No. 09-531

IN THE

Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

—v.—

JAMES W. GREEN, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

MICHEAL SALEM
SALEM LAW OFFICES
101 East Gray, Suite C
Norman, Oklahoma 73069
(405) 366-1234

CHARLES S. THORNTON
AMERICAN CIVIL LIBERTIES
UNION OF OKLAHOMA
FOUNDATION
3000 Paseo Drive
Oklahoma City, Oklahoma 73103
(405) 525-3831

DANIEL MACH
Counsel of Record
HEATHER L. WEAVER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
(202) 675-2330

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Blank Page

QUESTIONS PRESENTED

Whether the Tenth Circuit properly refused to abandon the contextual analysis long applied by this Court to religious displays in Establishment Clause cases, in favor of a blanket rule insulating virtually all governmental displays of Ten Commandments monuments from constitutional review?

Whether a person who regularly visits government land on which a sectarian religious symbol is displayed near the seat of local government, and thus comes into direct and unwelcome contact with that symbol, has Article III standing to bring an Establishment Clause challenge to the governmental display?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union of Oklahoma has no parent corporations, and no publicly held corporation owns ten percent or more of the American Civil Liberties Union of Oklahoma.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Blank Page

STATEMENT OF THE CASE

A. Factual Background

1. *Official Approval of the Haskell County Decalogue.* Haskell County's courthouse lawn stood without any religious monument for more than fifty years. In September 2004, however, in the wake of a nationwide furor over a large Ten Commandments monument placed in the Alabama State Judicial Building by Alabama Supreme Court Justice Roy Moore, the Haskell County Board of Commissioners approved the display of its own Decalogue. During one of the Board's regularly scheduled meetings, Pastor Mike Bush, a local lay minister, explained that "the Lord had burdened [his] heart" to ensure that a Ten Commandments monument was displayed on the courthouse lawn and requested the County's approval. Pet. App. 9a, 61a.[1] Bush presented no design plans or other written materials regarding his request, though he described the monument's proposed size and indicated that it would depict the Ten Commandments. Pet. App. 9a, 61a. After hearing Bush's religious plea, all three Board members – Chairman Sam Cole, Henry Few, and Kenny Short – immediately voted in favor of the proposed display. Pet. App. 9a; App. 1014, 1388. There was little discussion.[2] App. 1125; *see also* App.

---

[1] In this brief, "App. __" refers to pages in Appellants' Appendix previously filed in the Tenth Circuit on appeal. "Pet. __" and "Pet. App. __" refer to pages in the Petition for Writ of Certiorari and its appendix, respectively.

[2] Though Commissioner Few testified that the Board, at some point later, discussed "history" in relation to the monument, he could not remember whether the discussion occurred during or

1014. At the time, the Commissioners enjoyed unfettered discretion to accept or reject monuments for display for any reason. Pet. App. 60a; App. 1192; *see also* App. 1228-30, 1415 (Board had no written or unwritten policy governing the display of monuments on the courthouse lawn).[3] For example, Respondent James Green was denied permission in the 1990s to erect a rose garden in honor of all Stigler High graduates because the Board of Commissioners did not "want to clutter up the courthouse lawn." Pet. App. 60a.

2. *Designing and Erecting the Monument.* Pursuant to the Board's express directive, Bush began preparations for the monument's construction, raising funds with the help of Protestant religious leaders and local church groups. Pet. App. 62a. Though the district court found that the Board did not specifically review or approve Bush's design or text for the monument, Pet. App. 67a, in authorizing the display, the Commissioners fully anticipated not only that Bush would select a version of the Ten Commandments associated with his Southern Baptist beliefs, but that the engraved text would be

---

after the meeting. Neither Few nor any other witness, moreover, could recall any specific comment made or what aspects of "history" were addressed, and the meeting minutes, which were approved by the Board, did not reflect any such discussion. Pet. App. 9a; App. 385-87, 1130-33, 1249.

[3] Five months after this lawsuit commenced, the Board adopted a written policy regarding the display of monuments on county property. App. 1192. The district court determined, however, that the *post hoc* "policy, and its adoption, play[ed] no part in the outcome of this case." Pet. App. 60a n.3.

drawn from their personally favored version of the Bible – the King James edition. App. 402 (Cole testifying, "that's what we looked for, and that's what we got").[4] Consistent with the Board's expectation, Bush selected text paraphrased from Exodus 20 of the King James Bible. Pet. App. 10a, 64a. The monument, which is eight feet tall and three feet wide, states in bold black letters:

> The Ten Commandments
>
> I. Thou shalt have no other gods before me.
>
> II. Thou shalt not make unto thee any graven image.
>
> III. Thou shalt not take the name of the Lord thy God in vain.
>
> IV. Thou shalt remember the Sabbath day and keep it holy.
>
> V. Thou shalt honor thy father and mother.
>
> VI. Thou shalt not kill.
>
> VII. Thou shalt not commit adultry. [sic]
>
> VII. Thou shalt not steal.
>
> IX. Thou shalt not bear false witness against thy neighbor.
>
> X. Thou shalt not covet thy neighbor's house.
>
> Exodus 20

---

[4] Commissioner Cole testified that a different version of the Ten Commandments might have been treated differently. App. 403-04.

Pet. App. 7a. Bush also decided as "an afterthought" to add the text of the Mayflower Compact to the other side, motivated in part by a desire to stave off legal challenges and in part because it expressed the "sovereignty of God." Pet. App. 67a; App. 1022-28.

