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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 OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, MILITARY RELIGIOUS FREEDOM FOUNDATION, NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND UNION FOR REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

AYESHA N. KHAN
Counsel of Record
RICHARD B. KATSKEE
ELIZABETH J. STEVENS
Americans United for Separation of Church and State
518 C St., NE
Washington, DC 20002
(202) 466-3234

[Additional Counsel Listed on Inside Front Cover]

STEVEN M. FREEMAN
STEVEN C. SHEINBERG
Anti-Defamation League
605 Third Ave.
New York, NY 10158
(212) 885-7700

ETHAN FELSON
Jewish Council for Public Affairs
116 E. 27th St.
New York, NY 10016
(212) 684-6950

PEDRO L. IRIGONEGARAY
Military Religious Freedom Foundation
1535 SW 29th St.
Topeka, KS 66611
(785) 267-6115

ROBERT V. EYE
Military Religious Freedom Foundation
112 SW Sixth Ave., Ste. 202
Topeka, KS 66603
(785) 234-4040

MARGERY F. BAKER
DEBORAH LIU
People For the American Way Foundation
2000 M St., NW, Ste. 400
Washington, DC 20036
(202) 467-4999

MARK J. PELAVIN
Union for Reform Judaism
2027 Massachusetts Ave., NW
Washington, DC 20036
(202) 387-2800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Standing To Challenge Government-Sponsored Religious Displays Accords With Settled Standing Rules 4

A. Official use of religious symbols can inflict substantial injuries 4

B. Denying standing in religious-display cases would upend decades of settled jurisprudence 13

II. The District Court Did Not Abuse Its Discretion In Determining That The Land Transfer Is Inadequate To Cure The Constitutional Violation 26

A. District courts have substantial discretion to fashion and implement remedies 26

B. The district court did not abuse its discretion in finding that the land transfer is a sham transaction 28

CONCLUSION 35

TABLE OF CONTENTS — Continued

Page

APPENDIX A: DESCRIPTIONS OF THE *AMICI* 1a

APPENDIX B: RELIGIOUS-DISPLAY CASES INVOLVING STANDING TO SUE FOR HARMS TO THE RIGHT TO USE AND ENJOY PUBLIC LANDS 5a

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott Labs v. *Mead Johnson & Co.*, No. 91-202C (S.D. Ind. Aug. 18, 1992) 34

ACLU Greater Pittsburgh Chapter v. *County of Allegheny*, 842 F.2d 655 (3d Cir. 1988), aff'd in part and rev'd in part, 492 U.S. 573 (1989) 16, 17

ACLU of Fla. Inc. v. *Dixie County*, 570 F. Supp. 2d 1378 (N.D. Fla. 2008) 18

ACLU of Ga. v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) 19, 21

ACLU of Ill. v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) 22

ACLU of Ky. v. *McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005) 16

ACLU of Ky. v. *Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005) 16

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 27

Allen v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) 25

TABLE OF AUTHORITIES — Continued

Page(s)

Alpo Petfoods, Inc. v. *Ralston Purina Co.*, 720 F. Supp. 194 (D.D.C. 1989), rev'd in part on other grounds, 913 F.2d 958 (D.C. Cir. 1990) 33, 34

American Atheists, Inc. v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007) 11

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) 11, 32, 33

County of Allegheny v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) 10, 13, 20

Doe v. *County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994) 18

Donnelly v. *Lynch*, 691 F.2d 1029 (1st Cir. 1982), rev'd, 465 U.S. 668 (1984) 15

Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) 25

Energy Four, Inc. v. *Dornier Med. Sys., Inc.*, 765 F. Supp. 724 (N.D. Ga. 1991) 33

Engel v. *Vitale*, 370 U.S. 421 (1962) 20

Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 26

Freedom From Religion Found., Inc. v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) . . 28, 31

TABLE OF AUTHORITIES — Continued

Page(s)

Freedom From Religion Found., Inc. v. *City of Marshfield*, No. 98-C-270-S, 2000 WL 767376 (W.D. Wis. May 9, 2000) 31

Friedman v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) 22

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 24

Glassroth v. *Moore*, 335 F.3d 1282 (11th Cir. 2003) 17, 18, 21

Glassroth v. *Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), aff'd, 335 F.3d 1282 (11th Cir. 2003) 17, 18

Gonzales v. *North Twp.*, 4 F.3d 1412 (7th Cir. 1993) 21

Halter v. *Nebraska*, 205 U.S. 34 (1907) 6

Harris v. *City of Zion*, 927 F.2d 1401 (7th Cir. 1991) 22

Harvey v. *Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd, 15 F.3d 1097 (11th Cir. 1994) 18

Hein v. *Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007) 21

TABLE OF AUTHORITIES — Continued

Page(s)

Johnson v. *Board of County Comm'rs*, 528 F. Supp. 919 (D.N.M. 1981), rev'd sub nom. *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) 22

Kong v. *City of S.F.*, 18 Fed. App'x 616 (9th Cir. 2001) 31, 32

Langnes v. *Green*, 282 U.S. 531 (1931) 27

Lee v. *Weisman*, 505 U.S. 577 (1992) 20

Local 28 of Sheet Metal Workers' Int'l Ass'n v. *EEOC*, 478 U.S. 421 (1986) 27

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 24

Marsh v. *Chambers*, 463 U.S. 783 (1983) 13, 14

McCreary County v. *ACLU of Ky.*, 545 U.S. 844 (2005) 13, 14, 29, 30

Mendelson v. *City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) 22

Mercier v. *Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) 31

Missouri v. *Jenkins*, 515 U.S. 70 (1995) 26

Pleasant Grove City, Utah v. *Summum*, 129 S. Ct. 1125 (2009) 32

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 5

TABLE OF AUTHORITIES — Continued

Page(s)

Rufo v. *Inmates of Suffolk County Jail*,
502 U.S. 367 (1992) 26

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000) 20

School Dist. v. *Schempp*, 374 U.S. 203 (1963) 13

Sierra Club v. *Morton*, 405 U.S. 727 (1972) . . . 24, 25

Spence v. *Washington*, 418 U.S. 405 (1974) 6

Stone v. *Graham*, 449 U.S. 39 (1980) 15, 21

Summers v. *Earth Island Inst.*,
129 S. Ct. 1142 (2009) 24

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*,
402 U.S. 1 (1971) 27

Texas v. *Johnson*, 491 U.S. 397 (1989) 5, 6

United States v. *Eichman*, 496 U.S. 310 (1990) 6

United States v. *Paradise*,
480 U.S. 149 (1987) 26, 27, 29

United States v. *SCRAP*,
412 U.S. 669 (1973) 24, 25

Upjohn Co. v. *Riahom Corp.*,
641 F. Supp. 1209 (D. Del. 1986) 33

Utah Gospel Mission v. *Salt Lake City Corp.*,
316 F. Supp. 2d 1201 (D. Utah 2004),
aff'd, 425 F.3d 1249 (10th Cir. 2005) 32

TABLE OF AUTHORITIES — Continued

Page(s)

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 13, 14, 23

Van Orden v. *Perry*, 545 U.S. 677 (2005) 23

Van Orden v. *Perry*, No. A-01-CA-833-H, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002), aff'd, 351 F.3d 173 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005) 23

Virginia v. *Black*, 538 U.S. 343 (2003) 11

Washegesic v. *Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) 15, 16, 21

Washegesic v. *Bloomingdale Pub. Sch.*, 813 F. Supp. 559 (W.D. Mich. 1993), aff'd, 33 F.3d 679 (6th Cir. 1994) 15

West Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 4, 5

Constitution, Statutes, and Rules of Court:

U.S. Const. Amend. I . . . . . *passim*

Lanham Act, 15 U.S.C. § 1125(a) 33

Pub. L. No. 108-87, § 8121, 117 Stat. 1054 (2003) 27

Fed. R. Civ. P. 60(b) 29

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous:

George Willard Benson, *The Cross: Its History and Symbolism* (Kessinger Pub. 2003) 10

Allison E. Horton, Note, *Beyond Control? The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265 (2009) . . . 34

Alec MacGillis, *Obama Faces Test in Asserting His Own Brand of Patriotism*, WASH. POST, May 4, 2008, at A1 7

James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson* v. *Board of Educ.*, 330 U.S. 1, 63-72 (1947) (appendix to dissenting opinion of Rutledge, J.) 20

Muriel Morisey, *Flag Desecration, Religion & Patriotism*, 9 RUTGERS J. L. & RELIGION 1 (2007) 6

Thomas C. Morrison, *Corrective Advertising as a Remedy for the False Advertising of Prescription Drugs and Other Professionally-Promoted Medical Products*, 49 FOOD & DRUG L.J. 385 (1994) 33, 34

JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING (2004) 7

TABLE OF AUTHORITIES — Continued

Page(s)

NICHOLAS JACKSON O'SHAUGHNESSY, POLITICS AND PROPAGANDA (2004) 5, 7, 12

RESTATEMENT (SECOND) OF TORTS § 48 (1965) 13

RESTATEMENT (SECOND) OF TORTS § 559 (1977) . . . 13

RESTATEMENT (SECOND) OF TORTS § 568 (1977) . . . 13

Jim Rutenberg & Jeff Zeleny, *The Politics of the Lapel, When It Comes to Obama*, N.Y. TIMES, May 15, 2008, at A27 7

Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167 (1979) 8, 9

Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417 (1986) 8,9

Philip A. Saigh et al., *Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students*, 145 J. GENETIC PSYCHOL. 159 (1984) 8,9

Simon Taylor, *Symbol and Ritual Under National Socialism*, 32 BRITISH J. SOCIOLOGY 504 (1981) 12

Transcript of Oral Arg., *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (No. 03-1500) 18

TABLE OF AUTHORITIES — Continued

Page(s)

Mitja Velikonja, In Hoc Signo Vinces: *Religious Symbolism in the Balkan Wars 1991-1995*, 17 INT'L J. POLITICS, CULTURE, & SOC'Y 25 (2003) 10

Max Weisbuch-Remington et al., *The Nonconscious Influence of Religious Symbols in Motivated Performance Situations*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1203 (2005) 9

Jeff Zeleny, *The Politician and the Absent American Flag Pin*, N.Y. TIMES, Oct. 5, 2007, at A22 7

INTEREST OF THE *AMICI CURIAE*

The *amici* joining in this brief represent diverse religious and secular beliefs, but share a common interest in preserving religious liberty and preventing religious discrimination.[1]

Amici have a substantial interest in ensuring that public lands and facilities are equally open to all citizens regardless of their faith, and that the Establishment Clause's strict prohibitions against official religious favoritism remain intact.

Because several *amici* have joined in this brief, more detailed descriptions of each appear in Appendix A. The *amici* are:

- Americans United for Separation of Church and State, a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state.
- The Anti-Defamation League, organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.
- The Jewish Council for Public Affairs, the coordinating body of 14 national and 127 local Jewish community-relations organizations.

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[1] No counsel for either party authored this brief in whole or in part, and no persons or entities other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Consent letters from the parties are on file with the Clerk.

- The Military Religious Freedom Foundation, an organization dedicated to ensuring the religious freedom of all members of the United States Armed Forces.
- The North American South Asian Bar Association, an umbrella organization of 27 regional bar associations in North America that serves as the principal voice for attorneys of South Asian descent.
- People For the American Way Foundation, a nonpartisan citizens' organization established to promote and protect civil and constitutional rights.
- The Union for Reform Judaism, the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews.

INTRODUCTION AND SUMMARY OF ARGUMENT

Government-sponsored religious symbols are potent forms of speech that can have real, palpable effects on people who are subjected to them. The harm from them is not that they evoke mere distaste, displeasure, or even disgust. It is that they deprive citizens of the use and enjoyment of public lands, because using a public facility where the government has chosen to erect a monument to one faith stigmatizes nonadherents as second-class citizens, while demeaning the faith of adherents by coopting what is sacred.

Dismissing those harms as trivial, some of Petitioners' *amici* invite this Court to curtail or limit standing to challenge religious displays. See, *e.g.*, ACLJ's *Amicus* Br. 4-23; Cal. Am. Legion's *Amicus* Br. 3-9. This Court should decline that invitation, not only because accepting it would upend well-settled Establishment Clause jurisprudence and abrogate scores of decisions by this Court and the lower federal courts, but also because the harms inflicted by governmental displays are too significant to go unremedied.

Whether a land transfer can cure an Establishment Clause violation turns on the facts and circumstances of the case. At a minimum, however, the government must truly divest itself of ownership and control over the land, and clearly inform the public that it is no longer associated with the display. Here, the government has declined to take any steps that would disassociate it from the religious message conveyed by the cross. The land transfer to the VFW involves no fences, signs, disclaimers, or other visual cues to inform visitors to the Preserve that the land and cross are privately owned, or that the government has repudiated its longstanding display of the cross. The land transfer thus does not truly undo the government's unconstitutional act.

ARGUMENT

I. Standing To Challenge Government-Sponsored Religious Displays Accords With Settled Standing Rules.[2]

Petitioners' *amici* are quick to dismiss, as mere generalized grievances, having one's sacred symbols demeaned through official appropriation, being stigmatized by the government's aligning itself with a faith to which one does not subscribe, and being deprived of the enjoyment of public lands and facilities when those other harms are the price of entry. But a jurisdictional bar to claims concerning religious displays cannot be squared with the careful distinction that this Court has drawn between mere abstract knowledge of unlawful governmental action — which is not a basis for standing, under the Establishment Clause or elsewhere — and the deprivation of the use and enjoyment of public lands — which is.

