No. 08-472

IN THE
Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

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

BRIEF FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has affiliate attorneys throughout the country. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. More particularly, Liberty Counsel has represented and is representing governmental entities against challenges to historical displays that include the Ten Commandments, including McCreary and Pulaski counties in *McCreary County v. ACLU*, 545 U.S. 844 (2005).

A significant issue in *McCreary County* was the continuing viability of the *Lemon* test, and in particular the historical analysis undertaken as part of the purpose prong. *See id.* at 871-873 (majority opinion), 900-903 (Scalia, J. dissenting). That issue, and more specifically the concept of the religious "taint" attached to prior

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

governmental actions, has become problematic in appellate courts' analyses of Establishment Clause challenges, including in the decision below.[2] One appellate panel has called the current state of Establishment Clause jurisprudence "purgatory." *See ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). Liberty Counsel is concerned about the detrimental effects the reasonable observer standard and *Lemon* test have had on public entities and believes that it is critical that this Court has as complete a picture as possible of the ramifications of the *Lemon* test and the wisdom of retaining it.

Based upon the above, Liberty Counsel respectfully submits the following Amicus Brief for the Court's consideration.

SUMMARY OF ARGUMENT

What was true in 2005 is even more true today – the *Lemon* test is an unworkable standard that has caused more confusion than clarity. Government officials and appellate judges have been forced to journey through a maze fraught with wrong turns, dead ends and confusing guideposts that lead to contradictory results even with virtually identical factual scenarios.

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2. *Buono v. Kempthorne (Salazar),* 502 F.3d 1069, 1085 (9th Cir. 2007); *see also, e.g., ACLU v. Mercer County*, 432 F.3d 624, 632 (6th Cir. 2005); *ACLU v. Grayson County* 2008 WL 859279 (W.D. Ky. 2008), *appeal pending* Sixth Circuit Court of Appeals Case #08-5548; *ACLU v. Rutherford County*, 209 F. Supp. 2d 799, 811-812 (M.D. Tenn. 2002).

Cases decided since this Court's opinions in *McCreary County* and *Van Orden v. Perry*, 545 U.S. 677 (2005), have exacerbated the chaos arising from continuing application of the *Lemon* test to Establishment Clause challenges of government displays. In particular, identifying the "reasonable observer" and defining his knowledge and memory in order to determine whether a display evinces an impermissible religious purpose has proven to be a Sisyphean task. Without bright-line rules to guide them, judges have had to engage in ad hoc, subjective determinations which offer no guidance to government officials trying to comply with the Establishment Clause or to other judges struggling to address similar challenges. The result is a patchwork of inconsistent and contradictory opinions between and within circuits, and even contradictory opinions issued by the same judge only nine days apart. This case encompasses one of those opinions and brings into sharp focus the unworkability of the *Lemon* test.

The time has long passed to euthanize the *Lemon* test and to adopt a standard that will provide clarity and consistency for citizens, government officials and the courts. An objective standard such as a coercion test would bring the Court's Establishment Clause jurisprudence more in line with the First Amendment, this country's heritage, and this Court's historical interpretation of the clause. Liberty Counsel respectfully requests that the Court consider adopting such a standard.

LEGAL ARGUMENT

Rather than serving as a guidepost, the *Lemon* test has become a millstone around the necks of government officials and a miry bog for judges. The fractured decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005), have been followed by equally fractured and inconsistent appellate court decisions.

The uncertainty and inconsistency flowing from the *Lemon* test has transformed the straightforward concept of not establishing a religion into an "Establishment Clause purgatory." *See ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). That characterization is borne out where an identical display is found constitutional in one venue but unconstitutional in another based upon the alleged subjective intent of government officials. The inter-circuit and intra-circuit conflicts regarding whether a government display violates the Establishment Clause demand that the *Lemon* test be jettisoned and a new test be adopted, at least as it relates to government displays or religious acknowledgments. This case brings the problem into sharp focus as it shows inconsistency not merely between two judges on the same court, but two opinions by the same judge. *Compare Buono v. Kempthorne [Salazar],* 502 F.3d 1069 (9th Cir. 2007) with *The Access Fund v. USDA,* 499 F.3d 1036 (9th Cir. 2007). A standard that permits the same judge to find a regulation prohibiting access to a rock sacred to Native Americans constitutional (Access *Fund*), but a statute preserving a 75-year-old war memorial that includes a cross unconstitutional (*Salazar*) cannot remain the benchmark for analyzing Establishment Clause claims.