On November 5, 2004, the monument was permanently installed on the Haskell County Courthouse lawn.[5] Pet. App. 11a. The Commissioners selected its location – the front portion of the courthouse lawn – and marked the spot themselves. App. 412-13, 421. The side of the monument inscribed with the Ten Commandments faces Highway 9, Stigler's busiest thoroughfare, and abuts the walkway that leads to the front courthouse door. Pet. App. 11a, 57a, 63a; App. 940. In addition to the Ten Commandments monument, "a mélange of . . . monuments of various styles, sentiments and construction" are "[s]pread willy-nilly over the front lawn of the courthouse." Pet. App. 58a. Three monuments pay tribute to Haskell County citizens who died in World Wars I and II, the Korean War, and the Vietnam War; a fourth honors the Choctaw Nation; a fifth monument memorializes unmarked graves in Haskell County; and the remaining two monuments consist of stone benches in recognition of the High School Classes of 1954 and 1955. Pet. App.

---

[5] The Courthouse sits in Stigler, Haskell County's largest town, and houses the County's primary government offices, including the County Sheriff, District Attorney, Election Board, Assessor, and Judge. The County Commissioners hold their meetings at the courthouse, and citizens visit the building to vote, pay ad valorem taxes, access public records, and view historical records. Pet. App. 6a; App. 434-36, 942-44, 1327-28.

6a. A sidewalk on the lawn also contains individual bricks inscribed with messages from community members. Pet. App. 6a. The various monuments "have no apparent central theme to the amateur eye." Pet. App. 59a.

Approximately eighteen months after the monument was erected and unveiled, and six months after this lawsuit was filed, one additional change was made to the monument: Shortly before trial began and following a conversation with his attorney, Bush decided to have the words "Erected by Citizens of Haskell County" inscribed in small print at the bottom of the monument. Pet. App. 8a-9a; App. 1085, 1100-03.

3. *The Commissioners' Continuing Public Support for the Monument.* After approving the display of the Ten Commandments on the courthouse lawn, the Board continued to offer unqualified public support for the monument. Commissioners Cole and Few attended the monument's dedication, which was "mostly religious in nature." Pet. App. 62a. Though the Commissioners could not recall speaking at the event, according to Bush, who organized the ceremony, both Commissioners addressed the crowd of approximately 100-200 community members representing seventeen local churches.[6] Pet. App. 12a, 62a.

---

[6] Petitioners' assertion that "neither of the Commissioners who attended the ceremony spoke," Pet. 14, is not supported by the record. As the district court recognized, though both Commissioners denied speaking at the dedication, Bush testified that he remembered both addressing the crowd. Pet.

In addition, following the dedication ceremony, all of the Commissioners vigorously and publicly defended the monument, often in expressly religious terms. Local newspapers reporting on the controversy published numerous statements by the Commissioners regarding the monument. Pet. App. 12a-13a, 33a-34a; *see* App. 1230. Although the Commissioners subsequently disavowed many of these assertions during the litigation,[7] they admitted in their testimony that they had made the following public statements:

- "God died for me and you, and I'm going to stand up for him. . . . I won't say that we won't take [the monument] down, but it will be after the fight." Pet. App. 33a; App. 1412, 458-59.
- "That's what we're going to live by, that right there. . . . The good Lord died for me. I can stand for him and I'm going to. . . . I'm a

---

App. 62a; *see* App. 1098 ("I recall that both of them spoke, said something.").

[7] For example, though various news outlets quoted Commissioner Few as offering an identifiably religious defense of the County's display, at trial, Few did not confirm making the reported statements. *Compare, e.g.*, App. 1402 ("Whatever the law tells us to do, we'll do. We're also Christians and believe in God and the Ten Commandments are our path to heaven."), *with* App. 1173; App. 1400 ("My concern is that if we're not careful, Christians will sit here and not voice our opinions."), *with* App. 1168. Though the Commissioners denied making various remarks such as these when confronted with them during this litigation, they offered no evidence that they had ever disclaimed, sought to correct, objected to, or otherwise took actions to disassociate themselves from these widely reported comments.

Christian and I believe in this. I think it's a benefit to the community." Pet. App. 12a-13a; App. 1393, 455-56.

- "The good Lord, he died for you and me . . . I told him I would stand up for him anytime and I will." App. 456-57.
- "I don't believe in the separation of church and state." App. 1145-46, 1395-97.
- "I'm very, very proud that we have enough backbone to stand up for what we believe in. I believe the Good Lord put this up here, and I don't believe it will ever be taken down." App. 547, 471 (comment made while exiting Commissioners' meeting).

The Commissioners also posed together alongside the monument for myriad photographs. Pet. App. 12a, 53a; *see* App. 1160-61, 1256; App. 936, 960-63, 1015-20, 1331, 1386, 1390. They understood that these pictures were taken because they were elected officials, not merely as random community members, and that their actions would be construed by their constituents as defending the County's Ten Commandments monument. App. 1257-58; *see* App. 1161.

Furthermore, when a poster depicting a young girl praying before an American flag was affixed to the front door of the courthouse to publicize a rally to "Save the Ten Commandments," the Board – which "operates and controls county property," Pet. App. 61a, and thus could have ordered the poster removed to avoid any appearance of official endorsement of the event – took no action, permitting the poster to

remain for nearly three weeks on the front door of the courthouse. *See* Pet. App. 14a; App. 955-57, 1409, 1533-34. Yet, at the same time, when Respondent Green similarly tried to display on the courthouse door his own notice (regarding the placement of a proposed County jail), it was removed within twenty minutes. App. 958-59.