A. Official use of religious symbols can inflict substantial injuries.

Symbols have power. They encapsulate many layers of meaning, and communicate complex ideas far more effectively, and far more forcefully, than mere words can. As Justice Jackson explained, "[t]he use of an emblem or flag to symbolize some system, idea,

[2] *Amici* agree with Respondent that his standing is not properly before this Court. See Resp. Br. 11-18. But because Petitioners challenge Respondent's standing, and some of their *amici* would rewrite the standing rules wholesale, this Court may benefit from more thorough analysis of what is at stake.

institution, or personality, is a short cut from mind to mind." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943); see also *Regan* v. *Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting "adage that 'one picture is worth a thousand words,'" and citing "image of money" as "an especially evocative and powerful way of communicating ideas about matters of public concern, ranging from economics to politics to sports"). Symbols, no less than words, affect viewers' perceptions; their emotions; their actions.

The power of symbols not just to communicate, but to persuade, and to incite action, explains their ubiquity, both historically and today. As a practical matter, they "are an immensely cheap form of propaganda: they attract public notice, they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart * * *." NICHOLAS JACKSON O'SHAUGHNESSY, POLITICS AND PROPAGANDA 102 (2004); see also *Barnette*, 319 U.S. at 632 ("Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.").

As this Court has recognized, the U.S. flag has just that power. Images of the Stars and Stripes rising from atop Mount Suribachi on Iwo Jima in 1945, and from the rubble of the World Trade Center in 2001, capture American resilience more eloquently than words ever could. And nothing conveys a sense of valor and sacrifice more than a flag-draped coffin. "Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in

'America.'" *Texas* v. *Johnson*, 491 U.S. 397, 405 (1989); see also, *e.g.*, *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907) (recognizing that no citizen can view U.S. flag "without taking pride in the fact that he lives under this free government").

Precisely because of its unique symbolic value, the flag lends special power to individual expressions of dissent. See, *e.g.*, *Johnson*, 491 U.S. at 406 (flag-burning at opening of national political convention was "mo[st] powerful statement of symbolic speech * * * [that] could[] have been made at that time"); *Spence* v. *Washington*, 418 U.S. 405, 410 (1974) (peace sign affixed with black tape to inverted U.S. flag was "a pointed expression of anguish * * * about the then-current domestic and foreign affairs of [the] government"). And since this Court struck down legislation criminalizing some expressive uses of the flag (see *United States* v. *Eichman*, 496 U.S. 310 (1990)), resolutions proposing constitutional flag-desecration amendments have become a perennial feature of Congressional sessions as well as popular discourse (see Muriel Morisey, *Flag Desecration, Religion & Patriotism*, 9 RUTGERS J. L. & RELIGION 1, 4-5, 11 (2007) (chronicling historical and contemporary efforts to criminalize flag desecration)). Indeed, the very idea of "flag desecration" reflects the sanctity of the symbol as the embodiment of our national identity and fundamental values.

The importance of the U.S. flag as the embodiment of those values is evident even in the flag's absence: Then-candidate Barack Obama's failure to wear a flag pin on his lapel while on the campaign trail generated

frenzied speculation about whether he was unpatriotic, and therefore unfit for office. See, *e.g.*, Alec MacGillis, *Obama Faces Test in Asserting His Own Brand of Patriotism*, WASH. POST, May 4, 2008, at A1; Jim Rutenberg & Jeff Zeleny, *The Politics of the Lapel, When It Comes to Obama*, N.Y. TIMES, May 15, 2008, at A27; Jeff Zeleny, *The Politician and the Absent American Flag Pin*, N.Y. TIMES, Oct. 5, 2007, at A22.

In more prosaic aspects of life, symbols play equally critical roles. In commerce, for example, they permit 'branding' — *i.e.*, conditioning consumers to respond favorably to, and thus to purchase, a company's products. See JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 63, 67 (2004); O'SHAUGHNESSY, POLITICS AND PROPAGANDA, *supra*, at 102. Social scientists have identified a repeated-exposure effect that "induces more familiarity and, as a consequence, greater liking," for a product, "independent of any conscious cognitive appraisal" of the product's quality or value. O'SHAUGHNESSY & O'SHAUGHNESSY, PERSUASION IN ADVERTISING, *supra*, at 63, 67. "Making a brand familiar by repeated exposure through advertising encourages its adoption." *Id.* at 63. Thus, for example, aggressive advertising of pharmaceuticals leads to patients' "insist[ing] on [brand-name drugs] * * * even though less expensive and equally effective alternatives are available." *Ibid.* In other words, the use of a simple, evocative symbol fosters special affinities for what is being symbolized, in ways that rational argument or other forms of persuasion often cannot.

What is true for symbols generally is doubly so for religious ones. Empirical research confirms that such symbols can measurably affect behavior, even when displayed with no intent to proselytize or persuade.

Studies have shown, for instance, that viewing a religious symbol has statistically significant effects on students' academic performance. Researchers established baseline standardized-test scores for students attending Catholic elementary and junior-high schools in the United States, then retested the students, randomly dividing them into three groups. The examiner wore a necklace with a cross while retesting one group, a necklace with a Star of David while retesting the second, and no religious signifier while retesting the third. The researchers found that the students did systematically better when the examiner wore the cross, and systematically worse when he wore the Star of David. See Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417-18 (1986); Philip A. Saigh et al., *Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students*, 145 J. GENETIC PSYCHOL. 159, 159-62 (1984). The researchers conducted a similar study in religiously diverse Lebanon, and obtained similar results. Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168-69 (1979) (both Christian and Muslim students did better when examiner wore their faith's symbol, and worse when examiner wore other faith's symbol). The researchers attributed the effect to students' anxiety

over "confessional conflict" with an authority figure, on the one hand, and comfort in the presence of a coreligionist, on the other. See Saigh, *Junior High*, *supra*, at 418; Saigh, *Parochial School Students*, *supra*, at 163; Saigh, *Lebanese Elementary Schoolchildren*, *supra*, at 170-71. But regardless of the specific psychological mechanism at work, the studies revealed that even slight but direct exposure to religious symbols displayed by authority figures affected students' academic performance.

What is true for children is equally true for adults. In an unrelated study, adult test subjects were exposed to a subliminal image on a computer screen. Some were shown a picture of Jesus; and some, a Satanic symbol. See Max Weisbuch-Remington et al., *The Nonconscious Influence of Religious Symbols in Motivated Performance Situations*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1203, 1207-08 (2005). The test subjects were then asked to prepare and deliver a speech under conditions designed to induce stress. *Id.* at 1208. Relative to baseline measurements, Christian subjects who had viewed the image of Jesus exhibited higher blood-oxygen saturation and less blood vessel constriction (reflecting lower stress levels), while those who had viewed the Satanic symbol exhibited the opposite responses. See *id.* at 1208-10. In other words, even subliminal exposure to a symbol of one's own faith can yield physical as well as psychological benefits, while similar exposure to what one might consider a 'negative' religious symbol can be correspondingly detrimental.

The cross is, of course, the "supreme emblem of Christianity," and one of humanity's most ancient, widely recognized, and deeply hallowed symbols. See, *e.g.*, George Willard Benson, *The Cross: Its History and Symbolism* 11-16, 61 (Kessinger Pub. 2003). Both historically and today, the cross unites peoples. It divides nations. It provides shelter to the needy and sanctuary to the oppressed. It rallies soldiers to arms. It acts as a shield. It can be wielded as a sword.[3] To dismiss an official display of a large cross as merely passive and therefore insignificant, as petitioners' *amici* do,[4] is to misunderstand not only the display's purpose, but also the cross's essential nature and abiding power, both for those who cherish it and for those who do not. Cf. *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (recognizing coercive effect of "the permanent erection of a large Latin cross on the roof of city hall") (Kennedy, J., concurring in part and dissenting in part).

Indeed, the unique potency of the cross for transmitting complex messages and inciting action is

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[3] Nor are these uses mere historical relics. To take just one recent example, armies in the Balkans during the 1990's used the cross, as well as other traditional religious symbols, to forge a sense of national identity and unity among soldiers, displaying the symbols on uniforms, military equipment, and weapons. See Mitja Velikonja, In Hoc Signo Vinces: *Religious Symbolism in the Balkan Wars 1991-1995*, 17 INT'L J. POLITICS, CULTURE, & SOC'Y 25, 29-30 (2003).

[4] *E.g.*, ACLJ's *Amicus* Br. 4, 13, 15, 17; Cal. Am. Legion's *Amicus* Br. 3; Liberty Counsel's *Amicus* Br. 14-15, 18-19, 22, 24, 31, 35; VFW's *Amicus* Br. 26-27.

precisely why religious institutions and individuals employ that symbol. Cf., *e.g.*, Cal. Am. Legion's *Amicus* Br. 13-14 (arguing that cross is "uniquely transcendent symbol representing the decision to lay down one's life for the good of others"); *American Atheists, Inc.* v. *Duncan*, 528 F. Supp. 2d 1245, 1249 (D. Utah 2007) (defendants selected crosses to memorialize dead state troopers and refused to allow alternative memorials for non-Christians because they believed that "only a cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety").

It is also what encourages the cross's misuse. As this Court has recognized, the Ku Klux Klan has appropriated the cross as a powerful and highly effective weapon to foster hatred and intolerance, and to incite violence. See *Virginia* v. *Black*, 538 U.S. 343, 357 (2003) (noting that burning cross is a symbol of ideology and unity to Klan members, and "a message of intimidation, designed to inspire in the victim a fear of bodily harm," to nonmembers); *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring) (explaining that KKK "has appropriated one of the most sacred of religious symbols as a symbol of hate" and "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, communists, and any other groups hated by the Klan").

Nor is the Klan alone in appropriating the power of the cross for evil. The Nazi Party adapted it to form the swastika, thereby exploiting it to advance the Nazi political and social agendas, and all the horrors that

went with them. See, *e.g.*, Simon Taylor, *Symbol and Ritual Under National Socialism*, 32 BRITISH J. SOCIOLOGY 504, 506-07 (1981); see also O'SHAUGHNESSY, POLITICS AND PROPAGANDA, *supra*, at 55 (noting that Nazis "used pseudo-classical symbols" to condition citizens' behavior). Indeed, the Nazis launched their propaganda campaign by recasting the failed putsch of 1923 as a ritual sacrifice. Taylor, *supra*, at 506-07. Display of the "Bloodflag" — the familiar black swastika in a white circle on a red field — was the centerpiece of that effort, evoking the blood of the sixteen putsch 'martyrs' whose deaths were necessary to usher in the Third Reich. *Id.* at 507-09. The flag, "a transparent allegory of the Christian cross," thus became "the holiest relic of the National Socialist movement," and the key to a national mythology that cast Hitler as "Christ of the Second Coming," Jews as a conspiracy of "evil ones" that had to be purged to make way for him, and the German people as "the chosen ones" who would endure beyond the apocalypse. *Id.* at 509-10, 514-15. The twisted cross thus promulgated Nazi ideology and united the German people behind it. *Id.* at 504-05.

The public display of a symbol like the cross — whether for good or for evil — thus cannot be dismissed as trivial. It bombards the observer with its message visually rather than aurally; but as both research data and historical evidence demonstrate, that feature only makes its message all the more powerful.

B. Denying standing in religious-display cases would upend decades of settled jurisprudence.

Words alone can, of course, cause injuries, whether they take the form of insults,[5] defamation,[6] or official sponsorship of religion; and this Court has never doubted plaintiffs' ability to seek redress for those injuries. See, *e.g.*, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 855-56 (2005) (framed copy of Ten Commandments); *Allegheny*, 492 U.S. at 598 (crèche beneath sign reading "Glory to God in the Highest!"); *Marsh* v. *Chambers*, 463 U.S. 783, 784, 793 n.14 (1983) (nonsectarian legislative prayer). When the sovereign communicates a religious message, those who receive it are not mere "concerned bystanders" grousing about "conduct with which [they] disagree[]." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 485 (1982). They are victims of governmental pressure to accept and participate in an officially favored creed.

Thus, this Court held nearly half a century ago that students and parents "surely" had standing to challenge Bible-reading in public-school classrooms because they were "directly affected" by the practice. *School Dist.* v. *Schempp*, 374 U.S. 203, 205, 224 n.9 (1963). As this Court later explained, that direct effect was that the students were either "subjected to"

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[5] RESTATEMENT (SECOND) OF TORTS § 48 (1965) (common carriers liable for employees' gross insults to patrons).

[6] RESTATEMENT (SECOND) OF TORTS §§ 559, 568 (1977) (injuries to reputation actionable).

unwanted religious messages or "forced to assume special burdens to avoid" them. *Valley Forge*, 454 U.S. at 486 n.22 (explaining standing in *Schempp*).[7]

If being subjected to government-sponsored religion through the spoken or written word constitutes a cognizable injury, so too should being subjected to that same message in symbolic form. And if viewers have standing to challenge the written word despite the ability to avert their eyes (see generally *McCreary*, *supra*), and listeners have standing to challenge the spoken word despite the ability to plug their ears (see *Marsh*, 463 U.S. at 786 n.4), then it should be no answer to those who are subjected to religious symbols in a courtroom, park, or school to say, "cover your eyes or don't use the public facility."