Of particular concern is the concept of "religious taint" that was pivotal in this Court's finding of impermissible religious purpose in *McCreary County* and the Ninth Circuit's decision in this case. *Salazar*, 502 F.3d at 1085 (finding that Congress' approval of a land transfer evinced a religious purpose because the history of Congress' actions to preserve the war memorial reflected "herculean efforts" to preserve a sectarian religious symbol). Religious "taint" has exacerbated the problems caused by the *Lemon* test. Under the theory of "religious taint," government officials are subjected to indeterminate prohibitions against erecting or maintaining displays if at any time in the past someone directly or even remotely affiliated with the government might have had a religious motive. Despite sincere efforts by government officials to change course while maneuvering through *Lemon*'s land mines, the taint of the past continues to haunt future actions for an indeterminate period. This case is a particularly egregious example of the problem, but is representative of the confusion caused by the *Lemon* test and the critical need to replace its arbitrary, subjective standards with an objective test.

I. THE CONFUSION CAUSED BY THE *LEMON* TEST, AS EXEMPLIFIED IN THIS CASE AND OTHER GOVERNMENT DISPLAY CASES, DEMONSTRATES THE NEED FOR A SUBSTANTIAL REVISION OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

A. The *Lemon* Test Has Become An Unworkable Standard For Analyzing Establishment Clause Challenges.

Twenty years have passed since Justice Kennedy said that a "substantial revision of our Establishment Clause doctrine might be order." County *of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part, dissenting in part). The ensuing two decades of government display cases have demonstrated that the revision is long overdue. Justice Scalia's comment that "more decisions on the subject have been rendered, but they leave the theme of chaos securely unimpaired" is more true today then ever. *Edwards v. Aguilard*, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting). As Justice Scalia observed:

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause

> (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.

Id. at 636. Justice Scalia continued:

> In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility." *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. [646], at 662, 100 S.Ct. [840], at 851 [(1980)]. One commentator has aptly characterized this as "a euphemism . . . for . . . the absence of any principled rationale." [citation omitted]. I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning *Lemon*'s purpose test – a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences – would be a good place to start.

Id. at 639-640. Former Chief Justice Rehnquist similarly called for abandonment of the purpose prong, which he said is not "a proper interpretation of the Constitution,"

has "no basis in the history" of the First Amendment and "has proven mercurial in application." *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, C.J., dissenting). "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Id.* at 112.

Justice Scalia has similarly called the *Lemon* test " meaningless." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting). "The problem with (and the allure of) *Lemon* has not been that it is "rigid," but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire." *Id.* In his dissent in *McCreary County*, Justice Scalia pointedly described the flaws in *Lemon*'s reasonable observer standard and the concomitant concept of "religious taint" resulting from prior governmental actions:

> As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an " 'objective observer.' " Because in the Court's view the true danger to be guarded against is that the objective observer would

> feel like an "'outside[r]' " or " 'not [a] full membe[r] of the political community,' " its inquiry focuses not on the actual purpose of government action, but the "purpose apparent from government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.

McCreary County v. ACLU, 545 U.S. 844,900- 901 (2005) (Scalia, J., dissenting). "[T]he legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion," *Id.* at 901, or, as the Ninth Circuit said in this case, had that intention at some time in the past.

> By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

Id. at 902-903. The "religious taint" doctrine carries the "rigorous review" to the extreme as the court combs through the history of the display searching for any hint of recognition of religion. If any hint is found at any point in history, then the display may be deemed "tainted" with religious purpose. The "taint" remains indefinitely until some as yet unidentified action sufficiently scrubs the display clean. As Justice Scalia said, this antagonism toward religion is antithetical to the constitutional provisions that the doctrine is supposed to be protecting.

Justice Alito has also rejected the "religious taint" doctrine. In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU challenged Jersey City's holiday display containing a creche as unconstitutional. The district court initially enjoined the display and "any substantially similar scene or display." *Id.* at 96. The city erected a modified display that included the original elements plus Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id.* The District Court initially determined that the modified display was constitutional, but then reversed itself and entered judgment in favor of the ACLU. *Id.* at 97. Justice Alito, speaking for the Third Circuit, rejected the district court's conclusion that the display was unconstitutional because of the "taint" attached to the prior display:

> The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade

> constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to the one that would be permissible in other nearby cities, counsel for the plaintiffs insisted that Jersey City's "prior history" would have to be taken into account, at least until the time came when it could be considered to be "purged" of the "prior constitutional taint."
>
> We reject this argument. The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (citations omitted). The Court added:

> If the plaintiffs' view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse [in *County of Allegheny*] should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

The *McCreary County* majority said that "we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter," but did not provide any guidance regarding how or when a "taint" would be deemed removed. *McCreary County,* 545 U.S. at 874. Consequently, neither government officials nor appellate courts can determine when past actions have been sufficiently erased from the reasonable observer's memory to permit erection of a new display. That dilemma is reflective of the problem with the *Lemon* test overall and demonstrates why the time is right to abandon the *Lemon* test and adopt a new objective standard for Establishment Clause challenges of government displays.