Commissioners Cole and Few also attended the rally, seating themselves above the gathered crowd in the lawn's gazebo with local Protestant pastors and other distinguished guests who had been invited to speak. App. 501, 505, 511, 1314. The rally was a thoroughly religious event that opened and closed with prayers, featured sermon-like speeches,[8] and even included an altar call of sorts, during which Bush, noting that "if one person got saved on account of this monument, this would all be worth it," invited those who had not been saved to meet at the gazebo right after the final prayer. App. 1519, 1525; *see generally* App. 1499-1527 (partial transcript of rally). Speaking at the rally,[9] Commissioner Few

---

[8] According to one media report and a transcript of the event, one of the featured pastors appeared to suggest to the crowd that those who disagreed with the monument were wise not to attend because they would be "hanging from the trees." App. 1404, 1514. *But see* App. 509 (Cole denying that any such comment was made at the rally).

[9] One witness who attended the rally testified at trial that, when Few rose to address the crowd, he began by referencing the fact that he was a County Commissioner (and noting that he had, consequently, been advised not to speak). App. 1311. On the same subject, Bush testified that, though he did not recall Few being introduced by the title of Commissioner, "everyone there knew him" and agreed that it was "pretty

proclaimed that anybody seeking to remove the monument would, quite literally, have to go through him first. Pet. App. 14a ("I'll stand up in front of that monument and if you bring a bulldozer up here you'll have to push me down with it.").

4. *Community Reaction to the Monument.* The Board's approval and installation of the Ten Commandments monument has deeply divided the community. Many citizens have cheered the monument as a defense of Christian values and religious beliefs. *See, e.g.*, App. 1404-05. For example, in a letter to the editor regarding the "controversial monument that the commissioners voted to be placed on the courthouse lawn," Commissioner Cole's wife wrote that she "was proud of the stand they took for God and these young people, whose lives have been changed by a personal experience with God." App. 551. *See also, e.g.*, App. 1488 (petition in support of monument signed "Beginning of wisdom is the fear of the Lord").

Almost immediately after the monument was erected, however, some community members also objected to the display, taking offense at what they perceived as the County's endorsement of the majority's religious beliefs. Plaintiff James Green,

---

much" understood that he was a Commissioner. App. 1104; *cf.* App. 533-37 (Cole testifying that as a County Commissioner, "[y]ou're on all the time" and agreeing that "you're a county commissioner 24 hours a day, 7 days a week"); App. 1114-15 (Few agreeing that he attends certain public events to keep up his profile as a Commissioner and remain recognizable to constituents in his district).

who encounters the monument on a regular basis, App. 942-44, testified:

> I simply have an objection to the – to the fact that they placed it where I cannot avoid it, and it has certain connotations to me as a person who has been brought up in the church and those connotations do not agree with my – with my theology. . . . My – my fear is that – of the monument being placed and being promoted and defended . . . by my government means that I'm going to be treated and people who do not subscribe to a particular faith that is represented by this monument, and that we're going to be treated differently and more harshly.

App. 951. Elaborating on his theological objection to the government's Decalogue display, Green explained that he believes the Ten Commandments conflict with or undermine the "later teachings of Jesus," to which he subscribes, in that they fail to promote principles stressed by Christ, such as love and forgiveness. App. 946. Green also testified that he believed the Board treated him unfairly in unrelated actions as a result of his differing religious beliefs and opposition to the monument. App. 951-59.

Another Haskell County citizen, Sharon Nichols, similarly explained that she felt discriminated against by the Board after making known her opposition to the monument. Nichols testified that when she called Commissioner Cole to register her complaint about the County's actions, Cole inquired whether she was "a Christian." After Nichols declined to respond, Cole informed her, "'I

don't talk to people who are not Christians' and hung up on [her]."[10] App. 1324-25. Others also registered their objections to the monument. *See, e.g.*, App. 479-82 (Cole testifying that a local Baptist minister had objected to Ten Commandments display).

B. Procedural History

Plaintiffs James Green and the ACLU of Oklahoma (collectively, "Plaintiffs" or "Respondents") filed this action in the U.S. District Court for the Eastern District of Oklahoma on October 6, 2005, against Defendants, the Haskell County Board of Commissioners and its then-Chairman, Sam Cole, acting in his official capacity (collectively, "Defendants," the "County," "Haskell County," or "Petitioners"). Seeking a declaratory judgment and prospective injunctive relief pursuant to 42 U.S.C. §1983, Plaintiffs alleged that Defendants had violated the First and Fourteenth Amendments to the U.S. Constitution by displaying the Ten Commandments monument on the county

---

[10] The district court admitted this testimony into evidence, Pet. App. 75a-77a, but gave it minimal weight in resolving the merits, questioning Nichols's credibility because her other testimony was not "dispassionate" enough and determining that the defendants did not have a fair opportunity to rebut it before Cole's death. Pet. App. 75a-77a. Respondents argued in the court of appeals that the district court's ruling constituted plain error: As Nichols gave this information at her deposition on March 2, 2006, the defendants could have attached an affidavit from Cole denying the allegations when they filed their motion for summary judgment two weeks later on March 13, 2006. The Tenth Circuit did not address the issue and did not rely on this fact in its decision.

courthouse lawn. App. 731. After Cole's death on March 18, 2006, the parties substituted Commissioner Henry Few as a named Defendant. App. 732. Thereafter, Commissioner Kenny Short was substituted for Few on March 13, 2007, when Few lost his reelection bid. On April 11, 2006, the district court denied the parties' cross-motions for summary judgment. App. 718-19. The court held a two-day bench trial beginning May 1, 2006.

On August 16, 2006, the district court issued an opinion granting final judgment to Defendants. Pet. App. 56a. The opinion, framed by repeated allusions to Dante's *Divine Comedy*, trivialized Plaintiffs' constitutional claims, labeling the entire dispute a "kerfuffle." Pet. App. 56a. In Cantica II, Canto B of its opinion, the court held that Plaintiff Green had standing to assert his claim, but ruled that the ACLU of Oklahoma had failed to meet the requirements for associational standing because Plaintiffs had not submitted evidence that the interests implicated by the lawsuit were germane to the ACLU of Oklahoma's purpose. Pet. App. 85a. In Cantica III of its opinion, the district court concluded that "Haskell County did not overstep the line demarcating government neutrality towards religion," and thus did not violate the Establishment Clause. Pet. App. 108a.