The lower federal courts have thus consistently held that plaintiffs have standing to bring Establishment Clause actions where they are personally and directly affected by a government-sponsored religious display. And this Court has not hesitated to reach the merits in those cases. Indeed, *Amici* have identified, and listed in Appendix B to this Brief, an expansive body of Establishment Clause case law encompassing scores of decisions — including four from this Court — where

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[7] Petitioner's *amici* contend that *Valley Forge* stands for the sweeping proposition that no psychological injury, whatever its nature or source, can cross Article III's threshold. (See ACLJ's *Amicus* Br. 6-8; Cal. Am. Legion's *Amicus* Br. 3-4.) But the problem in *Valley Forge* was not that psychological harm is insubstantial. It was that the plaintiffs could not claim to have been directly touched by the challenged governmental action because they had merely read about it in the newspaper. See 454 U.S. at 486-87.

standing was premised, in whole or in part, on the plaintiffs' having been personally subjected to a religious display.[8] Although the plaintiffs were not always successful on the merits, what these cases show is that at least some harms from displays are clear, substantial, and deserving of redress; and that those harms would often be entirely irremediable if the accepted rules and forms of standing were jettisoned.

1. Religious displays in the public schools have, for example, the potential to inflict especially egregious and otherwise irremediable harms on impressionable children. In *Stone* v. *Graham*, 449 U.S. 39 (1980), for example, this Court invalidated a Kentucky statute requiring the posting of the Ten Commandments in every public-school classroom, because the statute's only conceivable effect was "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42. Similarly, in *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), the Sixth Circuit held that a public school in Michigan violated the Establishment Clause by displaying a portrait of Jesus alone in a prominent place outside the principal's office for 30 years (*id.* at 681), where the portrait's effect was "to make children look at, meditate upon, and perhaps revere Jesus Christ" (*Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559, 563 (W.D. Mich. 1993), aff'd, 33 F.3d 679 (6th Cir. 1994)).

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[8] *Amici* have excluded cases where taxpayer status appears to have been the sole asserted basis for standing — such as in *Donnelly* v. *Lynch*, 691 F.2d 1029, 1030-32 (1st Cir. 1982) (unreviewed determination of taxpayer standing), rev'd on merits, 465 U.S. 668 (1984).

In both instances, the displays were 'passive,' but their placement ensured that students would view them multiple times every day. And the *Washegesic* portrait's location guaranteed that visits to the principal's office, whether for praise or punishment, would always be conducted under Jesus' watchful eye. See 33 F.3d at 681. Thus, students had to submit to unwanted religious messages as the price of attending the public schools.

2. Religious displays are also all too common in courthouses. While not *formally* barring access to the courts any more than the displays in *Stone* and *Washegesic* barred school attendance, they can send the message that justice will not be blind to religious doctrine or denomination. Thus, courthouse displays may substantially interfere with the ability of lawyers, litigants, and citizens in general to avail themselves fully of the courts, courthouse services, and ultimately, the system of justice.

Accordingly, this Court struck down Ten Commandments displays in two county courthouses in *McCreary*, where standing was expressly based on the displays' interference with the plaintiffs' use of the courthouse facilities. See *ACLU of Ky.* v. *McCreary County*, 96 F. Supp. 2d 679, 682-83 (E.D. Ky. 2000), and *ACLU of Ky.* v. *Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005). And the basis for standing appears to have been the same in *Allegheny*, in which this Court struck down a solitary crèche on a county courthouse's main staircase, where "the county supplie[d] [only] a dolly and minimal aid" to the church

that owned and set up the display. *ACLU Greater Pittsburgh Chapter* v. *County of Allegheny*, 842 F.2d 655, 657 (3d Cir. 1988), aff'd in part and rev'd in part, 492 U.S. 573 (1989).[9]

The harms to courthouse visitors were especially grievous in *Glassroth* v. *Moore*, 335 F.3d 1282,1284-85 (11th Cir. 2003). In that case, Roy Moore, Alabama's then-chief justice, placed a two-and-a-half-ton Ten Commandments monument in the Alabama State Judicial Building. Moore privately financed and privately installed the monument in order to declare the "'sovereignty of God over the affairs of men'" — by which he meant the "'God of the Holy Bible and not the God of any other religion.'" *Glassroth* v. *Moore*, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002) (quoting Moore), aff'd, 335 F.3d 1282 (11th Cir. 2003). Moore made the Ten Commandments the "centerpiece" of the courthouse rotunda (335 F.3d at 1284-85), motivating visitors and building employees to pray before it (229 F. Supp. 2d at 1295). The lawyer-plaintiffs, "whose professional duties require[d] them to enter the Judicial Building regularly," were thereby made to "feel like outsiders" who were unwelcome in, and lacked equal standing before, the Alabama courts. 335

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[9] The *amici* States contend that the Third Circuit "focused entirely on *taxpayer* standing" in *Allegheny*. States' *Amicus* Br. 5. But, in fact, the court of appeals did not expressly address standing at all. It did, however, observe that, "[i]n view of the crèche's location, it is probably seen by many visitors to the courthouse including taxpayers, lawyers trying cases or serving as arbitrators, litigants, persons desiring to search certain court records, and people with business at the sheriff's office." *Allegheny*, 842 F.2d at 657.

F.3d at 1292. Holding that the plaintiffs therefore had Article III standing (see *id.* at 1291-93), the Eleventh Circuit went on to conclude that Moore had unconstitutionally imbued the courthouse with an "'overwhelming holy aura'" (*id.* at 1296-97 (quoting *Glassroth*, 229 F. Supp. 2d at 1303-04)) — a fact that the government has elsewhere acknowledged (Tr. of Oral Arg. at 51-52, *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (No. 03-1500) (oral argument of Paul D. Clement) (noting that Moore's display "was like a religious sanctuary within the walls of the courthouse," and conceding that "the display * * * probably does cross the constitutional line even under our view").[10]

As the Seventh Circuit recognized in *Doe* v. *County of Montgomery*, 41 F.3d 1156, 1159, 1161 (7th Cir. 1994), those who encounter a religious display upon entering a courthouse to register to vote, obtain an absentee ballot, serve on a jury, or participate as a party in a lawsuit are deprived of the ability to "fulfill certain legal obligations" and to "participate fully as citizens." They are put in the untenable position of having either to relinquish their right of access to the courts, or to use courthouse facilities and services in

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[10] See also, *e.g.*, *ACLU of Fla. Inc.* v. *Dixie County*, 570 F. Supp. 2d 1378 (N.D. Fla. 2008) (finding standing for prospective county resident who encountered six-ton Ten Commandments monument, inscribed with "LOVE GOD AND KEEP HIS COMMANDMENTS," on county-courthouse steps when visiting Register of Deeds); *Harvey* v. *Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (holding that local attorney had standing to challenge courthouse panel inscribed with Ten Commandments and quotations from Jesus), aff'd, 15 F.3d 1097 (11th Cir. 1994).

the shadow of a visible commitment to "Equal Justice for Christians Only."

3. Nor are the harms from religious displays in public parks insignificant, as the lower courts have recognized.

In Georgia, for example, a private association was permitted to construct and maintain a 35-by-26-foot, illuminated Latin cross in a state park. *ACLU of Ga.* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 & n.1 (11th Cir. 1983). From its mountaintop site, the cross was "visible for several miles from the major highways which traverse[d] the" area; and it flooded park campsites with "light almost bright enough to enable one to read at night." *Id.* at 1101, 1103. Georgia's cross was also plainly visible to a Unitarian minister at his church's retreat and conference center — *in North Carolina*. *Id.* at 1103 n.9. The Eleventh Circuit concluded that campers had standing to challenge the donated cross because they were "forced to locate other camping areas or to have their right to use [the] State Park conditioned upon the acceptance of unwanted religious symbolism"; and the minister had standing because he suffered the "particularly disturbing and intrusive" injury of having the county's cross "manifest[] itself at his special place of religious contemplation and retreat." *Id.* at 1108.

4. In many such cases, the plaintiffs suffered stigmatic injuries because the government aligned itself with a faith different from theirs. But this Court has never hesitated to consider Establishment Clause claims on the merits, and to recognize violations, where the government has endorsed or advanced the religion

to which the plaintiffs themselves subscribe. See *Lee* v. *Weisman*, 505 U.S. 577, 581, 584 (1992) (Jewish parent had standing to challenge Jewish prayer at public-school graduation).[11]

That those who venerate a religious symbol may, under appropriate circumstances, challenge its official use or misuse accords with the Framers' basic intent that the Establishment Clause safeguard freedom of conscience against governmental intrusions. See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421, 431-32 (1962) ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5, reprinted in *Everson* v. *Board of Educ.* 330 U.S. 1, 63-72 (1947) (appendix to dissenting opinion of Rutledge, J.)). A Christian's objection to a governmental display of a cross, but not to crosses in general, thus lies within the heartland of Establishment Clause concerns.

5. Closing the courthouse doors to those whose religious symbols the State has co-opted, or to those stigmatized by its embrace of another faith's symbols, would insulate many displays from challenge. Often, these displays are created, erected, and maintained with private funds. And even when public money is

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[11] See also, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 294 (2000) (Catholic and Mormon parents successfully challenged Christian prayers at high-school football games); *Allegheny*, 492 U.S. at 651 & n.8 (Stevens, J., dissenting) (noting that Jewish plaintiff challenged menorah display).

spent to create or maintain a religious display on public land, a plaintiff's ability to challenge the expenditure as a taxpayer is far from certain. See generally *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

In *Gonzales* v. *North Township*, 4 F.3d 1412 (7th Cir. 1993), for example, a town accepted an 18-foot, wood-and-terra-cotta crucifix from the Knights of Columbus, and displayed it in Wicker Memorial Park, over the objections of several ministerial associations. *Id.* at 1414-15. Town residents who used the park were permitted to challenge the display because their use and enjoyment of the park was diminished. *Id.* at 1416-17. But they lacked standing as taxpayers because there had been no public expenditure. *Id.* at 1416.

Likewise, the Ten Commandments displays in the public schools in *Stone* were procured using private contributions (449 U.S. at 39), and the Jesus portrait in the public school in *Washegesic* was privately donated (33 F.3d at 681). Thus, there would have been no taxpayer standing, and no basis to sue other than for the harms associated with students' "continuing direct contact" with the displays. *Id.* at 683. Similarly, the granite Ten Commandments monument in *Glassroth* and the illuminated cross in *Rabun County* were both donated by private parties. See *Glassroth*, 335 F.3d at 1285; *Rabun County*, 698 F.2d at 1101. If the plaintiffs' injuries in those cases — diminished enjoyment of public property — had been deemed insufficient, the displays would have been immune from judicial review.

6. Even when plaintiffs also have taxpayer standing, a pocketbook-injury claim may not adequately capture the nature or full extent of the harm that they suffer. New Mexico's Bernalillo County undoubtedly expended public funds to adorn county vehicles, official documents, and sheriffs' uniforms with its seal — a blazing Latin cross and the motto, "With This We Conquer." See *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc). But the principal injury that the non-Christian plaintiff alleged was that he was everywhere subjected to an "anathematical" expression of the city's favoritism toward Christianity. See *Johnson* v. *Board of County Comm'rs*, 528 F. Supp. 919, 920-21 (D.N.M. 1981), rev'd sub nom. *Friedman* v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc).[12] While the pocketbook injury was, we think, substantial in its own right, it would likely have been the last thing on the plaintiff's mind if he called the police in an emergency, only to have them arrive in crusaders' livery.

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[12] See also, *e.g.*, *Harris* v. *City of Zion*, 927 F.2d 1401, 1403-05 (7th Cir. 1991) (city seal, which appeared on everything from vehicle-tax stickers to water tower, bore slogan "God Reigns" on ribbon draped across shield featuring Latin cross, dove carrying branch, sword and crown, and city's name); *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (city displayed 35-by-18-foot, illuminated Latin cross atop fire station, causing city residents to alter their routes of travel to avoid it); *Mendelson* v. *City of St. Cloud*, 719 F. Supp. 1065, 1068 (M.D. Fla. 1989) (illuminated Latin cross atop city water tower was visible throughout community, causing plaintiff to avoid areas of town and businesses lying "in the 'shadow of the cross,'" and to drive his daughter to school via circuitous route).

7. To be sure, not all displays involving religious symbols will be held unlawful. In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), for example, this Court upheld a Ten Commandments display near the Texas Supreme Court and State Capitol buildings, where standing was premised on the fact that the lawyer-plaintiff could not use the court's library without viewing the monument. *Van Orden* v. *Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002), aff'd, 351 F.3d 173 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005). But close cases like *Van Orden* just underscore that Establishment Clause actions turn on careful review of the facts (*McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key")), and hence, that they should generally be decided on the merits rather than disposed of with a flat jurisdictional bar. The parents in *Stone* (who sought to spare their children a religious message at odds with their own beliefs), the minister in *Rabun County* (who wished to protect his spiritual retreat from intrusion by Georgia's religious imagery), and the citizen in *Friedman* (who wanted to ensure that he would receive the same police protection as Christians did) deserved to have their claims heard.