B. This Court Should Abandon *Lemon* And Adopt An Objective Test To Restore Clarity And Consistency To Establishment Clause Analysis.

As this Court has acknowledged, the wide variety of governmental functions that might be challenged under the Establishment Clause means that there cannot be a "one size fits all" test. "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring in part).[3]

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3. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004)(O'Connor, J., concurring); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 852 (Cont'd)

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (Stevens, J., concurring). But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order, and so on – are present in different degrees in each context. And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free

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(Cont'd)

(1995)(O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting)(citing *Grumet*, 512 U.S. at 751); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)(no "single test or criterion") (citing cases).

> speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

Id. at 718-719. As is true with Free Speech cases, Establishment Clause challenges involve different contexts, including: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies, under which the issues underlying the clause will operate quite differently. *See id.* at 720. In other words, there are different standards and concerns with funding cases, church property or employment disputes, and government acknowledgments of religion. Establishment Clause concerns are more heightened in the former two than in the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are more likely to raise Establishment Clause concerns than "under God" in the Pledge of Allegiance, "In God We Trust" on our currency, passive displays that include the Ten Commandments or war memorials that include crosses. Any test must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment. However, as Justice O'Connor cautioned, "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more

precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Id.*

1. A new objective test should distinguish between acknowledgment and establishment.

Amicus proposes a two-part test for Establishment Clause challenges of passive government displays. Under this proposal, if a display (1) comports with history and ubiquity, and (2) does not objectively coerce participation in a religious exercise or activity,[4] then it would be deemed a permissible acknowledgment of religion, not a violation of the Establishment Clause.

a. History and ubiquity, properly applied, would distinguish acknowledgment from establishment.

The first part of Amicus' proposed test focuses on "history and ubiquity." Ubiquity in this context is not the dictionary meaning of "omnipresent," but a practice "observed by enough persons" to warrant the term. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). Ubiquity is less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on old traditions. Each Presidential invocation of God is both new and old. State

4. Acknowledgments do not violate *Larson v. Valente*, 456 U.S. 228 (1982).

mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity is helpful only to the extent that it illuminates historical tutelage, one of the two aspects of history, the other being historical meaning. Historical tutelage looks at historical practices to distinguish between mere shadows of religious acknowledgment versus real threats of establishment. References to God in the country's mottos, constitutions, historical documents and even legislative prayers, have neither established nor tended to establish religion and would, therefore, be regarded as mere shadows of religious acknowledgment, not establishments.

Whether a display has sparked controversy is not helpful in discerning between acknowledgment and establishment. Longstanding practice and the lack of controversy do not create "a vested or protected right" to violate the Constitution *Id.* at 39. However, the presence of controversy can undercut a constitutional practice. *Id.* Litigation is, by definition, a controversy.[5]

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5. *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989)(O'Connor, J., concurring)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002) ("prosecuting a lawsuit" cannot serve to create "divisiveness") (quoting *Aguilar v. Felton*, 473 U.S. 402, 229 (1985) (O'Connor, J., dissenting)).

Relying upon controversy could create a "heckler's veto," which would doom such acceptable practices as Sunday closing laws and school funding, which were the subjects of numerous lawsuits.[6]

What is relevant, then, is whether history reveals that a practice has established or tended to establish religion. An historical meaning analysis should look for the best understanding of the purposes of the Establishment Clause, for which there is some agreement. Some general assumptions regarding the meaning of the Establishment Clause include that government cannot establish a church, discriminate among sects, or objectively compel a certain sectarian belief.[7] There are divergent opinions beyond these areas,

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6. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 32 (2004)(Rehnquist, C.J., concurring); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 119 (2001)(refusing to employ "a modified heckler's veto"); *McGowan v. Maryland*, 366 U.S. 420, 435 (1961)("litigation over Sunday closing laws is not novel. Scores of cases may be found in state appellate courts."); *id.* at 527-36 (Frankfurter, J., concurring)(listing cases).