On September 14, 2006, Plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Tenth Circuit. App. 925. On June 8, 2009, a panel of the Tenth Circuit unanimously reversed the district court's order. The Court affirmed Plaintiff Green's standing and found it unnecessary to address

whether the ACLU of Oklahoma had standing. Pet. App. 15a. In reaching its conclusion that the County's Ten Commandments monument violated the Establishment Clause, the Tenth Circuit conducted a thorough and detailed analysis of the context and circumstances surrounding the display to determine whether it improperly conveyed a predominantly religious message. *See* Pet. App. 27a-28a. Among other factors, the court of appeals examined "the nature and history of the Haskell County community, the circumstances surrounding the Monument's placement on the courthouse lawn, its precise location on the lawn and its spatial relationship to the other courthouse monuments, and also the Haskell County community's response to the Monument." Pet. App. 30a. Considering the "record as a whole," Pet. App. 45a, the court held that, "under the unique circumstances presented here," the monument "had the impermissible or primary effect of endorsing religion."[11] Pet. App. 5a. The court repeatedly emphasized that its narrow decision did not turn on any one fact, but rather was the

---

[11] Formally, the Tenth Circuit characterized this contextual analysis as an application of the second prong of the *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), with Justice O'Connor's endorsement gloss. Pet. App. 23a. The court, however, "remain[ed] mindful [of Justice Breyer's admonition in *Van Orden v. Perry*, 545 U.S. 677 (2005)] that there is 'no test-related substitute for the exercise of legal judgment.'" Pet. App. 23a. Having concluded that the monument violated the second prong of *Lemon*, the court explained, "[W]e need not (and do not) opine on whether the Board's action satisfies the first *Lemon* prong (i.e., whether the Board's purpose was secular)." Pet. App. 25a-26a.

result of the particular combination of facts in this case. *See* Pet. App. 31a n.10, 37a, 39a, 45a. Indeed, had the Tenth Circuit been presented with a set of facts evincing a context different from the circumstances here, it might have reached a different result in light of its conclusion that "[t]he Ten Commandments have a secular significance that government may acknowledge" and thus can "be constitutionally integrated into a governmental display that highlights [their] secular significance." Pet. App. 27a.

On June 19, 2009, the defendants filed a petition for rehearing *en banc*, which was denied on July 30, 2009. Pet. App. 112a-113a. Two judges wrote dissenting opinions. Pet. App. 113a-144a. On August 17, 2009, the district court entered judgment against Defendants and ordered the County to remove the monument. Judgment, *Green v. Haskell County*, No. 05-406 (E.D. Okla. Aug. 17, 2009). To Respondents' knowledge, as of this filing, the County has not complied with the district court's order and the monument remains on the courthouse lawn.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S CONTEXTUAL APPROACH IS CONSISTENT WITH THIS COURT'S RELIGIOUS-DISPLAY JURISPRUDENCE AND THE FACT-SENSITIVE STANDARD APPLIED BY THE OTHER CIRCUIT COURTS.

Petitioners mistake the divergent outcomes in several circuit courts' religious-display decisions for a conflict in legal principle. That the Tenth Circuit "became the first circuit court since *Van Orden* [*v. Perry*, 545 U.S. 677 (2005)] to . . . strike down a Ten Commandments monument displayed on government grounds with other historical monoliths," as Petitioners proclaim, Pet. 11, is noteworthy only if one reads *Van Orden* as dispensing with, or radically departing from, the defining feature of modern Establishment Clause jurisprudence: contextual analysis. Whether grounded in the *Lemon*, endorsement, or coercion tests, or a combination of these legal standards, this Court's opinions have repeatedly recognized that, "under the Establishment Clause, detail is key." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005); *see also, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . ."); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one.").

Context has been particularly central to the Court's analysis of religious displays because, in

those cases, the constitutional inquiry ultimately focuses on whether the government's speech conveys or endorses a predominantly religious message – a determination that is inextricably linked to the specific history, facts, and circumstances surrounding the challenged display. *See McCreary*, 545 U.S. at 868 ("Where the text [of the Ten Commandments] is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view."); *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) ("the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context"); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("the focus of our inquiry must be on the crèche in the context of the Christmas season"); *id.* at 690 ("we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the City's display actually conveyed") (O'Connor, J., concurring). The Tenth Circuit and other courts of appeals have faithfully heeded this fact-sensitive approach. Though Petitioners may not like the result it produced in this case, their disagreement is not grounds for review by this Court.

A. *Van Orden* Did Not Abandon the Court's Contextual Focus.

Van Orden does not support abandoning a contextual approach in favor of a blanket rule that so-called "passive displays of the Ten

Commandments, along with other historical monuments on government property, do not violate the Establishment Clause." Pet. 10. Quite the contrary: In his controlling concurrence,[12] Justice Breyer expressly reaffirmed a contextual standard, noting that "no exact formula can dictate a resolution to such fact-intensive cases." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Justice Breyer's inquiry into the "message that the [monument] here conveys," accordingly, took account of a wide range of contextual factors. *See id.* at 700-05. And although Justice Breyer voted to uphold the Texas display, it follows from his characterization of the monument as a "borderline case," *id.* at 700, that any change in circumstance easily could have prompted the opposite result. *Cf. McCreary*, 545 U.S. at 881 (holding display of Ten Commandments unconstitutional in same-day companion opinion).

