framework entirely.

Stating that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings,'" 134 S. Ct. at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)), the Court looked to objective and historical facts, including the longstanding tradition of legislative prayer dating back to the founding generation. The Court held that the line that must be drawn "between the permissible and the impermissible" under the Establishment Clause has nothing to do with the reasonable observer and his perceptions of endorsement, but rather must be "one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294, (1963) (Brennan, J., concurring)).

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[8] The term "reasonable observer" appears once in the plurality, but only in passing and not clearly as an invocation of the "endorsement test." *Id*. at 1825 (plurality opinion).

Importantly, *Town of Greece* nowhere suggests that its historical-based rationale is limited only to the context of legislative prayer. In fact, the Court made it clear that its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), often described as an "exception" to Establishment Clause jurisprudence, 134 S. Ct. at 1818, "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation," *id*. at 1819. In other words, a historical foundation is not a basis for holding that an otherwise unconstitutional practice or display should be permitted, but a criterion for determining their constitutionality in the first place. *See Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting in denial of certiorari) ("*Town of Greece* left no doubt that the Establishment Clause must be interpreted by reference to historical practices and understandings.") (internal quotations omitted).[9]

That historical foundation criterion, moreover, should not be "confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669 (Kennedy, J.); *see also id*. ("Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."). Nowhere does the Court in *Town of Greece*

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[9] *See also* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, 2013-14 Cato Sup. Ct. Rev. 71, 84 (noting that in *Town of Greece* the Court has "introduce[d] a 'historical override' to all Establishment Clause claims," and "*Marsh*'s historical analysis trumps the *Lemon* test, not the other way around").

(or anywhere else, for that matter) suggest that *only* practices engaged in by the founding generation could withstand an Establishment Clause challenge. While, for example, the tradition of this Court's invocation, "God save the United States and this Honorable Court," may not stretch back all the way back to the founding of the Court, it is nonetheless a tradition in keeping with the Founders' understanding of what the Establishment Clause allows. The same rationale applies to the Pledge of Allegiance, the National Motto, and Presidential proclamations and speeches that invoke the Divine. *Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25-30 (2004) (Rehnquist, C.J., concurring in the judgment).[10]

Finally, *Town of Greece*'s historical criterion is consistent with this Court's observations that there is 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 674, and that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution," *Lee v. Weisman*, 505 U.S. 577, 598 (1992). Justice Scalia's suggestion for "an Establishment Clause jurisprudence that is in accord with our Nation's past and present

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[10] As Michael McConnell has observed: "The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways, without favoring one sect over another. . . . The Religion Clauses were not directed against the evil of perceived messages, but of government power." *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 155 (1992).

practices, and that can be consistently applied," is also consistent with the approach taken in *Town of Greece*. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring). The "central relevant feature" of that analysis "is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Id*.

How the Founding Fathers understood the nature of the Establishment Clause has aptly been described by the judges dissenting from the denial of rehearing en banc in this case. *See* App. 116-130a; *see also Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting). And the historical foundation of the Ten Commandments with respect to our country's heritage was described by the *Van Orden* plurality. 545 U.S. at 689-90 (plurality opinion). There is no need to repeat or expand on those discussions here. In short, a display of the Ten Commandments, like the one at issue in this case, is more than supported by the historical foundations criterion of *Town of Greece*.

B. The Coercion Criterion

Town of Greece did not just look to history, however, in determining the constitutionality of the challenged prayer practice, but to *coercion*. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" 134 S. Ct. at 1825 (opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)). *See also id*. (citing *Van Orden*, 545 U.S. at 683 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens")).

While a majority in *Town of Greece* did not agree on what type or level of coercion would have to be present in order to find an Establishment Clause violation, there would be no need to resolve that issue in this case because Respondents have not been coerced into doing *anything*, much less "compelled . . . to engage in a religious observance." *Id*.

Like the plaintiffs in *Town of Greece*, who "stated that the prayers gave them offense and made them feel excluded and disrespected," *id*. at 1826, the Respondents, according to the lower court, "feel excluded by the Ten Commandments, particularly the first four commandments," App. 10a.

"Offense, however, does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.). Just as "[a]dults often encounter speech they find disagreeable," *id*., so too might they encounter disagreeable monuments or displays, as Respondents have here. "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression" of views which are contrary to his own. *Id*. Indeed, it is difficult to see how "passive and symbolic" displays create a "risk of infringement of religious liberty." *Allegheny*, 492 U.S. at 662 (Kennedy, J.).

As noted by the plurality in *Van Orden*, the context of the Texas Decalogue was not similar to that in *Stone v. Graham*, 449 U.S. 39, (1980) (per curiam), "where the text confronted elementary school students every day," and it was "quite different" from the prayers involved in *Sch. Dist. of Abington Township v. Schempp*, and *Lee v. Weisman*. 545 U.S. at 691 (plurality opinion).

That same context applies here, where the adult Respondents are not forced into participating in any religious exercise by a passive monument whose content, in fact, *they have actually never read*. App. 11a. *See Allegheny*, 492 U.S. at 664 (Kennedy, J.) ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.").

The lower court's Establishment Clause analysis is therefore not only plainly inconsistent with *Town of Greece*'s historical foundations criterion, but its coercion criterion as well. Indeed, as a practical matter, why should the plaintiffs in *Town of Greece*, who witnessed sectarian prayers at a town council meeting, and who felt offended thereby, ultimately fail in their Establishment Clause challenge, while Respondents here, who felt offended by a passive Ten Commandments monument *seen from a distance*, prevail? App. 11-12a ("Once Plaintiffs learn the Monument is the Ten Commandments, they will know what it is whenever they view it, even from afar."). If *Town of Greece* means what it says, then the Ten Commandments display in this case no more violates the Establishment Clause than the sectarian legislative prayers in *Town of Greece*. It would strain credulity to suggest otherwise.

While this Court in *Town of Greece* did not *formally* announce the demise of *Lemon*, including its endorsement/reasonable observer standard, the rationale of that decision, which notably avoided those rubrics entirely, strongly indicates that they have now been abrogated. At least two justices of the Court have

noted that they think so. *See Elmbrook Sch. Dist.*, 134 S. Ct. at 2284 (Scalia, J., joined by Thomas, J., dissenting from the denial of certiorari) ("*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis for the decision below."). And until this Court makes such an announcement, the lower courts will continue applying *Lemon*, even in the face of *Town of Greece*, which did not rely on that decision despite the obvious and admittedly religious nature of the practice at issue.

Finally, a decision not to resolve *Van Orden* and *McCreary* in this case will not only prolong the tension between those two decisions, but will also serve to create another conflict in need of future resolution: between *Town of Greece*, with its emphasis on history and coercion, and *McCreary*, with its emphasis on *Lemon* and the "reasonable observer." There is no need, however, to kick that proverbial can down the road when the facts and law of this case provide a clean vehicle for review.

At the very least, this Court should grant, vacate, and remand the case with instructions that the lower court adjudge the facts in light of the criteria presented and articulated in *Town of Greece*.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully asks the Court to grant the petition.

Respectfully submitted,

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