7. *See, e.g., Newdow*, 542 U.S. at 31 n.4 (Rehnquist, C.J., concurring)(distinguishing between compulsion and coercion); *id.* at 50-51 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *County of Allegheny*, 492 U.S. at 590-91 (summarizing the Establishment Clause); *id.* at 659-63 (Kennedy, J., concurring in part, dissenting in part). *See also* Philip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 856 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). There seems to be some agreement on direct coercion and less on indirect.

but this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice . . . is not something to be lightly cast aside."[8]

b. A coercion analysis should focus on compulsion rather than psychological coercion.

The coercion factor in the proposed objective test would be more akin to compulsion than to psychological coercion. Governmental acknowledgments of religion are pervasive. The mere presence of a religious symbol or statement that is pervasive historically and physically does not send a message of compulsion. Acknowledgments such as passive displays are far less

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8. *Newdow*, 542 U.S. at 39 (O'Connor, J., concurring)(quoting *Walz*, 397 U.S. at 678); *Lynch*, 465 U.S. at 668; *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the contributions of James Madison and Thomas Jefferson are relevant, they are not dispositive. Madison was not an ardent proponent of the Bill of Rights. His original draft was not adopted, his opinions shifted later in life, and he acted in ways some members of this Court describe as falling short of his ideals. Jefferson did not participate in drafting or debating the First Amendment. Both supported prohibiting clergy from holding political office and both condoned confiscating church-owned glebe lands, an act possibly understandable then but an extreme separationist position now. *See Lee v. Weisman*, 505 U.S. 577, 624-26 (1992)(Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-99 (1985)(Rehnquist, J., dissenting); *McDaniel v. Paty*, 435 U.S. 618, 623 (1977); Mathew D. Staver and Anita L. Staver, *Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches*, 33 CUMBERLAND L. REV. 43 (2003).

likely to pose a real threat of coerced belief than are other forms of governmental involvement with religion such as the state churches that were a concern for the Founding Fathers. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Newdow*, 542 U.S. at 39. The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part).

A display does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 576. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 569-60. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662. "Any coercion that persuades an onlooker [to view the veterans' memorial] is inconsequential as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 542 U.S. at 44 (O'Connor, J., concurring). "Symbolic references to religion," like the cross in the Sunrise Rock memorial, will pass the coercion test. *Id.* There is neither subtle nor direct coercion at issue with the memorial. It is not

located in a high traffic area in a public park, but atop a rock in the middle of the Mojave Desert. Visitors are not compelled to pass by the monument. In fact, the monument would be barely visible to most people driving by on the interstate.

Similar to the Ohio Motto ("With God All Things Are Possible") which the Sixth Circuit upheld, the Sunrise Rock veterans' memorial

> does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. And, as far as we can see, its [posting by the courthouses] does not represent a step calculated to lead to any of these prohibited ends.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (2001) (en banc).

Displays such as Sunrise Rock do not elevate one sect over another in violation of *Larson*, even if they contain a sectarian symbol. For example, it is irrelevant that a creche is sectarian or whether it is displayed on

December 25 instead of January 6, the day Christ's birth is celebrated by some Christians, because the religious symbol alone does not determine endorsement – history and context do. This Court rejected an argument based upon *Larson* that a creche, which "is identified with one religious faith," discriminates among sects. *See Lynch*, 465 U.S. at 685, 687 n.13. Similarly this Court has found that the Sabbath has a secular application and references to God merely acknowledge the historical fact that "we are a religious people" and "[o]ur history is replete with official religious references. . . ." *Id.* at 675 (citation omitted). As the dissenters in *Lynch* commented, the "chief symbol" of the "Christian religion" was upheld even though its sectarian message was not neutralized. *See id.* at 705-08 (Brennan, J., dissenting).

Like the menorah, the Latin cross is religious, but the "message is not exclusively religious." *County of Allegheny*, 492 U.S. at 613. But, even if it were exclusively religious, it would not affect the result here because the history of this display in particular, and the Latin cross in general as a memorial, does not establish a religion, nor has it tended to do so. Hanukkah need not be characterized as a secular holiday, or the menorah as having a secular dimension, to conclude that such a holiday display "does not convey a message of endorsement of Judaism or of religion in general." *Id.* at 634 (O'Connor, J., concurring). This conclusion "does not depend on whether or not the city [could have used] 'a more secular alternative symbol.' " *Id.* at 636. Requiring that the government use a " 'more secular alternative' [if] available is too blunt an instrument for Establishment Clause analysis." *Id.*

2. A new objective test should comport with history and treat passive displays less harshly than more intrusive government involvements with religion.