While more circumscribed than Justice Breyer's expansive fact-sensitive analysis, the *Van Orden* plurality likewise used a contextual approach, explaining, "our analysis is driven by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686 (plurality opinion). In upholding the monument, the plurality took note of the monument's physical location (contrasting the Capitol grounds with a public-school classroom); the reaction of those confronted with the monument (pointing out that Van Orden had "apparently

---

[12] Because *Van Orden* was decided by a plurality, the separate, narrower concurring opinion of Justice Breyer, who supplied the decisive fifth vote, controls. *See Marks v. United States*, 430 U.S. 188 (1977).

walked by the monument for a number of years before bringing this lawsuit"); the monument's fit within the State's longstanding and well-established theme for the Capitol grounds (citing the State's past treatment of the grounds "as representing the several strands in the State's political and legal history"); and the purpose with which the monument was erected (concluding that "it is clear from the record that there is no evidence of such a [religious] purpose in this case"). *See id.* at 691-92 & n.11.

Van Orden thus left the prevailing constitutional landscape intact. It surely did not, as Petitioners appear to suggest, authorize the courts of appeals to dispense with the fact-sensitive and nuanced analysis this Court has long applied to religious displays, in favor of a categorical imperative sanctioning any display that may share some similarities with the Texas Ten Commandments monument.

B. The Differing Results in the Circuit Courts' Religious-Display Cases Stem From Their Factual Differences, Not a Split in Legal Principle.

Consistent with *Van Orden* and this Court's steadfast emphasis on context, the Tenth Circuit conducted a careful and balanced analysis of the particular facts and circumstances surrounding the Haskell County monument to determine whether it conveys a religious message, repeatedly "underscoring the proposition that '[c]ontext carries much weight in the Establishment Clause calculus.'" Pet. App. 48a (quoting *Weinbaum v. City of Las*

Cruces, 541 F.3d 1017, 1033 (10th Cir. 2008)).[13] Each of the other courts of appeals to consider a Ten Commandments display since *Van Orden* likewise has adopted a contextual approach, considering a range of factors to determine whether the challenged monument improperly conveyed a religious message. *See ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) ("Context is crucial . . . ."); *id.* at 639 ("Although treating the subject matter categorically would make our review eminently simpler, we are called upon to examine Mercer County's actions in light of context."); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (en banc) ("[C]onsideration must be given to the context in which the Ten Commandments' text is used."); *Card v. City of Everett*, 520 F.3d 1009, 1019 (9th Cir. 2008) (noting that Justice Breyer examined "'the message that the text . . . conveys . . . [in] the context of the display'" and "[v]iewing Justice Breyer's factual analysis side by side with the factual circumstances here") (quoting *Van Orden,* 545 U.S. at 700-01) (Breyer, J., concurring).

---

[13] *See also, e.g.*, Pet. App. 26a ("Establishment Clause cases are predominantly fact-driven . . . .") (internal quotation marks and citation omitted); *id.* at 30a ("Consistent with the fact-intensive nature of this effect inquiry, the Supreme Court has advised that, in Establishment Clause cases, the inquiry calls for line drawing; no fixed, per se rule can be framed.") (internal quotation marks and citation omitted); *id.* at 31a n.10 ("the analysis must undertake a significant inquiry into the surrounding circumstances").

In light of the contextual approach taken by both this Court and the courts of appeals, it is hardly remarkable or unexpected that the Tenth Circuit in this case held the Haskell County display unconstitutional, while the Sixth, Eighth, and Ninth Circuits approved the specific Ten Commandments monuments before them. Those displays were defined by a particular combination of constitutionally significant and operative facts not shared by the County's monument, and *vice versa*. Unlike the Haskell County monument, for example, both the *Card* and *Plattsmouth* Decalogues were (1) donated by a civic group to achieve a primarily secular goal; (2) engraved with a nonsectarian version of the Ten Commandments, as well as a prominent inscription indicating that they were gifts to the city; (3) accepted and displayed by the city without clear evidence of an expressly religious aim; and (4) displayed for decades without complaint. *Compare Card*, 520 F.3d at 1010-13, 1020-22, *with Plattsmouth*, 419 F.3d at 773-74; *cf. infra* pp. 26-31 (identifying numerous factual distinctions between the Haskell County and *Van Orden* displays). Similarly, the context and circumstances surrounding the display of the Ten Commandments upheld by the Sixth Circuit in *Mercer* are readily distinguishable from those associated with Petitioners' monument.[14] The copy of the Ten

[14] Petitioners' claim that the court of appeals disregarded "'the role religion has played in our governmental institutions'" and declared it generally unacceptable "'for a state to include religious references, even in the form of sacred texts, in honoring American legal traditions,'" thereby creating a "[c]onflict with the Sixth Circuit," *see* Pet. 23-24 (quoting

Commandments posted in the Mercer County Courthouse was part of a unified "Foundations of American Law and Government" exhibit, which was maintained by the County "to recognize American legal traditions," without any additional indication of an express religious message. *See Mercer*, 423 F.3d at 631-32, 637-38.

Nor is it surprising that the courts of appeals upheld the religious displays addressed in the pre-*McCreary/Van Orden* cases relied on by Petitioners, *Books v. Elkhart County* ("*Books II*"), 401 F.3d 857 (7th Cir. 2005), and *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997). These courts also applied a contextual analysis to the challenged displays, reaching conclusions that turned entirely on the particular facts of those cases. *See Books II*, 401 F.3d at 865 (court must examine "'the particular display at issue, considered in its overall context'") (quoting *Books v. City of Elkhart* ("*Books I*"), 235 F.3d 292, 303 (7th Cir. 2000)); *Elewski*, 123 F.3d at 52 ("Establishment Clause case law applies a highly fact-specific test to government-sponsored crèches[.]"). As in *Mercer*, the *Books II* Ten Commandments display constituted only one element of a thematically unified "Foundations of

---

Mercer, 423 F.3d at 639-40), is simply not supported by the Tenth Circuit's opinion. On the contrary, refusing to adopt a constitutional presumption against Ten Commandments displays, the court of appeals expressly recognized that "[t]he Ten Commandments have a secular significance that government may acknowledge," and that such displays can, depending on their context, broadcast a permissible secular message. Pet. App. 27a-28a.