8. In urging an extreme jurisprudential change of course, Petitioners' *amici* characterize the basis for standing in religious-display cases as *sui generis*. See, *e.g.*, ACLJ's *Amicus* Br. 2. But putting citizens to the untenable choice either to acquiesce in the government's subjecting them to its message of religious favoritism (and its derogation, through co-optation, of the sacred symbols of the favored faith), or else to forgo their rights to use and enjoy the property (cf. *Valley Forge*, 454 U.S. at 486 n.22), mirrors those

injuries that this Court has deemed sufficient for standing purposes in other contexts.

This Court has repeatedly reaffirmed, for example, that when governmental action affects public land, those whose enjoyment of that land is diminished meet Article III's injury-in-fact requirement. See, *e.g.*, *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (although "generalized harm to * * * the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice"); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 566-67 (1992) (threatened harm to animals that one observes confers standing to challenge agency's interpretation of environmental regulation); *United States* v. *SCRAP*, 412 U.S. 669, 688-89 (1973) (persons who use parks from which more resources may be extracted and in which more refuse will be discarded because of federal action suffer "specific and perceptible harm" for standing purposes); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-35 (1972) ("impair[ing] the enjoyment" of national park by "adversely affect[ing] the scenery" is cognizable injury to those who use park (internal quotation marks omitted)). And contrary to the contentions of Petitioners' *amicus* the Becket Fund (see Becket Fund's *Amicus* Br. 10), this Court has expressly and consistently held that plaintiffs have standing where governmental action diminishes their subjective enjoyment of public land but does not physically impede their use of it. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (standing existed where factory discharge made river look and smell unappealing);

Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) (standing existed where presence of nuclear reactor caused concern over possibility of radiation exposure and where discharged water raised lake's temperature).[13]

Undoing Establishment Clause standing would not only sweep away a longstanding, settled body of law (see App. B), but also place Establishment Clause jurisprudence out of step with broader standing doctrine. As the D.C. Circuit has explained, "[p]laintiffs [a]re entitled, as members of the public, to enjoy [public] land * * *; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional." *Allen* v. *Hickel*, 424 F.2d 944, 947 (D.C. Cir. 1970) (rejecting government's argument that "if the plaintiffs didn't like to look at the crèche, they could avoid walking near the Ellipse").

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[13] Although a religious display on public property may literally displace plaintiffs from only a small segment of the land, that is no different from when a road is run through pristine wilderness, as in *Sierra Club*, 405 U.S. at 734-35; and it is a much greater impediment than when litter increases, as in *SCRAP*, 412 U.S. at 688-89. In each case, the government has caused an aesthetic change that negatively affects users' enjoyment of the land.

II. The District Court Did Not Abuse Its Discretion In Determining That The Land Transfer Is Inadequate To Cure The Constitutional Violation.

A. District courts have substantial discretion to fashion and implement remedies.

When a district court finds a constitutional violation, it "has a duty to command a remedy that is effective, and it enjoys the broad equitable authority necessary to fulfill this obligation." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 399 (1992). The district court thus has broad discretion to craft an appropriate remedy, taking all the case's facts and circumstances into account. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 87 (1995) ("discretion * * * must necessarily adhere in a district court in fashioning a remedy"); *Rufo*, 502 U.S. at 402-03 ("The duty of the District Court is * * * to consider the various interests involved and, in the sound exercise of its discretion, to fashion the remedy that it believes to be best."); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770 (1976) ("The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts.").

The commitment to the district court of both the duty and the discretion to fashion remedies makes perfect sense. The district court knows the facts; it knows the parties; and it has lived with both through every procedural stage of the litigation. Consequently, it "is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands'" in the particular circumstances before it.

United States v. *Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)).

Here, the district court has managed this litigation since March 2001, issuing the injunction that it deemed most appropriate. It then determined in the subsequent enforcement proceeding that the transfer statute (Pet. App. 147a-148a (Pub. L. No. 108-87, § 8121, 117 Stat. 1054, 1100 (2003))) was an inadequate substitute for the injunction (see Pet. App. 89a). That determination is likewise properly committed to the sound discretion of the district judge because, "having had the parties before [him] over a period of time, [he] was in the best position to judge whether an alternative remedy * * * would have been effective in ending petitioners' [unconstitutional] practices." *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) (quoted in *Paradise*, 480 U.S. at 184). This Court should not substitute its judgment for that of the district judge, whose "proximate position and broad equitable powers mandate substantial respect for this judgment." *Paradise*, 480 U.S. at 184. See generally, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (standard of review for appropriateness of equitable remedy is "the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case" (quoting *Langnes* v. *Green*, 282 U.S. 531, 534 (1931))).

B. The district court did not abuse its discretion in finding that the land transfer is a sham transaction.

Whether a sale of land provides an adequate remedy for an unconstitutional governmental display will depend on the nature and location of the display, the parties' behavior in the litigation, and the terms and circumstances of the sale. To be sure, a sale can sometimes be "an effective way for a public body to end its inappropriate endorsement of religion." *Freedom From Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). But selling the land in a transaction that is designed to ensure the display's retention, without doing anything to inform the public of the transfer, perpetuates rather than corrects the wrong. Thus, the district court's conclusion — that a halfhearted land sale was an inadequate remedy for a 75-year constitutional violation — was not an abuse of the court's discretion.

1. In some cases, a sale of any kind will be an inadequate remedy. The government could not, for example, replace the Statue of Freedom atop the U.S. Capitol dome with a large Latin cross, and then insulate the display from constitutional scrutiny by selling the spot to a private party — even if the dome were adorned with an elaborate disclaimer. Nor should governmental authorities be able to sell a public school's lobby or a county courthouse's staircase to permit the erection of religious statues there, no matter how emphatically disclaimed the displays might be. Those locations are simply too closely aligned with the government to permit their privatization.

2. In other instances, even if a sale might otherwise have been permissible, a litigant's behavior may suggest that the transaction is not a legitimate effort to divorce the government from a display, but is instead a dilatory or obstructionist tactic to ensure that the display remains in place. Here, the injunction — which prohibits Petitioners from "permitting display of the Latin cross" — was entered seven years ago, in July 2002. Pet. App. 58a. But Congress forbade the expenditures required to comply. J.A. 45; Pet. App. 60a. The injunction was affirmed by the court of appeals over five years ago, with that court explicitly holding that the land-transfer statute did not moot the case because the land might revert to the government. See Pet. App. 102a-104a. Petitioners did not seek rehearing or *certiorari* review of that judgment, and the injunction became final. Yet Petitioners did not comply; nor did they file a Rule 60(b) motion to lift or modify the injunction. See Fed. R. Civ. P. 60(b). Rather, they waited for Respondent to move to enforce the injunction, which they took as an opportunity to revisit all aspects of the litigation — including the threshold question whether Respondent had the right to sue in the first place. Under those circumstances, the sale was reasonably viewed with suspicion by the district court, whose proximity to and familiarity with the case uniquely qualified it to assess the government's motivations. See *Paradise*, 480 U.S. at 170-71 (nature and extent of remedy properly affected by defendant's resistance to court's order).

3. The terms of a sale may further underscore that the government's agenda is to "reach[] for any way to keep a religious [item] on [display]." *McCreary*, 545

U.S. at 873. So, for example, a government's decision to sell land lying directly under and adjacent to a display, while retaining ownership of all the surrounding land, should be viewed as an impermissible gerrymander that fails sufficiently to divorce the government from its past action. See, *e.g.*, Pet. App. 85a ("Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve — like a donut hole with the cross atop it — will do nothing to minimize the impermissible governmental endorsement."). Judicial skepticism is similarly warranted where the government retains an interest in the land or encourages the buyer to retain the display — particularly where the government also continues to confer on the display the special status reserved for the nation's most important icons (see Resp. Br. 37-41 (explaining national-memorial designation)). And where the government structures a transaction to all but guarantee the display's retention (see *id.* at 37-54), it is entirely reasonable for the district court to deem the land transfer a sham (Pet. App. 65a, 90a-98a).

4. The retention of a display is all the more egregious when nothing is done to inform viewers of the transfer. Under the terms of the land transaction here, the cross does not move; the government does not erect any fences or signs to mark the Preserve's supposed new boundary or to disclaim the cross and the religious message that it conveys; and the VFW has no duty to distinguish the parcel from the surrounding federal lands or to claim the cross as purely private speech. In short, there are no visual cues of any kind that the cross's 75-year status has changed. Thus,

visitors to the Preserve would naturally and reasonably continue viewing the cross as communicating the same exclusionary message that it always has.

5. The courts of appeals have thus consistently recognized that for a land sale to remedy past governmental endorsement of religion, there must be a readily apparent, visual divorce of the now-private display from the surrounding public property. In *Marshfield*, for instance, the Seventh Circuit held that a sale of parkland with a towering, marble Jesus statue was inadequate, in part because the transferred property was "not physically differentiated from the surrounding public park, and no visual boundaries * * * exist[ed] that would inform the reasonable but unknowledgeable observer that the * * * property should be distinguished from the public park." 203 F.3d at 494. On remand, the district court ordered erection of a fence and signs clearly designating the parcel as private, and disclaiming official endorsement of the display. See *Freedom From Religion Found.* v. *City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at *1 (W.D. Wis. May 9, 2000). In *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 700-04 (7th Cir. 2005), the Seventh Circuit approved similar demarcation of a transferred parcel with a Ten Commandments monument as a valid cure, in part because all indicia of governmental sponsorship of the monument had been not only removed, but publicly and permanently repudiated with signs and fences. And in *Kong* v. *City of San Francisco*, 18 Fed. App'x 616, 618 (9th Cir. 2001), the Ninth Circuit approved a sale because the parcel with the religious display was

"visually differentiate[d]" from the surrounding park, the display itself was for the most part visible only from the private parcel, and "several signs throughout the park describ[ed] the private nature of the parcel and the circumstances of the conveyance" with sufficient detail to ensure that no one would reasonably conclude that the display was still government sponsored or government approved.[14]

Because signs and fences are the traditional, familiar boundary markers between public and private property, they "help[] remove doubt about [official] approval of" a display. *Pinette*, 515 U.S. at 776 (O'Connor, J., concurring in judgment). And hence, their presence or absence should be an important factor in determining whether the government has ceased to broadcast its past message of religious endorsement. In that regard, this Court recognized just last Term that "[p]ermanent monuments displayed on public property typically represent government speech." *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1132 (2009). Where the government has been both landowner and speaker; where the constitutional injury resides in the official message that it has sent, day after day, with its permanent monument; and where nothing about the parcel, the monument, or the

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[14] See also *Utah Gospel Mission* v. *Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1242-43 (D. Utah 2004) (concluding that sale of portion of city's Main Street to church did not violate Establishment Clause because, among other things, resulting Main Street Plaza "look[ed] significantly different from the public sidewalks" and was marked by signs and other clear visual cues that it was church land rather than public property), aff'd, 425 F.3d 1249 (10th Cir. 2005).

surrounding public land is different after the sale than before, there is more than a mere presumption that the display represents government speech.[15]

6. Nor is Establishment Clause law peculiar in calling for disclaimers to cure or mitigate the effects of harmful messages that the defendant has previously communicated to the public. On finding liability for making false or misleading claims about a product under the Lanham Act (15 U.S.C. §1125(a)), courts have required offending firms to publish corrective advertisements or otherwise to inform consumers to disregard the prior claims. See, *e.g.*, *Energy Four, Inc.* v. *Dornier Med. Sys., Inc.*, 765 F. Supp. 724, 735 (N.D. Ga. 1991) (requiring distribution of court-authored notice to all customers of both parties); *Alpo Petfoods, Inc.* v. *Ralston Purina Co.*, 720 F. Supp. 194, 215 (D.D.C. 1989) (requiring dissemination of court-approved "corrective release" to those who received information containing false claim), rev'd in part on other grounds, 913 F.2d 958 (D.C. Cir. 1990); *Upjohn Co.* v. *Riahom Corp.*, 641 F. Supp. 1209, 1226 (D. Del. 1986) (requiring that product packaging include statement correcting manufacturer's prior false claims); Thomas C. Morrison, *Corrective Advertising as a Remedy for the False Advertising of Prescription Drugs and Other Professionally-Promoted Medical*

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[15] Because this case concerns whether the government has adequately divorced itself from its past religious speech (in the form of a permanent monument) and has never involved a public forum, there is no risk that fences, boundary signs, or official disclaimers might be mistakenly perceived as unconstitutional discrimination against private, religious speech. Cf. *Pinette*, 515 U.S. at 769 (plurality opinion).

Products, 49 FOOD & DRUG L.J. 385, 390 & n.22 (1994) (describing *Abbott Labs* v. *Mead Johnson & Co.*, No. 91-202C (S.D. Ind. Aug. 18, 1992), which required publication of court-approved statement in all journals in which false claims had appeared, and mailing of statement to all who had received brochure containing false claims). As one court explained, simply ceasing to make misleading claims is insufficient corrective action where the claims have "left a lingering impression" on persons exposed to them. See *Alpo Petfoods*, 720 F. Supp. at 215.

Libelous statements can likewise linger in the minds of those who read them, continuing to injure long after further defamation has been enjoined, unless the defendant prints a retraction. Thus, at least 31 states have enacted statutes that recognize the importance of countering expression-related injuries with corrective speech, by providing for reduced damages where defamatory statements are retracted using means commensurate with those used to communicate the original statements. See Allison E. Horton, Note, *Beyond Control? The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1294-95 & n.136 (2009).