Whatever test is adopted for Establishment Clause challenges of government displays, it should comport with history and not wipe away the country's heritage. Furthermore, the test should not treat passive displays more harshly than this Court's cases addressing governmental funding. The history of religious school and institutional funding cases supports the argument that a passive memorial containing a cross is constitutional. In 1947 this Court in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15-16 (1947), issued its oft-repeated (and quite frankly erroneous) statement about the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form

> they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Although the Establishment Clause was said to prohibit a "tax in any amount, large or small" being "levied to support any religious activities or institutions," the *Everson* court approved government funding for bus transportation of children attending parochial schools. *Id.* at 15-18. This Court has also declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[9] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that

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9. *See e.g., Zelman*, 536 U.S. at 639 (vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deduction); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (revenue bonds for colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants for colleges); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Medicare funds used by sectarian healthcare providers pose no constitutional problem.[10] Although guiding principles in government funding cases have been neutrally available benefits and private choices, those decisions have permitted at least the indirect advancement of institutions' religious missions.

If the Establishment Clause reaches its apex in government funding of sectarian institutions and permits funding that at least indirectly advances the religious mission, then a passive display of a cross commemorating war dead must be found to comport with the Establishment Clause. If governmental funding has not raised the shadow of an established religion, then the World War I memorial standing atop a rock in the Mojave Desert for more than 75 years certainly cannot.

Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols [including the war memorial in this case] pose a real danger of

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10. *See e.g., Zelman*, 536 U.S. at 667-68 (Medicare); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

establishment of a state church is farfetched indeed."[11] The existing analytical standard that permitted the Ninth Circuit to reach the "farfetched" conclusion that a 75-year-old war memorial containing a cross violates the Establishment Clause must be re-examined and replaced. The need for an objective test to replace *Lemon* test is all the more apparent when the Ninth Circuit's holding in *Salazar* is compared to its holding in *The Access Fund v. USDA,* 499 F.3d 1036 (9th Cir. 2007).

II. THE NINTH CIRCUIT'S INCONSISTENT OPINIONS IN *SALAZAR* AND *ACCESS FUND* ILLUSTRATE HOW *LEMON*'S PURPOSE PRONG HAS BECOME A SNARE FOR UNWITTING GOVERNMENT OFFICIALS.

Judge McKeown's inconsistent opinions in *Buono v. Kempthorne [Salazar],* 502 F.3d 1069, 1072 (9th Cir. 2007) and *The Access Fund v. USDA,* 499 F.3d 1036, 1046 (9th Cir. 2007), cogently illustrate how *Lemon*'s purpose prong has left governmental agencies at a loss as to how to conduct business without facing an Establishment Clause challenge. They also exemplify why a new objective standard such as the test described above should be adopted in place of *Lemon*. The "rigorous

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11. *Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 (1985) (Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini v. Felton*, 521 U.S. 203 (1997). History confirms the Archbishop is still held at bay.

review" required to determine whether a reasonable observer would discern a religious purpose, and in particular whether prior actions have "tainted" a display, result in inconsistent conclusions from substantially similar facts.

A. The Ninth Circuit's Decision Illustrates How The *Lemon* Test Can Be Manipulated To Find An Impermissible Religious Purpose In A Seventy-Five-Year-Old War Memorial That Features A Latin Cross.

A war memorial in the form of a Latin cross has been in place at Sunrise Rock in the Mojave Desert continuously since 1934. *Salazar*, 502 F.3d at 1072. Beginning in 1935, people gathered intermittently at the site for Easter services, and those services became a regular occurrence in 1984. *Id.* According to the National Parks Service, those gatherings by private parties somehow transformed the war memorial into a religious shrine of sorts and thereby disqualified it from being included in the National Register of Historic Places. *Id.* at 1073. Based upon that, the parks service indicated that it was going to remove the memorial. *Id.* Congress stepped in and enacted a series of laws aimed at preserving the monument, including, most recently, a land exchange that would transfer ownership of the land upon which the monument rests to the Veterans of Foreign Wars in exchange for its donation of an equivalent piece of property to the parks service. *Id.* at 1075.