American Law and Government" exhibit, which was posted by the county without any identifiable religious aim. *See* 401 F.3d at 864-68. Similarly, in considering the crèche challenged in *Elewski*, the Second Circuit viewed the city's simultaneous display of artificial greenery, wreaths, colored lights, decorated trees, reindeer, snowman, wire bells, and a menorah as "part of the relevant context." 123 F.3d at 54. Though spread farther apart than the monuments on the Haskell County lawn, these elements all fit within a very specific, identifiable, and unified theme: a holiday celebration. *See id.* at 54-55. By contrast, while acknowledging that "a reasonable observer would have noticed that the [Haskell County] Monument was one of numerous other monuments and displays on the courthouse lawn," which "would typically weigh against a finding of endorsement," the Tenth Circuit could not ignore the fact that the other monuments here lacked a "unifying, cohesive secular theme." Pet. App. 39a, 42a n.16.

As the cases relied on by Petitioners demonstrate, differing outcomes do not always equate to a conflict in legal principle, especially where, as here, the outcomes depend so heavily on the particular facts and context of each challenged action. Indeed, were it otherwise, many of the appellate decisions cited by Petitioners would present *intra*-circuit splits, as the same courts of appeals have held other governmental religious displays unconstitutional. *See, e.g.*, *Cooper v. USPS*, 577 F.3d 479 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3322 (U.S. Nov. 17, 2009) (No. 09-608);

ACLU of Ohio Found. v. Ashbrook, 375 F. 3d 484 (6th Cir. 2004); *Books I*, 235 F.3d 292. At its core, the legal standard derived from this Court's opinions and applied by the courts of appeals is no different now than it was before *Van Orden*. The confusion or conflict, if any, rests more with the circuit courts' disagreement over the appropriate nomenclature for this contextual analysis than the actual substance of the analytical process itself.

C. Petitioners' Disagreement With the Result of the Tenth Circuit's Contextual Analysis Does Not Warrant Review by This Court.

As their proposed "substantial similarities" analysis illustrates, even Petitioners ultimately do not take issue with the Tenth Circuit's contextual approach; indeed, in suggesting that the *Van Orden* and Haskell County monuments are "virtually identical," they explicitly compare the contextual circumstances surrounding both displays.[15] Pet. 13. Petitioners' objection is, instead, one of application – or rather, misapplication. Put simply, Petitioners

---

[15] Petitioners compare a variety of contextual factors, including: who initiated, financed, and determined the content and location of the displays; the actual text of the monument; the physical setting of the monument and surrounding displays; the purpose of the donors; and officials' attendance at the monument's dedication ceremony. *See* Pet. 13-14. Though this cherry-picked list of purportedly "substantial similarities" between the two monuments tells only half the story and elides a catalogue of undisputed facts that speak to the substantial *dis*similarities between the two cases, *see infra* pp. 26-31, it evinces Petitioners' acceptance of a context-based analysis.

contend that the court of appeals weighed the facts incorrectly. They argue, in essence, that the court gave too much weight to some contextual factors and not enough weight to others, thereby reaching the wrong result. Were it conducting the contextual analysis, the County clearly would place great emphasis on the "operative facts" listed in its petition, Pet. 13-14, while according little significance to a litany of other factors that (1) distinguish this case from *Van Orden* and the circuit courts' subsequent religious-display decisions, and (2) counsel in favor of a determination that the County's display conveys a religious message. *See* Pet. 13-14. Petitioners' alleged "misapplication of a properly stated rule of law," however, is generally not an adequate basis for review by this Court,[16] especially where, as here, it is clear that the court of appeals reached the correct result.

II. THE COURT OF APPEALS REACHED THE CORRECT RESULT IN THIS CASE.

The myriad facts distinguishing the Haskell County monument from the displays upheld in *Van Orden*, *Card*, *Plattsmouth*, *Mercer*, *Books II*, and *Elewski* did not escape the Tenth Circuit's attention. Conducting a balanced and nuanced review of the monument's context and carefully weighing the facts

[16] *See* Sup. Ct. R. 10 (2007) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

on both sides,[17] the court issued a narrow decision that turned on the particular combination of "unique circumstances" in this case. Pet. App. 5a. No one factor considered by the court was determinative; rather, the court of appeals reached its conclusion based on the "record as a whole." Pet. 45(a); *see, e.g.*, Pet. App. 31a n. 10 (noting that while "[t]he reasonable observer would be very unlikely . . . to give the Board's agreement [with Bush] determinative weight . . . [he or she] could not negate this circumstance as one in the *totality of circumstances* that was consistent with a conclusion that the Board's conduct had the effect of endorsing religion") (emphasis added); Pet. App. 37a ("We underscore that the reasonable observer's impression

---

[17] Though the court of appeals disagreed with the legal conclusions drawn by the district court from its factual findings, the Tenth Circuit deferred to the factual findings themselves. *See, e.g.*, Pet. App. 6a n.2 ("Our recitation of the facts relies largely on the district court's factual findings in its opinion issued after the bench trial."). In other words, the court of appeals left undisturbed all of the district court's factual findings regarding, for example, the physical description of the courthouse lawn and the monument itself, the events leading to the County's adoption and erection of the display, and the content of the County Commissioners' public statements in defense of the monument. Whether those facts collectively amount to an Establishment Clause violation, however, is fundamentally a legal question that the court of appeals properly reviewed *de novo*. *Cf. McCreary*, 545 U.S. at 867 (district court's legal rulings reviewed *de novo*). Because neither Petitioners nor the court of appeals takes issue with any of the district court's factual findings, the standard of review applied to those findings, even if the subject of a circuit split, as Petitioners claim, see Pet. 28-29, has no bearing on the outcome here.

of government endorsement would not be based upon the commissioners' statements alone."); Pet. App. 37a n. 12 (noting that inferences drawn from Board's failure to offer secular reason for display "would not be determinative by any means, but it would be one factor, among many others, that the reasonable observer could consider in reaching a conclusion on the endorsement issue"); Pet. App. 39a ("We recognize that certain evidence weighs against a finding of endorsement. However, *surveying the entire record,* we cannot conclude that this evidence sufficiently blunts the message of endorsement that we find to be present to alter the result.") (emphasis added).