The lingering effects are no less real — and the need for affirmative measures to dispel them are no less critical — where, every day for 75 years, the government has advertised an unconstitutional message of religious favoritism that has stigmatized members of minority faiths, debased the sacred symbols of the majority, and deprived both groups of the full use and enjoyment of public lands.

CONCLUSION

According to petitioners' *amici*, "[t]his case is only the most extreme example of a phenomenon that has plagued the federal courts," with "[i]deologically motivated citizens" roaming the countryside in search of religious symbols, hoping to "make a federal case out of offense at the display[s]" they find. ACLJ's *Amicus* Br. 4. On gaining access to the courts, these "delicate plaintiffs with eggshell sensitivities" obstinately insist that religious displays "be gutted" (see Cal. Am. Legion's *Amicus* Br. 3, 17), with no regard for "those who will be truly harmed in a *real* way by the [displays'] destruction" (see TMLJ's *Amicus* Br. 5).

On that view, Establishment Clause plaintiffs are little better than B-movie vampires: They suck the life's blood out of communities, corrupting and destroying everything good and holy, yet cower in fear at the mere mention of a cross. The caricature and the attendant trivialization of claims over official religious displays elide the fact that one cannot use and enjoy public lands or facilities fully, as an equal citizen, when the price of entry is stigmatization as a disfavored outsider, or else governmental co-optation, and thus degradation, of the signs and symbols that one holds sacred. To curtail those harms, the government cannot simply delegate to a private party the broadcasting of the unconstitutional message. It must clearly, publicly, and permanently disavow its past speech. That it has not done.

Accordingly, the judgment below should be affirmed.

Respectfully submitted.

STEVEN M. FREEMAN
STEVEN C. SHEINBERG
Anti-Defamation League
605 Third Ave.
New York, NY 10158
(212) 885-7700

ETHAN FELSON
Jewish Council for Public Affairs
116 E. 27th St.
New York, NY 10016
(212) 684-6950

PEDRO L. IRIGONEGARAY
Military Religious Freedom Foundation
1535 SW 29th St.
Topeka, KS 66611
(785) 267-6115

ROBERT V. EYE
Military Religious Freedom Foundation
112 SW Sixth Ave., Ste. 202
Topeka, KS 66603
(785) 234-4040

AYESHA N. KHAN
Counsel of Record
RICHARD B. KATSKEE
ELIZABETH J. STEVENS
Americans United for Separation of Church and State
518 C St., NE
Washington, DC 20002
(202) 466-3234

MARGERY F. BAKER
DEBORAH LIU
People For the American Way Foundation
2000 M St., NW, Ste. 400
Washington, DC 20036
(202) 467-4999

MARK J. PELAVIN
Union for Reform Judaism
2027 Massachusetts Ave., NW
Washington, DC 20036
(202) 387-2800

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APPENDIX

APPENDIX A

DESCRIPTIONS OF THE *AMICI*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases decided by this Court and the lower federal and state courts nationwide.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting anti-Semitism, hatred, discrimination, and all forms of bigotry. ADL believes that its stated goals, as well as the general stability of our democracy, are well-served through strict separation of church and state, and commensurately strict enforcement of the Free Exercise Clause.

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is

essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

Jewish Council for Public Affairs

The Jewish Council for Public Affairs, the coordinating body of 14 national and 127 local Jewish community-relations organizations, was founded in 1944 by the Jewish federation system to safeguard the rights of Jews throughout the world, and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and to the concept of separation of church and state as an essential bulwark for religious freedom in the United States.

Military Religious Freedom Foundation

The Military Religious Freedom Foundation is dedicated to ensuring that all members of the United States Armed Forces fully receive the constitutional guarantees of religious freedom to which they and all Americans are entitled by virtue of the Establishment Clause of the First Amendment. MRFF believes that

religious faith is a constitutionally guaranteed freedom that must never be compromised, except in the most limited of military circumstances, because of its fundamental importance to the preservation of the American nation and the American way of life. Additionally, MRFF adheres strongly to the principle that religious faith is a deeply personal matter, and that no American has the right to question another American's beliefs as long as they do not unwontedly intrude on the public space or the privacy or safety of another individual.

North American South Asian Bar Association

The North American South Asian Bar Association is an umbrella organization of 27 regional bar associations across North America, representing the interests of over 6,000 attorneys. NASABA is the principal voice for attorneys of South Asian descent, who illustrate the same broad and diverse range of religious backgrounds as the pluralistic heritage of the United States. NASABA takes an active interest in issues that affect the constitutional rights of ethnic, racial, and religious minorities.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide.

PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. PFAWF has joined in filing this amicus curiae brief in order to help ensure the continued vitality of the First Amendment principle that government must not be permitted to favor one religion over another.

Union for Reform Judaism

The Union for Reform Judaism is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews.

The Union has long maintained a firm commitment to the principle of separation of church and state, in the belief that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history. The government's sponsorship of religious symbols threatens the principle of separation of church and state, which is indispensable to the preservation of that spirit of religious liberty, a unique blessing of American democracy.

APPENDIX B

RELIGIOUS-DISPLAY CASES INVOLVING STANDING TO SUE FOR HARMS TO THE RIGHT TO USE AND ENJOY PUBLIC LANDS

The federal courts have decided scores of Establishment Clause challenges to religious displays on the merits, where standing was premised wholly or partly on the harms to the plaintiffs' use and enjoyment of public lands or facilities. Whether, in the end, the plaintiffs won or lost their suits, each case turned on the nature and history of the challenged display, as well as the context in which it appeared. What follows is a list of all the display cases decided on the merits that *amici* have been able to identify as involving that form of standing, using Westlaw searches of both published and unpublished decisions. We have excluded state-court actions because of the inapplicability of Article III's jurisdictional requirements; and we have excluded the federal cases in which the only asserted or recognized basis for standing was some other theory, such as taxpayer status. The descriptions draw, as appropriate, on prior rulings in each case.

U.S. Supreme Court Cases:

McCreary County v. *ACLU of Ky.*, 545 U.S. 844 (2005), aff'g 354 F.3d 438 (6th Cir. 2003), aff'g 145 F. Supp. 2d 845 (E.D. Ky. 2001), modifying *ACLU of Ky.* v. *McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000): Where plaintiffs challenged Ten Commandments displays in county courthouses, the district court held they had standing because they would necessarily

encounter the displays whenever they entered the courthouses to conduct civic business. The courts enjoined the displays, and both the Sixth Circuit and this Court affirmed, concluding, in light of history and context, that the displays had a predominantly religious purpose.

Van Orden v. *Perry*, 545 U.S. 677 (2005), aff'g 351 F.3d 173 (5th Cir. 2003), aff'g No. A-01-CA-833-H, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002): An atheist who frequently used the Texas Supreme Court's law library challenged a Ten Commandments monolith on the grounds of the State Capitol, which was adjacent to the library. The district court held he had standing because he was subjected to the monolith whenever he used the library, and took offense at the state's perceived preference for religion over nonreligion. The district court, the Fifth Circuit, and this Court all upheld the monolith, which shared the Capitol grounds with 16 other monuments and 21 historical markers, in a nonreligious setting, and prominently acknowledged its private donor.

County of Allegheny v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), aff'g in part and rev'g in part 842 F.2d 655 (3d Cir. 1988): Local residents challenged two privately-owned holiday displays erected on public property in downtown Pittsburgh: a solitary crèche on the county courthouse's main staircase, and a menorah displayed alongside secular symbols on the city-county building's exterior steps. The Third Circuit held that both displays impermissibly endorsed religion. This Court affirmed with respect to the crèche but not the menorah, based

on the displays' different meanings, messages, and contexts.

Stone v. *Graham*, 449 U.S. 39 (1980), rev'g 599 S.W.2d (Ky. 1980): Several plaintiffs — including students, a teacher-parent, and a rabbi — challenged a Kentucky statute requiring that copies of the Ten Commandments, purchased with private funds, be posted in every public-school classroom in the state. An equally divided state supreme court upheld the trial court's determination that the statute was constitutional, but this Court reversed, concluding that the statute's preeminent purpose was religious because the only conceivable effect of posting the Ten Commandments in every public-school classroom would be to make children reflect on, and perhaps venerate, an inherently religious text.

U.S. Courts of Appeals Cases:

Green v. *Haskell County Bd. of Comm'rs*, 568 F.3d 784, (10th Cir. 2009), rev'g 450 F. Supp. 2d (E.D. Okla. 2006): A county resident sued after the county permitted a private party to install a Ten Commandments monolith, also inscribed with the Mayflower Compact, on the courthouse lawn. The district court held that the plaintiff had standing because he was subjected to the monument when compelled to visit the courthouse for business, and the Tenth Circuit agreed, going on to strike down the display.

Weinbaum v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), aff'g 465 F. Supp. 2d 1164 (D.N.M. 2006), and *Weinbaum* v. *Las Cruces Pub. Sch.*, 465 F. Supp.

2d 1182 (D.N.M. 2006): In two separate cases, the parent of a public-school student and other non-Christian Las Cruces residents challenged the city's official seal, the local school district's emblem, and a permanent mural in an elementary school — all of which bore three Latin crosses. In the suit against the city, the district court held that the plaintiffs had standing based on their ongoing, direct, personal contact with the symbols, which appeared on monuments, signs, flags, uniforms, vehicles, and buildings. Consolidating the cases on appeal, the Tenth Circuit held that the plaintiffs had standing based on their constant exposure to the three-cross emblems, but held that the emblems were constitutional because they simply signified the city's name and history.

Card v. *City of Everett*, 520 F.3d 1009 (9th Cir. 2008), aff'g 386 F. Supp. 2d 1171 (W.D. Wash. 2005): A local resident challenged Everett's display of an Eagles-donated Ten Commandments monolith on the grounds of its Old City Hall. The monolith, which was partially obscured by shrubbery, shared the grounds with a plaque and three large war memorials, and several statues and monuments stood in the park across the street. Both the district court and the Ninth Circuit concluded that the monument and the context in which it was displayed were virtually indistinguishable from those in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and accordingly upheld the display.

Vasquez v. *Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007): A county resident and employee sued after the county modified its official seal, removing a cross and making other changes. The Ninth Circuit held that he

had standing because, as an employee, he had daily contact with the seal. But the court held that the cross's removal was constitutionally permissible.

Skoros v. *City of New York*, 437 F.3d 1 (2d Cir. 2006), aff'g No. CV-02-6439 (CPS), 2004 WL 5570287 (E.D.N.Y. Feb. 18, 2004): Two Roman Catholic public-school students and their mother challenged holiday displays at their school, as well as the policy governing those displays. The policy required all holiday displays to include symbols from multiple cultural traditions, proscribed the use of religious symbols, and expressly permitted use of the menorah and star-and-crescent. Both the district court and the Second Circuit upheld the policy and the displays.

O'Connor v. *Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005), aff'g in part and rev'g in part 305 F. Supp. 2d 1217 (D. Kan. 2004): A professor and a student, both Roman Catholic, sued to enjoin their university's display of a 37-inch bronze statue of a bishop wearing a phallic miter as part of the university's annual, outdoor exhibit of sculptures. The district court held that the plaintiffs had standing based on their direct, personal contact with the statue, but found no constitutional violation. The Tenth Circuit agreed, affirming both rulings.

ACLU of Ky. v. *Mercer County*, 432 F.3d 624 (6th Cir. 2005), aff'g 240 F. Supp. 2d 623 (E.D. Ky. 2003): A county resident sought to enjoin the installation in the Mercer County courthouse of a "Foundations of Law" display identical to the final display considered in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). The county had never previously displayed the

Ten Commandments in the courthouse. The district court granted summary judgment to the county, and the Sixth Circuit affirmed based on *McCreary*.

Books v. *Elkhart County*, 401 F.3d 857 (7th Cir. 2005): Where a county's display of the Ten Commandments in its administrative building alongside several other, identically-sized historical documents, the U.S. and state flags, and an explanatory plaque, a county resident and regular visitor to the building sued. The Seventh Circuit held that he had standing because he had to come into direct and unwelcome contact with the display to access county services, but it concluded that the display was constitutional.

Mercier v. *Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), rev'g *Mercier* v. *City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003): After nearly two dozen individual plaintiffs who lived or worked in La Crosse sued to enjoin the display of a donated Ten Commandments monument in a city park, the city sold the monument and the land beneath it to the monument's donor. After concluding that the plaintiffs had standing, the district court held that the monument was unconstitutional. The Seventh Circuit reversed on the merits.

Lambeth v. *Bd. of Comm'rs*, 407 F.3d 266 (4th Cir. 2005), aff'g 321 F. Supp. 2d 688 (M.D.N.C. 2004): Two attorneys who regularly practiced in the courts located in Davidson County's government center challenged the county board's decision to inscribe the national motto, "In God We Trust," on the front of the building. Because the plaintiffs regularly encountered the inscription in the course of their professional activities,

the district court held they had standing; but it dismissed their complaint for failure to state a claim. The Fourth Circuit affirmed, holding that the inscription was clearly constitutional.

Modrovich v. *Allegheny County*, 385 F.3d 397 (3d Cir. 2004): Two county residents who were atheists challenged a donated bronze plaque inscribed with the Ten Commandments and other biblical passages, which was displayed among various commemorative plaques on the county courthouse's exterior wall. The plaintiffs encountered the plaque when walking to and from work and when entering the courthouse on errands. The district court granted summary judgment to the county, and the Third Circuit affirmed, holding that the plaque's display was constitutional.