The Ninth Circuit concluded that Congress' actions evinced an impermissible religious purpose because

they represented "herculean efforts" to preserve "a sectarian religious symbol." *Id.* at 1085. According to the Ninth Circuit, the "reasonable observer" in *Salazar* could only view the proposed transfer of the subject property "as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.*

As Fifth Circuit Judge Edith Brown Clement commented, "A critic might argue that the Ninth Circuit was so determined to see this cross removed from a rock in the middle of the desert that it held that the government could not even *give* it away."[12] "The Ninth Circuit's inference that the cross's display constituted the establishment of Christianity also ignored many secular reasons Congress may have had in seeking to preserve the decades-old private war memorial, while at the same time not objecting to the Park Service's determination that new memorials on the same site were inappropriate."[13] "[T]he court gives insufficient weight to important historical and contextual factors in concluding that permitting the existing war memorial but prohibiting a new religious monument constituted per se evidence of an Establishment Clause violation."[14] Instead of acknowledging the historical and cultural significance of the memorial honoring all World War I

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12. Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After McCreary and Van Orden,* 32 HARV. J. L & PUB. POL'Y 231, 254 (2009).

13. *Id.*

14. *Id.*

veterans, the Ninth Circuit upheld the district court's finding that "the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion'. . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1081. In other words, efforts to preserve the memorial were "tainted" by religious undertones and nothing Congress did erased that taint.

B. The Panel Opinion In *Access Fund* Demonstrates How The *Lemon* Test Can Be Manipulated To Disguise An Obviously Religious Motivation As A Permissible Secular Purpose.

However, regulations protecting a site sacred to the Washoe religion from activities that the Native Americans viewed as sacrilegious did not have an impermissible religious taint according to Judge McKeown's opinion in *Access Fund,* 499 F.3d at 1046. While Judge McKeown ignored historical and cultural factors in *Salazar*, in *Access Fund* she strained to find historical and cultural factors to justify the regulations. *Id.* at 1044. "Historical and cultural considerations motivate the preservation of a national monument that may have religious significance to many or even most visitors." *Id.* at 1044. "Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally." *Id.* (citing *Bauchman v. West High School*, 132 F.3d 542, 554 (10th Cir.1997)).

> Indeed, such secular motivations lie behind the government's protection of many religious landmarks in this country, such as 'the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

Id. Interestingly, the court had not found a similar secular motivation behind the government's protection of the Sunrise Rock veteran's memorial.

Contrary to its conclusion in *Salazar,* in *Access Fund* the Ninth Circuit found that the Forest Service's regulation prohibiting rock climbing, which was offensive to Native American beliefs, but not other uses for Cave Rock near Lake Tahoe, "easily satisfied" the purpose prong of the *Lemon* test. *Id.* at 1043. Despite evidence that the Forest Service regulation was enacted to preserve Native American religious beliefs, the Ninth Circuit found no religious "taint" to counter its finding of a secular purpose. *See, id.* at 1041-1042.

The stark contrast between the opinions in *Salazar* and *Access Fund* demonstrate why the *Lemon* test should be replaced by a more objective standard. Secular purposes advanced by Congress to protect a memorial containing a cross were found to be a "sham" in *Salazar,* but Forest Service statements that its regulation was based upon culture and history, not religion, were credible and determinative. *Salazar,* 502 F.3d at 1085;

Access Fund, 499 F.3d at 1044. A test that permits the same court to find an impermissible religious purpose in a cross sitting atop a rock in the Mojave Desert, but no religious purpose in a regulation that preserves the integrity of a Native American religious site is, as Chief Justice Rehnquist said, of little use as a constitutional theory. *See Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). The inconsistent decisions in *Salazar* and *Access Fund* aptly demonstrate that the *Lemon* test purpose prong "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results." *Id.*

By contrast, an objective test such as the coercion test described above would use history grounded in the original meaning of the Establishment Clause to determine whether the monuments were permissible acknowledgments of religion or impermissible attempts to establish a religion. The monuments would be viewed in context to determine whether they compel an observer to believe that a certain doctrine is true or merely symbolize the place of religion in the history of a particular region or event. Application of that test to *Salazar* and *Access Fund* would yield the consistent and correct answer that neither monument violates the Establishment Clause.

III. INCONSISTENT OPINIONS IN OTHER RELIGIOUS DISPLAY CASES FURTHER ILLUSTRATE HOW THE *LEMON* TEST HAS CONFUSED INSTEAD OF CLARIFIED THE QUESTION OF WHEN A GOVERNMENT DISPLAY VIOLATES THE ESTABLISHMENT CLAUSE.

Justice Souter observed that the Court's emphasis on the history, and in particular the religious history, of a government display means that the same display could be constitutional in one instance and unconstitutional in another. *McCreary County v. ACLU*, 545 U.S. 844, 866 n.14 (2005). Such a result "presents no incongruity, however, because purpose matters." *Id.* In fact, the standard announced in *McCreary County* has resulted in tremendous nonsensical incongruity as courts struggle with a test that was difficult to use before *McCreary County* and has only become more so since then. This is particularly apparent in the inconsistent lower court decisions addressing passive displays of the Ten Commandments.