Given this Court's ongoing, consistent embrace of context as a measure of constitutionality, even if the Tenth Circuit had viewed this case solely through the lens of *Van Orden,* as Petitioners demand, Haskell County's Ten Commandments monument still would not have passed constitutional muster because there are significant, material distinctions between this display and the monument in *Van Orden.* Unlike in *Van Orden,* for example, the monument donor in Haskell County was unequivocal in stating his "unalloyed religious motivation"; Board members appeared immediately to affirm this singular religious purpose; and until litigation commenced, Board members neither gave any indication, collectively or individually, that they intended for the display to serve a secular purpose, nor otherwise distanced themselves from the religious origin of the monument. *Compare* Pet. App. 31a n. 10; *supra* pp. 1-8, *with Van Orden,* 545 U.S. at

701 (Breyer, J., concurring) (explaining that the Fraternal Order of Eagles is a "civic (and primarily secular) organization" that "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency"); *id.* (citing official resolution recognizing secular purpose).[18] Quite the opposite: Haskell County Board members publicly declared their support for the monument in expressly religious terms and posed together beside the monument, "giv[ing] the impression of the Board's united endorsement."[19] *See* Pet. App. 33a-35a; *supra*

---

[18] There is no evidence that this resolution expressed approval of the organization's religious aspects, as Petitioners imply. *See* Pet. 14; *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *4 (W.D. Tex. 2002) (setting forth text of resolution), *aff'd*, 351 F.3d 173 (5th Cir. 2003), *aff'd*, 545 U.S. 677 (2005).

[19] The Court properly considered these statements and photos as part of its contextual analysis. Petitioners' reliance on *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), in arguing to the contrary, is misplaced. That opinion is an outlier decision from the Eighth Circuit that predates this Court's decisions in *Lee*, *Santa Fe*, *McCreary*, and *Van Orden*, which all expressly reaffirmed the import of history and context in Establishment Clause cases. *See supra* pp. 15-18. Moreover, this Court has repeatedly factored officials' public statements, along with other publicly available information, into its contextual analysis. *See, e.g.*, *McCreary*, 545 U.S. at 851 (citing statements made by a county official and his pastor at a religious dedication ceremony); *Edwards v. Aguillard*, 482 U.S. 578, 587, 590-93 (1987) (treating legislators' statements as compelling evidence that challenged statutes had been enacted for improper purpose); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 & n.16 (1968) (pointing to letters from the public and advertisements used to secure adoption of an Arkansas anti-evolution statute to highlight its religious aims). In considering these facts, the

pp. 5-9. In addition, unlike in *Van Orden*, the dedication ceremony attended by Board members was "mostly religious," as was the Save the Commandments rally at which Commissioner Few declared that he would lie down in front of a bulldozer to protect the monument. *Compare supra* pp. 5, 7-9, *with Van Orden v. Perry*, 351 F.3d 173,179-80 (5th Cir. 2003) ("There is no evidence of any religious invocations or that any minister, rabbi, or priest were even present."), *aff'd*, 545 U.S. 677 (2005).

Furthermore, as even the district court recognized, the courthouse lawn contains a "mélange" of monuments that are "spread willy-nilly over the front lawn of the Courthouse" and "have no apparent central theme to the amateur eye." Pet. App. 58a-59a. This haphazard physical arrangement supported the Tenth Circuit's conclusion that the

---

court of appeals did not impose a heightened Establishment Clause standard on small-town government officials. *See* Pet. 26-27. Rather, taking into account Petitioners' own admission that Board members act as county officials "24 hours a day, 7 days a week," *supra* note 9; the content and nature of the Commissioners' statements; and the fact that the Commissioners made no attempt to distinguish between their beliefs and those of the Board, the court properly concluded that a reasonable observer would be more likely to perceive religious endorsement under these particular circumstances. In any event, the Tenth Circuit did not consider these statements to be determinative of its conclusion. *See* Pet. App. 37a ("We underscore that the reasonable observer's impression of government endorsement would not be based upon the commissioners' statements alone. The statements would be just part of the history and context of which the reasonable observer would be cognizant.").

monuments have "less of a unifying cohesive secular theme" than those in *Van Orden* such that "the Haskell County courthouse display was at least to some appreciable degree less likely than the *Van Orden* display to bring to the fore the secular historical and moral messages of the Ten Commandments." *See* Pet. App. 42a n. 16. Additionally, in contrast to the *Van Orden* display, the Haskell County monument did not include a statement indicating it was donated to the County when it was erected – a detail omitted in Petitioners' comparison of the two cases. *See* Pet. 13. The language was added only "*after* litigation had begun and on the eve of trial." *Compare* Pet. App. 48a, *with Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring) (noting that monument "prominently acknowledge[d] that the Eagles donated the display, . . . thereby further distanc[ing] the State itself from the religious aspect of the Commandments' message").