ACLU Neb. Found. v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), rev'g 186 F. Supp. 2d 1024 (D. Neb. 2002): An atheist who was a city resident challenged the display of a donated Ten Commandments monument in a city park, contending he limited his use of the park because of the monument's presence. The district court held that he had standing, and that the display was unconstitutional. The Eighth Circuit reversed the merits ruling and upheld the monument.

McGinley v. *Houston*, 361 F.3d 1328 (11th Cir. 2004), aff'g 282 F. Supp. 2d 1304 (M.D. Ala. 2003): Plaintiffs sued when, in accordance with the Eleventh Circuit's decision in *Glassroth* v. *Moore*, 335 F.3d 1282 (11th Cir. 2003), the associate justices of the Alabama Supreme Court removed a two-and-a-half ton, granite Ten Commandments monument that the state's chief

justice had installed in the state judicial building's rotunda. Both the district court and the Eleventh Circuit concluded that the display's removal was constitutionally permissible.

ACLU of Ohio Found. v. *Ashbrook*, 375 F.3d 484 (6th Cir. 2004), aff'g 211 F. Supp. 2d 873 (N.D. Ohio 2002): The ACLU sought to enjoin a county-court judge's display of a Ten Commandments poster in his courtroom beside an identically sized Bill of Rights poster. Both the district court and the court of appeals held that the ACLU had standing because one of its Ohio members, an attorney, regularly practiced law in that courtroom and averred that the poster negatively affected his use of the facility. Affirming the district court, the Sixth Circuit concluded that the display was unconstitutional.

Baker v. *Adams County/Ohio Valley Sch. Bd.*, Nos. 02-3776, 02-3777, 2004 WL 68523 (6th Cir. Jan. 12, 2004), aff'g No. 1:99-CV-94 TSH, 2002 WL 33957387 (S.D. Ohio June 11, 2002): After the county school board erected Ten Commandments monuments at the entrances to four public high schools, a county resident and a student's parent sued. The board then surrounded each monument with four monuments inscribed with religious excerpts from documents with legal significance. Both the district court and the court of appeals concluded that the plaintiffs had standing because they encountered the displays while visiting the schools for events, or while passing them on public roads. Affirming the district court, the Sixth Circuit held that the displays were unconstitutional.

Briggs v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003): After Mississippi adopted a new design for its state flag that included the St. Andrew's Cross – a component of the Confederate battle flag – a state resident sued. Both the district court and the Fifth Circuit concluded that the flag's design was constitutionally permissible.

ACLU of Ky. v. *McCreary County*, 354 F.3d 438 (6th Cir. 2003), aff'g *Doe* v. *Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000), cert. denied, *Harlan County* v. *ACLU of Ky.*, 545 U.S. 1152 (2005): A public-school student and her parents challenged the presence of Ten Commandments displays in classrooms at her school. After they filed suit, the school added religious excerpts from other historical documents to the displays. The district court held that the plaintiffs had standing because the student had daily contact with the displays, and her parents encountered them when they attended parent-teacher conferences and other meetings. On the merits, the court held that even as modified, the displays were unconstitutional. The Sixth Circuit affirmed in a decision consolidated with the two cases involving the courthouse displays that this Court struck down in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005).

Glassroth v. *Moore*, 335 F.3d 1282 (11th Cir. 2003), aff'g 229 F. Supp. 2d 1290 (M.D. Ala. 2002): After Roy Moore, the ten-chief-justice of the Alabama Supreme Court, installed a two-and-a-half ton, granite Ten Commandments monument in the Alabama State Judicial Building's rotunda, three lawyers who regularly used the courthouse sued. The district court

held that they had standing. Because two of lawyers had altered their behavior to limit or avoid further direct contact with the monument, the Eleventh Circuit affirmed. On the merits, both the district court and the court of appeals concluded that the display was unconstitutional.

King v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003): A county resident challenged the inclusion on a court clerk's seal, used solely to authenticate documents, of an outline of the Ten Commandments. The Eleventh Circuit held that the seal was constitutional.

Freethought Soc'y of Greater Phila. v. *Chester County*, 334 F.3d 247 (3d Cir. 2003), rev'g 191 F. Supp. 2d 589 (E.D. Pa. 2002): A county resident who was an atheist challenged a donated Ten Commandments plaque that had been affixed to an exterior wall of the county courthouse for decades. The district court held that she had standing because, as a county resident, she often had unwelcome, direct contact with the display when she visited the courthouse to serve as a juror or witness, to transact other business, and to participate in demonstrations. The district court held that the plaque was unconstitutional, but the Third Circuit reversed on the merits.

Adland v. *Russ*, 307 F.3d 471 (6th Cir. 2002), aff'g 107 F. Supp. 2d 782 (E.D. Ky. 2000): Kentucky passed a law requiring relocation of a Ten Commandments monument, previously displayed on the State Capitol grounds, so that it would be included in "a historical and cultural display" designed to "remind Kentuckians of the Biblical foundations" of the state's laws. Several

frequent visitors to the State Capitol grounds challenged the proposed display, and both the district court and the Sixth Circuit held that the plaintiffs had standing because they anticipated direct, personal contact with the display in the course of their regular activities. Both courts also held that the planned display was unconstitutional.

Paulson v. *City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc): In *Ellis* v. *City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), a San Diego resident had brought state and federal constitutional claims against San Diego's display of a 43-foot Latin cross atop Mt. Soledad, on city property; and the Ninth Circuit had held that the cross violated the California Constitution. To comply with the resulting injunction, the city sold the land beneath the cross to the private party that had originally erected the display. The plaintiff moved to enforce the injunction, and the district court held that the sale did not cure the violation. After a competitive-bidding process, the city selected the same private party as the winning bidder. This time, the district court held that the city had cured the violation; but the Ninth Circuit reversed.

Indiana Civil Liberties Union v. *O'Bannon*, 259 F.3d 766 (7th Cir. 2001), aff'g 110 F. Supp. 2d 842 (S.D. Ind. 2000): State employees sought a preliminary injunction barring the installation of a Ten Commandments monument, which also had the Bill of Rights and the Indiana Constitution's Preamble inscribed on it, in a park outside the State Capitol building, where the employees worked. Both the district court and the Seventh Circuit concluded that although the Capitol

grounds and a nearby park featured other monuments, those monuments shared no common theme with the Ten Commandments. As such, the display was unconstitutional.

ACLU of Ohio v. *Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (en banc), aff'g 20 F. Supp. 2d 1176 (S.D. Ohio 1998): A presbyterian minister and the ACLU sought to enjoin the inscription of the Ohio State motto, "With God, All Things Are Possible," on a plaza outside the State Capitol. The district court likened the motto to the national motto and upheld the display, but it did enjoin the state from attributing the motto to the New Testament, which the plaintiffs had shown to be the source of the text. The Sixth Circuit affirmed.

Freedom from Religion Found., Inc. v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000): A local businessman sued to enjoin the display of a donated, fifteen-foot-tall, white marble statue of Jesus along the main thoroughfare through town, in a city park created specifically to accommodate the statue. The city then placed a disclaimer near the statue and sold a tiny plot of land beneath the statue to a private group. The district court concluded that the sale had cured any constitutional violation. The Seventh Circuit reversed, holding that the display remained unconstitutional.

Books v. *City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), rev'g 79 F. Supp. 2d 979 (N.D. Ind. 1999): Elkhart residents challenged a donated Ten Commandments monument displayed on the city municipal building's lawn, where the only other adornment was a smaller war memorial, some distance away. The district court

held that the plaintiffs had standing, but concluded that the monument's display was constitutional. The Seventh Circuit agreed that the plaintiffs had standing because they had to come into direct and unwelcome contact with the monument in order to participate fully as citizens, but it reversed the district court's holding on the merits, striking down the display.

Brooks v. *City of Oak Ridge*, 222 F.3d 259 (6th Cir. 2000): For its fiftieth anniversary, Oak Ridge installed a Japanese "Friendship Bell" in a public park. The bell, which resembled those found in Buddhist temples, was meant to memorialize the deaths of Japanese civilians killed by nuclear blasts in WWII, and to express hope for a more peaceful future. Affirming the district court, the Sixth Circuit held that there was no constitutional violation.

Granzeier v. *Middleton*, 173 F.3d 568 (6th Cir. 1999), aff'g 955 F. Supp. 741 (E.D. Ky. 1997): County residents, who regularly conducted business at the county courthouse, sued after the county posted a sign, emblazoned with a crucifix, to inform visitors that the courthouse would be closed "IN OBSERVANCE OF GOOD FRIDAY." After holding that the plaintiffs' regular courthouse use and contact with the sign conferred standing, the court found that the sign was unconstitutional, but that closure on Good Friday was not. The plaintiffs appealed the latter holding and Sixth Circuit affirmed.

ACLU v. *City of Florissant*, 186 F.3d 1095 (8th Cir. 1999), rev'g 17 F. Supp. 2d 1068 (E.D. Mo. 1998): A non-Christian city resident — who lived three blocks from the city's civic center and regularly visited and

traveled past it — sued to enjoin the inclusion of a near-life-size nativity scene in the center's holiday display. The city then added numerous secular symbols to the display. Determining that the original display was unconstitutional, the district court also held that the additions had not cured the violation. Focusing strictly on the modified display, the Eighth Circuit reversed.

ACLU of N.J. v. *Schundler*, 104 F.3d 1435 (3d Cir. 1997), aff'g in part and rev'g in part 931 F. Supp. 1180 (D.N.J. 1995), appeal after remand, 168 F.3d 92 (3d Cir. 1999): After encountering the displays as they traveled near or transacted business at city hall, Jersey City residents challenged the city's placement of a lone menorah, and later, its placement of a lone crèche, on the plaza in front of city hall. The city responded by adding a sign praising its residents' diverse cultural heritage and placing a Christmas tree in the vicinity. The district court held that the displays were unconstitutional. The following year, the city displayed the crèche and menorah together, along with various secular holiday symbols, and the Third Circuit concluded that this modified display was constitutional.

Separation of Church & State Comm. v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam): A group of Eugene residents challenged the display of a 51-foot Latin cross on public property adjacent to the city's downtown business district. The cross was originally erected by private parties on public land but later deeded to the city for use as a war memorial. The

district court upheld the cross, but the Ninth Circuit reversed.

Suhre v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997), rev'g *Suhre* v. *Board of Comm'rs*, 894 F. Supp. 927 (W.D.N.C. 1995): A county resident and frequent litigant sought an injunction requiring the removal of a Ten Commandments plaque from the county courthouse's main courtroom, where county board meetings as well as trials were held. The plaintiff, an atheist, claimed that he could not participate in litigation and public meetings without confronting the plaque. The district court held that he lacked standing, but the Fourth Circuit reversed and remanded, holding that the plaintiff's personal contact with state-sponsored religious symbolism comprised a cognizable injury-in-fact, whether or not the plaintiff altered his conduct to avoid the display. On remand, the district court upheld the display.

Elewski v. *City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), aff'g No. 95-CV-1830 (FJS), 1996 WL 31169 (N.D.N.Y. Jan. 19, 1996): A Syracuse resident who was an atheist challenged the city's display of a crèche alongside colored lights, a Christmas tree, wire bells, reindeer, and a privately-owned menorah on public property in the city's downtown area. Both the district court and the Second Circuit held that the crèche's inclusion in the display was constitutionally permissible.

Alvarado v. *City of San Jose*, 94 F.3d 1223 (9th Cir. 2002), aff'g No. C 94-20773 JW, 1995 WL 66785 (N.D. Cal. Feb. 10, 1995): Several San Jose residents sued after the city placed a "Plumed Serpent" sculpture depicting Quetzalcoatl, an Aztec mythological figure, in

a city park as part of a public-artwork program designed to promote the city's diverse heritage. The district court found no constitutional violation, and the Ninth Circuit affirmed.

Carpenter v. *City of S.F.*, 93 F.3d 627 (9th Cir. 1996), rev'g 803 F. Supp 337 (N.D. Cal. 1992): San Francisco residents challenged the display of a 103-by-39-foot Latin cross atop a mountain in a public park. The district court concluded that the cross complied with both the federal and state constitutions. The Ninth Circuit reversed, holding that the display violated the California Constitution's no-preference clause.

American Jewish Congress v. *City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (en banc): Every Chanukah, the city issued a permit to a private Jewish organization to erect a 27-foot, unattended menorah in a public park near city hall. The city exercised considerable discretion over who could obtain a permit. City residents sued, and ultimately, the Ninth Circuit held that the menorah's display was unconstitutional.

Gaylor v. *United States*, 74 F.3d 214 (10th Cir. 1996): Several U.S. citizens and an atheist organization sought to enjoin further use of the national motto and its appearance on U.S. currency. The Tenth Circuit held that the motto and its display are constitutional.

Robinson v. *City of Edmond*, 68 F.3d 1226 (10th Cir. 1995): Jewish and Unitarian residents of Edmond sued to enjoin use of the city's seal, which depicted a steam engine and oil derrick, tower, covered wagon, and Christian cross, and which appeared on city signs, flags, uniforms, vehicles, correspondence, and utility

bills. The Tenth Circuit held that the seal was unconstitutional.