A. Inter-Circuit And Intra-Circuit Conflicts Regarding The Constitutionality Of Displays Featuring The Ten Commandments Illustrate How The *Lemon* Test Leads To Unprincipled Results.

The inconsistent decisions regarding displays that include the Ten Commandments demonstrate how, as Chief Justice Rehnquist predicted, the *Lemon* test and its purpose prong yield unprincipled results. *Wallace v.*

Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Historical displays that include the Decalogue have been found constitutional or unconstitutional, depending upon how the courts applied the purpose prong. Foundations of American Law and Government displays, which consist of nine documents in equally-sized frames, one of which is the Ten Commandments, have been donated by private parties and displayed in county government buildings throughout the country. Lawsuits claiming that the displays violate the Establishment Clause have been filed against counties in Kentucky, Tennessee and Indiana. Two such displays in McCreary and Pulaski counties in Kentucky were addressed by this Court when it upheld preliminary injunctions in *McCreary County*.[15] Since then, district court judges examining identical displays in other Kentucky counties have reached contradictory conclusions regarding their constitutionality. *ACLU of Kentucky v. Mercer County*, 240 F.Supp.2d 623 (E.D.Ky. 2003), *aff'd* , 432 F.3d 624, 636 (6th Cir. 2005) (finding the Foundations Display constitutional); *ACLU v. Rowan County*, 513 F. Supp. 2d 889 (E.D.Ky. 2007) (same); *ACLU v. Grayson County* 2008 WL 859279 (W.D. Ky. 2008)*, appeal pending*, Sixth Circuit Court of Appeals Case #08-5548 (finding the

15. On remand, the district court issued permanent injunctions against the McCreary and Pulaski county displays based upon a conclusion that the religious "taint" arising from the counties' earlier attempts to display the Ten Commandments had not been removed. That decision is on appeal to the Sixth Circuit, *ACLU of Kentucky v. McCreary County*, Case No. 08-6069.

Foundations Display unconstitutional).[16] A district court judge in Indiana also found the Foundations Display unconstitutional, but was overturned on appeal. *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (finding the Foundations Display constitutional).

In *Rowan County,* the district court found that a Foundations Display erected after the Ten Commandments had been displayed for two years satisfied the post-*McCreary Lemon* test. *Rowan County,* 513. F. Supp. 2d at 903. Before the Foundations Display was erected, the Ten Commandments were displayed without other historical documents, but not in isolation and not in a "high traffic area" of the courthouse. *Id.* Under those circumstances any religious message conveyed by posting the Ten Commandments was sufficiently diminished to satisfy the purpose prong. *Id.* "While the posting of the Ten Commandments without any other historical documents evidences a religious purpose, it is the Court's opinion that the message is diluted in comparison to the situations in other counties such as McCreary, Pulaski, and Garrard."*Id.* Garrard County Kentucky also had a Foundations Display that was challenged as unconstitutional. *ACLU of Kentucky v. Garrard County*, 517 F. Supp.2d 925 (E.D. Ky 2007). As was true in McCreary and Pulaski counties, in Garrard County, the Foundations Display was preceded by a display that featured the Ten Commandments and was posted in a high traffic area of the courthouse.

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16. A Tennessee district court judge also found the Foundations Display was likely unconstitutional under the purpose prong but constitutional under the effects prong. *ACLU v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).

Id. at 928. The district court denied the county's motion for summary judgment because there were factual questions about the purpose and effect of the Foundations Display in that instance. *Id.* at 945.

The same district court judge found that the Foundations Display placed in Mercer County, Kentucky's courthouse with no prior history of Ten Commandments displays satisfied the *Lemon* test. *Mercer County,* 240 F. Supp.2d at 626. The Sixth Circuit upheld the ruling under the *Lemon* test as modified by this Court in *McCreary County*. *Mercer County,* 432 F.3d at 636. However, another district court judge found that the identical Foundations Display in Grayson County Kentucky, also with no history of prior Decalogue displays, did not satisfy the *Lemon* test. *Grayson County,* 2008 WL 859279.[17] The *Grayson* court concluded that the Foundations Display violated the post-*McCreary Lemon* "predominant purpose" test because the government did not expressly state that it had a secular purpose for erecting the display and because the private donor of the display mentioned the Ten Commandments *before* he mentioned the other historical documents during a public comment period. *Id.* at *9. Viewed together, the Kentucky decisions hold that a "reasonable observer" in Mercer and Rowan counties would not understand the Foundations Display to have a predominantly religious purpose, but a "reasonable observer" in Grayson County would discern such a purpose, for reasons not at all apparent. Furthermore, according to the Seventh Circuit, a

17. The Grayson County decision is on appeal. *ACLU of Kentucky v. Grayson County*, Sixth Circuit Case # 08-5548.

"reasonable observer" of the same display in Elkhart County Indiana would "think history, not religion." *Books*, 401 F.3d at 869. These decisions exemplify the kind of unprincipled results wrought by the *Lemon* test, and, particularly the fact-intensive predominant purpose standard.