Finally, unlike in *Van Orden*, the Haskell County monument incited discord in the community almost immediately after it was erected. While the Texas monument stood for forty years without challenge, the County's display prompted litigation within months of its unveiling. *Compare Van Orden*, 545 U.S. at 702 (Breyer, J., concurring), *with supra* pp. 9-11. This fact is significant under *Van Orden* not because the age of a monument or the length of time it goes unchallenged are dispositive, in and of themselves,[20] but because these factors serve as

[20] The court of appeals did not make this factor "determinative," as Petitioners claim. Pet. 16. Rather, the court was describing

barometers for the divisiveness of the display. This, in turn, provides insight into what message the community has "understood the monument" to convey. *Van Orden*, 545 U.S. at 702-03 (Breyer, J., concurring). Here, the Commissioners, along with many other members of the Haskell County community, have vigorously defended the monument in staunchly religious terms, understanding it to be an affirmation of the community's faith and the majority religious beliefs. *See supra* pp. 6-9.

As a review of the full panoply of facts reveals, this case can hardly be characterized as "virtually identical" to *Van Orden*. *See* Pet. 13. If the Texas Ten Commandments monument straddled the "borderline" of constitutional boundaries, as Justice Breyer concluded in *Van Orden*, 545 U.S. at 700

Justice Breyer's treatment of that fact in *Van Orden*. Pet. App. 44a. In the next paragraph, where the court of appeals discussed the age of the Haskell County monument, the court clarified that it was "viewing the record as a whole." Pet. App. 45a. Moreover, this factor was "determinative" in *Van Orden* only in the sense that the lack of divisiveness there, when added to the other contextual factors highlighting the monument's secular message and downplaying its religious meaning, cemented Justice Breyer's conclusion that the display was permissible. *Van Orden*, 545 U.S. at 702-04. Justice Breyer did not, as Petitioners suggest, hold that the passage of time or age of a monument can insulate all Establishment Clause violations, however egregious, from review, nor would his analysis render successful every possible challenge to recent government activity. *See* Pet. 16-17. Instead, his discussion simply highlights that the likely "divisive" nature of a "more contemporary state effort to focus attention upon a religious text" should be factored into the contextual analysis. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring).

(Breyer, J., concurring), there can be little question that the Haskell County display steps over that line,[21] violating the Establishment Clause and rendering any dispute over the precise governing analytical framework irrelevant to the outcome of this case. Accordingly, because resolution of the circuit split alleged by Petitioners, even if it existed, would have no bearing on the ultimate result here, this Court should deny *certiorari* and wait until presented with a case in which resolution of the conflict below would be determinative. *See* Eugene Gressman, et al., *Supreme Court Practice* 248 (9th ed. 2007) (where the "resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied") (citing *Sommerville v. United States*, 376 U.S. 909 (1964)).

III. THE TENTH CIRCUIT'S STANDING DETERMINATION IS UNEXCEPTIONAL AND DOES NOT WARRANT REVIEW BY THIS COURT.

Both the district court and the court of appeals agreed that Respondent Green has standing to bring this case. As the district court held, Green "disagrees theologically with the Monument, and is confronted with the Monument when compelled to go to the

---

[21] This conclusion is even more evident when a number of additional relevant factors not even considered by the court of appeals are added to the contextual analysis, including: the numerous statements attributed to the Commissioners in the media, later denied in litigation, *see supra* p. 6 & n.7; and Commissioner Cole's discriminatory treatment of Susan Nichols, *see supra* pp. 10-11.

courthouse for business." Pet. App. 84a. That is all he is required to show. Green does not, contrary to the County's assertions, object primarily to the Commissioners' statements regarding the monument. *See* Pet. 30. Rather, as he testified and both the district court and the Tenth Circuit acknowledged:

> Green is offended by the monument because he believes its text is presented as a mandate and is thus an endorsement by the government of religious matters. He objects to the text of the Ten Commandments etched into the monument because he subscribes to the later teachings of Jesus. . . . Green also believes that his opposition has caused Commissioner Sam Cole to destroy or ignore Green's open records request, his request for hearing impairment assistance, and his petition regarding the location of the new county jail.

Pet. App. 69a; *accord* Pet. App. 13a.

Unable to support their argument that Green has "not proved sufficient facts to establish standing," Pet. 30, Petitioners instead ask this Court to rewrite the basic, time-honored principle that observers who are personally and directly confronted and affected by unwelcome governmental displays of religious symbols have standing to challenge those displays. That principle has never been rejected in any Establishment Clause decision involving religious displays, either in this Court or any federal

court of appeals.[22] Accordingly, the issue of Green's standing does not warrant this Court's review.

[22] *See, e.g.*, *McCreary*, 545 U.S. at 844-80; *Van Orden*, 545 U.S. at 677-692 (plurality opinion) & 698-706 (Breyer, J., concurring); *Weinbaum*, 541 F.3d at 1028-29; *Vasquez v. L.A. County*, 487 F.3d 1246, 1249-53 (9th Cir. 2007); *Modrovich v. Allegheny County*, 385 F.3d 397, 399-415 (3d Cir. 2004); *Plattsmouth*, 419 F.3d at 775 n.4; *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002); *Books I*, 235 F.3d at 299-301; *Suhre v. Haywood County*, 131 F.3d 1083, 1090 (4th Cir. 1997); *Murray v. City of Austin*, 947 F.2d 147, 150-52 (5th Cir. 1991); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107-08 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully Submitted,

Daniel Mach
Counsel of Record
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
(202) 675-2330

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

Micheal Salem
SALEM LAW OFFICES
101 East Gray, Suite C
Norman, OK 73069
(405) 366-1234

Charles S. Thornton
AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA FOUNDATION
3000 Paseo Drive
Oklahoma City, OK 73103
(405) 525-3831