Washegesic v. *Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994), aff'g 813 F. Supp. 559 (W.D. Mich. 1993): A public-secondary-school student challenged the display of a donated, solitary portrait of Jesus in the hallway between his school's gym and principal's office. The Sixth Circuit held that the plaintiff's graduation had not mooted the case because he regularly visited the school to attend sporting events and social functions with his girlfriend, who was still a student, and thus had continuing, personal contact with the portrait. On the merits, it affirmed the district court's ruling that the portrait's display was unconstitutional.

Kunselman v. *Western Reserve Local Sch. Dist.*, 70 F.3d 931 (6th Cir. 1994): Three public-school students and their parents sought to enjoin their school district's adoption of a new mascot, the "Blue Devil," copied from Duke University and named for a WWII corps of French soldiers. The district court and the Sixth Circuit both held that there was no constitutional violation.

Doe v. *County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994), aff'g in part and rev'g in part 848 F. Supp. 832 (C.D. Ill. 1994): Where a donated, permanent metal sign reading "THE WORLD NEEDS GOD" greeted entrants to a county courthouse, a nonresident, who had never seen the courthouse, and two county residents, who visited the courthouse to register to vote, obtain absentee ballots, and serve as jurors, sued. The district court dismissed for lack of standing, but

the Seventh Circuit reversed as to the two residents because they could not participate fully as citizens of the county and fulfill their legal obligations without encountering the sign.

Gonzalez v. *North Twp.*, 4 F.3d 1412 (7th Cir. 1993), rev'g 800 F. Supp. 676 (N.D. Ind. 1992): Residents challenged the display in a public park of an eighteen-foot crucifix donated by the Knights of Columbus. The district court concluded that only one plaintiff, who had quit his job as a park employee to avoid the crucifix, had standing. Because the other plaintiffs avoided the area in the park surrounding the crucifix, the Seventh Circuit concluded that they had standing, too. On the merits, the court of appeals held that the display was unconstitutional.

Kreisner v. *City of San Diego*, 1 F.3d 775 (9th Cir. 1993), aff'g 788 F. Supp. 445 (S.D. Cal. 1991): A San Diego resident sued the city after it permitted a private group to erect a display consisting of scenes from the New Testament in a public park during December. The district court originally found the display constitutionally permissible private speech in a public forum, but the Ninth Circuit remanded for further fact-finding on the policies governing speech within the park. On remand, the district court again found that the display was private speech, and the Ninth Circuit affirmed.

Ellis v. *City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), aff'g *Murphy* v. *Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991): In three consolidated cases, a Catholic county resident challenged the display of a 36-foot, illuminated Latin cross atop Mt. Helix, on San Diego

County property; two atheist San Diego residents challenged the display of a 43-foot, illuminated Latin cross atop Mt. Soledad, on city property; and an Episcopalian La Mesa resident challenged the inclusion of a Latin cross on the city's seal (which appeared prominently on city vehicles and all official city mailings). The district court held that all four plaintiffs had standing. Rather than addressing the plaintiffs' federal constitutional claims, it evaluated the three crosses under the California Constitution's no-preference clause, and found each one unconstitutional. The Ninth Circuit affirmed both on standing and on the merits.

Americans United for Separation of Church & State v. *City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc), rev'g 784 F. Supp. 412 (W.D. Mich. 1991): Grand Rapids had opened its principal public plaza as a public forum and regularly issued permits for private events and displays. The plaintiffs sued when the city permitted a private group to erect a menorah, accompanied by a sign acknowledging its private sponsor, on the plaza during Hanukkah. The district court enjoined the display in an oral ruling, but the Sixth Circuit reversed.

Harris v. *City of Zion*, 927 F.2d 1401 (7th Cir. 1991), aff'g in part and rev'g in part 729 F. Supp. 1242 (N.D. Ill. 1990): In a pair of consolidated cases, residents challenged their cities' seals. One depicted a leaf, a water tower, industrial buildings, and a church and cross; and the other depicted a Latin cross, a dove, a sword, a crown, and a banner reading, "God Reigns." The district court held only the latter seal

unconstitutional. On appeal, the Seventh Circuit first held that both plaintiffs had standing because they encountered the seals on vehicle tax stickers, garbage bags, a water tower, and elsewhere, and had altered their routes of travel to limit contact with the seals. On the merits, the court held that both seals were unconstitutional.

Murray v. *City of Austin*, 947 F.2d 147 (5th Cir. 1991), aff'g in part and rev'g in part 744 F. Supp. 771 (W.D. Tex. 1990): An Austin resident and taxpayer sought to enjoin use of the city's seal — which included a cross adapted from the family coat-of-arms of Stephen Austin, the city's namesake. The seal appeared on the plaintiff's monthly utility bills, on the uniforms of all city employees with whom the plaintiff interacted, and on and in various public buildings that he visited throughout the city. The district court granted summary judgment to the city. After holding that the plaintiff had standing based on his frequent, personal contacts with the seal, the Fifth Circuit affirmed.

Hewitt v. *Joyner*, 940 F.2d 1561 (9th Cir. 1991), rev'g 705 F. Supp. 1443 (C.D. Cal. 1989): Christian, Jewish, atheist, and agnostic residents of San Bernadino County challenged the county's ownership and maintenance of a donated park decorated with 36 sculptures and tableaux depicting scenes from the life of Jesus. After concluding that the plaintiffs had standing, the district court upheld the displays. The Ninth Circuit agreed that the plaintiffs had standing based on their inability to use the park freely. On the merits, it held that the displays violated the California

Constitution, and thus declined to address the federal Establishment Clause claim.

ACLU of Ky. v. *Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), aff'g 701 F. Supp. 1296 (E.D. Ky. 1988): As part of a holiday display with secular symbols on the State Capitol grounds, Kentucky constructed a rustic stable in which private groups were permitted to perform live nativity pageants. The district court found that the plaintiffs had taxpayer standing that the State could cure any constitutional violation by posting a disclaimer beside the stable and opening it as a limited public forum for live performances by secular and religious groups. The Sixth Circuit determined that the plaintiffs had standing based on the alternative basis that they suffered impairment of their use and enjoyment of the facility, and affirmed on the merits.

Doe v. *City of Clawson*, 915 F.2d 244 (6th Cir. 1990): An anonymous city resident, whose standing was established in camera, sued to enjoin the display of a crèche among a variety of secular holiday symbols at the entrance to city hall. The Sixth Circuit upheld the display.

Smith v. *County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), aff'g *Smith* v. *Lindstrom*, 699 F. Supp. 549 (W.D. Va. 1988): Several county residents — including six Christian and Unitarian ministers and a Jewish rabbi — challenged a solitary, lighted crèche owned and erected by a private party on the county office building's lawn. Although it found that the lawn was a limited public forum, the district court concluded that the display was unconstitutional. On appeal, the Fourth Circuit confirmed that the plaintiffs had

standing based on their allegations of noneconomic injury, and it also affirmed the district court's ruling on the merits.

Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), rev'g 655 F. Supp. 844 (D. Utah 1987): St. George citizens, including several ministers, challenged both the depiction of a Mormon temple on the city logo and the city's provision of free electricity to illuminate the local temple's exterior. The district court held that the plaintiffs lacked standing to challenge the electricity subsidy, and it upheld the logo on the merits. The Tenth Circuit held, however, that the plaintiffs had standing to challenge the electricity subsidy, and that the subsidy to a religious institution was impermissible. It further held that the plaintiffs' direct personal contact with the logo, which appeared on city vehicles and at city hall, conferred standing to challenge it, but remanded for further fact-finding on the merits of that claim.

Doe v. *City of Warren*, Nos. 88-2187, 89-1078, 1989 WL 137851 (6th Cir. Nov. 16, 1989): In two consolidated cases, the plaintiffs sought to enjoin their cities' holiday displays. Warren's display, on the front lawn of city hall, included a crèche and menorah among various secular symbols and figures. Westland's display, spread over a considerable distance in a large public square, consisted of a crèche and many secular items. Both the district court and court of appeals upheld both displays.

Kaplan v. *City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), rev'g 700 F. Supp. 1315 (D. Vt. 1988): A rabbi, a Unitarian minister, and a lawyer challenged their

city's issuance of a permit to a private group to erect a menorah in City Hall Park, where they each encountered it in the course of their daily activities and suffered consequent mental anguish. The district court upheld the display, but the court of appeals reversed and struck it down.

Mather v. *Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989), rev'g 699 F. Supp. 1300 (N.D. Ill. 1988): A Jewish resident sued to enjoin the display of a crèche, accompanied by a disclaimer and numerous secular holiday symbols, on the village hall's lawn. The district court found the display unconstitutional, but the Seventh Circuit reversed, concluding that Mundelein's display was virtually indistinguishable from that upheld in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

American Jewish Congress v. *City of Chicago*, 827 F.2d 120 (7th Cir. 1987), rev'g No. 85-C-9471, 1986 WL 20750 (N.D. Ill. Nov. 5, 1986): Four Chicago citizens, two Jewish and two Catholic, challenged the display of a privately-owned crèche alongside a Santa Clause, reindeer, wreaths, and Christmas lights in the lobby of City Hall. The district court held that the plaintiffs had standing but found no constitutional violation. The Seventh Circuit reversed on the merits and struck down the crèche.

ACLU v. *City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), aff'g 588 F. Supp. 1337 (E.D. Mich. 1984): A Birmingham resident challenged the city's holiday display, which consisted solely of a crèche erected by city employees on the city-hall lawn. The district court held that the display was unconstitutional, and the Sixth Circuit affirmed.

ACLU of Ill. v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), aff'g 622 F. Supp. 1542 (N.D. Ill. 1985): Two residents, a Methodist and a nonbeliever, sought to enjoin their city's display of a 35-by-18-foot, illuminated Latin cross atop the city firehouse. The district court issued a preliminary injunction. Holding that the plaintiffs had standing because they alleged they had altered their routes of travel to avoid exposure to the cross, the Seventh Circuit affirmed on the merits.

Friedman v. *Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc), rev'g *Johnson* v. *Board of County Comm'rs*, 528 F. Supp. 919 (D.N.M. 1981): A non-Christian county resident challenged his county's seal, which bore a blazing Latin cross beneath a Spanish translation of "With This We Conquer." The seal was affixed to county vehicles, documents, and sheriff's department uniforms. The district court held that the plaintiff had standing but that the seal merely honored the county's cultural heritage. The Tenth Circuit reversed on the merits, concluding the seal was unconstitutional.

ACLU of Ga. v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (en banc), aff'g 510 F. Supp. 886 (N.D. Ga. 1981): Several plaintiffs, including two campers, challenged the display on a mountaintop in a state park of a 35-by-26-foot Latin cross, constructed and maintained by the local chamber of commerce. The cross was visible for several miles, even in an adjacent state; and it flooded two camping areas in the park with light almost bright enough to read by at night. One of the campers, a Unitarian

minister, was subjected to the cross from the porch of his cabin at his church's retreat and conference center in North Carolina. The Eleventh Circuit concluded that the campers had standing because they were forced either to camp elsewhere or to have their right to use the campgrounds conditioned upon exposure to an unwanted religious symbol. The court also concluded that the minister had standing because the cross intruded on his spiritual retreat. On the merits, the court affirmed the district court's ruling that the display was unconstitutional.

Crowley v. *Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980), aff'g 462 F. Supp. 725 (D.D.C. 1978): An individual and two Christian religious groups sued the Smithsonian, contending that its exhibits referring to evolutionary theory unconstitutionally promoted secular humanism. The district court upheld the exhibits, and the D.C. Circuit affirmed.

Hall v. *Bradshaw*, 630 F.2d 1018 (4th Cir. 1980): North Carolina residents and taxpayers challenged the state's inclusion of a "motorist's prayer" on state maps. The Fourth Circuit concluded the prayer was unconstitutional.

Allen v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), rev'g 333 F. Supp. 1088 (D.D.C. 1971), on remand from *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970): An Episcopalian minister, a Catholic priest, a rabbi, and others sued to prevent the federal government from constructing a crèche on the White House Ellipse as part of an annual, multi-symbol holiday display. The D.C. Circuit held that the plaintiffs had standing because the crèche would

interfere with their use and enjoyment of public parkland, but it remanded for further fact-finding on the merits. On remand, the district court upheld the display, but the D.C. Circuit reversed, concluding that the government's sponsorship and administration of the construction of the crèche was unlawful, although the crèche itself was not.

U.S. District Court Cases:

Menes v. *City Univ. of N.Y. Hunter Coll.*, 578 F. Supp. 2d 598 (S.D.N.Y. 2008): A city-college employee challenged his office's custom of permitting employees to display religious items — including angel figurines, a magazine cover featuring the Pope, and Christian-themed holiday posters — in their cubicles and elsewhere in the office. The district court granted summary judgment to the college because the plaintiff produced no evidence that the college or the office manager acted with an improper religious purpose.

ACLU of Fla., Inc. v. *Dixie County*, 570 F. Supp. 2d 1378 (N.D. Fla. 2008): When he visited the Dixie County courthouse to trace the title of a property that he wanted to buy, a prospective county resident encountered a six-ton monument inscribed with the Ten Commandments and "LOVE GOD AND KEEP HIS COMMANDMENTS." The monument sat on the courthouse's front steps. Refusing to buy property in the county while the monument remained, he sued, and the district court held that he had standing because he had altered his course of conduct to avoid the display.