Which "reasonable observer" might be applied in a particular case, and whether a government's prior actions will be viewed by him as having "tainted" the display with religious undertones so as to violate the Establishment Clause remain unanswered. Under the *Lemon* test, whether a Foundations Display is constitutional does not depend upon the content and context of the display, but upon how third parties would perceive the reason for the display. Such unpredictable findings demonstrate why the *Lemon* test must be replaced with an objective standard which would find that these passive displays of historical documents are a permissible, non-coercive acknowledgment of religion.

B. The Tenth Circuit's Conflicting Opinions Regarding Crosses On Government Seals Further Demonstrate Why *Lemon* Should Be Abandoned.

The inconsistent rulings by the Tenth Circuit illustrate how the *Lemon* test has created a land mine laden trail that even the most skilled governmental official is unable to maneuver successfully. An objective standard such as the coercion test described above would transform that trail into a smooth path lined with principled guideposts easily traversed by government officials and appellate court judges.

In *Robinson v. City of Edmond*, 68 F.3d 1226, 1228 (10th Cir. 1995), the Tenth Circuit found that a cross in one quadrant of the seal of the City of Edmond, Oklahoma, violated the Establishment Clause. The Tenth Circuit was not convinced by the city's explanation that the symbol represented the Christian heritage of the city, just as the oil derricks, sooner wagon, train and historical building represented other aspects of the city's heritage. *Id.* According to the court, the "average observer" would conclude that the presence of a cross in one quadrant of the seal represented the city's intent to honor Christianity and that conclusion would not be diminished by the secular components in the other three quadrants. *Id.*

On the other hand, the prevalence of crosses throughout Las Cruces, New Mexico, did sufficiently dilute any imprimatur that might have arisen from the city's seal featuring three interlocking crosses surrounded by a sun symbol. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017,1025 (10th Cir. 2008). The Tenth Circuit said that the unique history of the city and how it got its name militated against finding an impermissible religious purpose or effect. *Id.* at 1033-1034. The "reasonable observer" in that case would be aware of the history of the city and its name – that there were forests of crosses marking the gravesites of people who were killed near the city. *Id.* at 1034. "Because a city's symbol is shorthand for the entity itself – a pictograph of sorts – the use of crosses makes intuitive sense for a city named 'The Crosses.'" *Id.* at 1033-1034.

However, the same court found that a radiant cross in the seal of Bernalillo County, New Mexico, with the

motto "With This We Overcome" in Spanish, violated the Establishment Clause. *Friedman v. Board of County Comm'rs of Bernalillo County,* 781 F.2d 777, 781 (10th Cir. 1985) (en banc). As was true with the crosses in the Las Cruces seal, the cross in the Bernalillo County seal had been used for many years and was pervasive throughout the community. *Id.* at 779. The district court agreed with the government that the cross alluded to Spanish conquistadors who, accompanied by Catholic priests and friars, conquered the indigenous population of the area. *Id.* The Tenth Circuit disagreed, saying that the county's explanation "unmistakably suggests that it was the force of the Christian faith that powered the conquest and that it will continue to enable the County to overcome" *Id.* The Tenth Circuit was so zealous to find a violation that it said that the flock of sheep on the seal, which alluded to sheep-raising, was in fact an allusion to Jesus. *Id.* As the *Weinbaum* court observed, "with no principled basis for distinguishing one seal from the next, our opinions will be fastidiously fact-bound and our precedent hopelessly abstract." *Weinbaum*, 541 F.3d at 1039. That aptly describes the consequences of continued reliance upon *Lemon* and why *Lemon* should be abandoned in favor of an objective test.

CONCLUSION

For at least 20 years, members of this Court have said that its Establishment Clause jurisprudence needs to be revised. This case and other government display cases decided since 2005 cogently illustrate the need for a revision and in particular for abandonment of the *Lemon* test. Amicus Curiae Liberty Counsel urges this Court to abandon *Lemon* and adopt an objective standard for analyzing Establishment Clause challenges such as the coercion test described above.

Respectfully submitted,

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