Trunk v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008): In 1993, the Ninth Circuit concluded in *Ellis* v. *City of La Mesa,* 990 F.2d 1518 (9th Cir. 1993), that the display of a 43-foot, illuminated Latin cross atop Mt. Soledad on public property violated the California Constitution's no-preference clause. Meanwhile, the private group that had originally erected the cross added myriad other symbols and items to the site; and in 2004, Congress designated it a national war memorial and took the property by eminent domain. A Jewish war veterans' organization and four individual plaintiffs then sued, contending that the cross's display on federal land violated the U.S. Constitution. The district court held that the plaintiffs had standing because the cross's presence interfered with their use and enjoyment of public property, but on the merits, it concluded that the cross's display was constitutionally permissible.

ACLU of Ky. v. *Rowan County*, 513 F. Supp. 2d 889 (E.D. Ky. 2007): Individuals and the ACLU challenged a county's placement of a Ten Commandments plaque among several unrelated plaques on the wall of a courtroom occasionally used for public meetings and voting. After they filed suit, the county replaced the plaque with a display identical to the final display examined by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). The district court held that the plaintiffs had standing based on their past and continuing, direct contact with both the original and modified displays; but it concluded that the modified display was constitutional.

ACLU of Ky. v. *Garrard County*, 517 F. Supp. 2d 925 (E.D. Ky. 2007): County residents challenged a display, on a county-courthouse wall, of the Ten Commandments and religious excerpts from other historical documents. After they filed suit, the county replaced the display with one identical to the final display examined by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). On the county's motion for summary judgment, the district court held that the individual plaintiffs had standing based on their past and continuing, direct contact with both the original and modified displays. The court then denied the motion because material factual issues on the merits remained in dispute.

American Atheists, Inc. v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007): To memorialize state troopers killed in the line of duty, Utah permitted a private organization to erect twelve-foot Latin crosses, each emblazoned with the Utah Highway Patrol logo. Each cross was placed near the site of a particular trooper's death, on state property adjacent to a highway. Three state residents sued, and the district court held that they had standing because they had frequent, direct, and unwelcome contact with the crosses, and would have had to alter their commutes to avoid such contact. On the merits, the court held that the crosses were constitutional.

American Atheists, Inc. v. *City of Starke*, No. 3:05-cv-977-J-16MMH, 2007 WL 842673 (M.D. Fla. Mar. 20, 2007). A Starke resident challenged the display of an illuminated cross, visible from at least a quarter-mile away, atop the city water tower, which

was also emblazoned with the city name and the high-school football team's logo. After holding that the plaintiff had standing because he could not travel in the city without encountering the cross, the district court concluded that the cross display was unconstitutional.

Cooper v. *United States Postal Serv.*, 482 F. Supp. 2d 278 (D. Conn. 2007): A postal customer challenged the display of various religious items in a contract postal unit operated by a church. The customer began using a different, more distant post office — and ultimately sued — after repeatedly encountering a wall display informing customers about Jesus and asking them to submit prayer requests; advertisements and a donation box for a missionary organization; a television monitor playing church-related religious videos; and various other religious items. The district court held that the displays were unconstitutional.

ACLU of Ohio Found., Inc. v. *Board of Comm'rs*, 444 F. Supp. 2d 805 (N.D. Ohio 2006): A lawyer in Lucas County challenged the display of a donated Ten Commandments monument, which was one of fourteen markers and monuments on the county-courthouse grounds. The district court held that he had standing because he encountered the monument in the course of practicing his profession and found the monument and its proximity to the courthouse offensive. On the merits, the court held that the monument was constitutional.

Twombly v. *City of Fargo*, 388 F. Supp. 2d 983 (D.N.D. 2005): Fargo residents challenged a Ten Commandments monument that was donated by a

private party in 1958 to commemorate an urban-renewal project, and was displayed on public land in the heart of the city. No other objects were displayed anywhere nearby; and private parties were not permitted to install permanent displays in that area. The district court held that the monument was constitutional.

Chambers v. *City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005): A Frederick resident who lived within eight blocks of a Ten Commandments monument challenged the city's sale of the monument and land beneath it to a private party, contending that the transaction failed to cure an existing constitutional violation (which had been the subject of an earlier suit that had led to the sale). The district court held that the sale had cured any violation.

Osediacz v. *City of Cranston ex rel. Rossi*, 344 F. Supp. 2d 799 (D.R.I. 2004), rev'd in part on other grounds, 414 F.3d 136 (1st Cir. 2005): A city opened a limited public forum for the display of holiday and seasonal decorations on the front lawn of city hall. When a menorah and crèche were among the first items placed, a city resident brought Establishment and Free Speech Clause claims. The district court ruled for the city on the Establishment Clause Claim, but it held the policy governing the public forum facially unconstitutional because it granted unbridled discretion over speech within the forum to the city's mayor. The First Circuit later reversed in part, concluding the plaintiff lacked standing to assert a free-speech claim because she never desired to erect a display on the lawn.

Staley v. *Harris County*, 332 F. Supp. 2d 1030 (S.D. Tex. 2004), appeal dismissed as moot, 485 F.3d 305 (5th Cir.) (en banc), cert. denied, 128 S. Ct. 647 (2007): A private religious organization donated to Harris County a memorial. The memorial consisted of a Bible, open and inclined toward the courthouse entrance, beneath a glass case atop a stone pedestal. An elected state judge, who had run on a campaign of putting Christianity back into government, used private funds to replace the Bible and encircle it in neon lights and the county then held a rededication ceremony. A lawyer who lived and paid taxes in the county, and who repeatedly encountered the monument in the course of her professional activities, filed suit. The district court concluded that the monument was unconstitutional. A panel of the Fifth Circuit affirmed, but then the en banc court dismissed the county's appeal as moot because the county had removed the monument while renovating the courthouse grounds. Because the county was responsible for mooting its own appeal, the en banc court declined to vacate the district court's decision.

Turner v. *Habersham County*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003): Two county residents, a Baptist minister and an atheist fireman, sued to enjoin the county's displays of the Ten Commandments in the county courthouse and natatorium. The district court held that both plaintiffs had standing based on their direct contacts with the displays, and that the displays were unconstitutional, notwithstanding that the county had added various other documents to each display after being sued.

Jocham v. *Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003): Non-Christian owners of a business located two blocks from the county courthouse challenged a private group's placement of a crèche on the courthouse lawn as part of a holiday display. The district court held that inclusion of the crèche was constitutionally permissible.

ACLU of Tenn. v. *Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002): County residents challenged a display of the Ten Commandments along with other historical documents in the county courthouse. The plaintiffs encountered the displays when they visited the courthouse to obtain and renew licenses, register property, pay local taxes, vote, and transact other business. The district court granted a preliminary injunction, later staying the litigation pending this Court's decision in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). After lifting the stay, the court held that the plaintiffs had standing based on their direct, personal contacts with the display, but declined to enter a permanent injunction on the existing record.

ACLU of Tenn. v. *Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002): Several county residents, including a rabbi and an individual who was engaged in ongoing litigation in county court, sued to enjoin solitary Ten Commandments plaques posted in three county-court buildings. Because the rabbi and the litigant had suffered unwelcome direct contact with displays in two of the buildings while participating in legal proceedings, the district court held that they had standing to challenge only those two displays. On the

merits, the court concluded that the displays were unconstitutional.

Kimbley v. *Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000): A county resident who drove past the courthouse a few times each week, and who frequently visited the genealogy room in its basement, challenged the installation on the courthouse lawn of a donated five-and-a-half ton, limestone monument imprinted with the Ten Commandments, Bill of Rights, and Preamble to the Indiana Constitution. The district court granted a preliminary injunction.

ACLU of Ohio, Inc. v. *City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998): City resident and the ACLU challenged the inclusion of a large Latin cross atop an open book on a city's seal (which also included a factory; a house; and a scroll, quill, and ink bottle). The district court held that the seal was unconstitutional.

Amacio v. *Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998): A Somerset resident challenged a holiday display consisting of a prominent crèche, lights, a wreath, a Christmas tree, and a plastic Santa Claus, on the Town Hall lawn. The district court concluded that the display was unconstitutional.

Harvey v. *Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd mem., 15 F.3d 1097 (11th Cir. 1994): A Jewish lawyer sued to enjoin the solitary display, on an interior wall of a county courthouse, of a panel inscribed with the Ten Commandments and a quote attributed to Jesus. The district court held that the plaintiff had standing based on his regular contacts

with the display, and that the display was unconstitutional.

Doe v. *Small*, 726 F. Supp. 713 (N.D. Ill. 1989), rev'd, 964 F.2d 611 (7th Cir. 1992) (en banc). A city resident sued to enjoin the winter-long display of 16 paintings depicting scenes from the life of Jesus, illuminated at night by streetlights, in a public park that she visited regularly when the paintings were not present. A private party erected the displays but placed them in permanent concrete foundations authorized by the city; in only one year had secular items and a disclaimer been displayed alongside the paintings. The district court enjoined the displays, but the Seventh Circuit concluded that the injunction was overbroad because it reached purely private speech.

ACLU of Cent. Ohio v. *County of Del.*, 726 F. Supp. 184 (S.D. Ohio 1989): Two individuals and the ACLU challenged the county's display of a nativity scene on a courthouse lawn during the winter holidays. The only other display was a small "peace tree" some ninety feet away. The district court held that the display was unconstitutional.

Mendelson v. *City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989): St. Cloud displayed a privately owned, illuminated cross atop its water tower, which was itself emblazoned with the city seal and a welcome message, and was visible throughout the community. A Jewish area resident sued, and the district court concluded that he had standing because he avoided areas of town and businesses lying "in the 'shadow of the cross'" and drove his daughter to school via a circuitous route to avoid viewing the cross. On the

merits, the court held the cross display unconstitutional.

Spacco v. *Bridgewater Sch. Dep't*, 722 F. Supp. 834 (D. Mass. 1989): Christian and Hindu public elementary-school students and their parents challenged the students' assignment to classrooms leased from a Catholic parish, where religious symbols and phrases adorned the building's common spaces and exterior walls, and a priest in robes greeted students as they entered the building. In granting a preliminary injunction requiring that the students be transferred to another school facility, the district court found that the presence of the various religious symbols at a public-school facility constituted a constitutional violation.

Jewish War Veterans of the U.S. v. *United States*, 695 F. Supp. 3 (D.D.C. 1988): A Jewish veterans' organization and one of its members challenged the display of a 65-by-35-foot, illuminated Latin cross, constructed with public resources, on a U.S. Marine Corps base. The district court held that the plaintiffs had standing because the individual avoided using services available on the base and had altered his routes of travel to avoid contact with the cross. On the merits, the court concluded that the display was unconstitutional.

Aitken v. *United States*, No. 86-0533, 1987 WL 49142 (D. Haw. Jan. 16, 1987): Plaintiffs of various faiths challenged the display of a 65-by-35-foot, illuminated Latin cross, constructed with public resources, on a U.S. Marine Corps base. The district court held that only one, a Jewish area resident who avoided traveling

on a highway from which the cross was visible, had standing. The plaintiffs later voluntarily dismissed the suit.

ACLU of Miss. v. *Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987): Each December, lights in a twenty-story state office building in downtown Jackson were left on or turned off, and curtains were drawn, to create an illuminated Latin cross that spanned the entire building. The cross could easily be seen from miles away, including from the major north-south arteries of the city. Several Jackson residents, including two from whose homes the cross was visible, sought a preliminary injunction. Because the illuminated cross affected the residents' use and enjoyment of a vast swath of the city — including, for two of them, their own homes — the court held that they had standing; and it issued a preliminary injunction.

Libin v. *Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985): Where a volunteer fire department's holiday display consisted of an illuminated cross, three wreaths, and a few strings of lights, citizens sought a preliminary injunction prohibiting the cross's display on the town-owned firehouse. The district court granted the preliminary injunction.

Greater Houston Chapter of the ACLU v. *Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), appeal dismissed, 755 F.2d 426 (5th Cir. 1985): A county commissioner installed a row of three, free-standing Latin crosses, with the center cross taller than the others, and later a Star of David, at a designated meditation site adjacent to a zoo in a public park. Two anonymous residents initially

challenged the display; but when the court required them to reveal their identities, they were replaced by several other, named residents. These included a Jewish woman who lived near the park, who encountered the symbols when visiting the zoo with her daughters, and who testified that she felt terrified and threatened by the symbols' presence. The court concluded that the display was unconstitutional.

Birdine v. *Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983): After discovering a desecrated cemetery on property condemned for highway construction, the Georgia Department of Transportation planned to preserve the graves and to install a statue of Jesus and several Latin crosses to recreate a graveyard feel. Several individuals who lived nearby, including some non-Christians, sued to enjoin the planned monuments. The district court held that they had standing because they would frequently encounter the monuments in the ordinary course of their routine activities. The court also concluded that the planned Jesus statue would be unconstitutional, but that because the State had changed its plan to permit surviving relatives of identified decedents to select appropriate burial markers for installation on the site, rather than simply using crosses for everyone, the plaintiffs' other claims were moot.

Ring v. *Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980): Several parents and their minor children sought to enjoin the implementation of a statute requiring the posting of placards bearing the Ten Commandments "of the Christian religion" in all

public-school classrooms in the state. The district court struck down the statute as unconstitutional.