No. ____

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

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QUESTIONS PRESENTED

The Tenth Circuit held that the inclusion of a Ten Commandments monument amidst other privately donated historical monuments on a county courthouse lawn violated the Establishment Clause of the First Amendment, despite this Court's decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Tenth Circuit then denied rehearing *en banc* on an equally divided, 6-6 vote. The questions presented are:

1. Did the Tenth Circuit err by holding in conflict with *Van Orden* and recent decisions in the Ninth and Eighth Circuits, that it violated the Establishment Clause to include a monument passively acknowledging the historical significance of the Ten Commandments among other privately donated historical monuments?

2. Did the Tenth Circuit err by invoking an *uninformed and mistaken* "reasonable observer" in applying the endorsement test, in conflict with the *well-informed* "reasonable observer" employed by the Second, Sixth, Seventh, and Eighth Circuits in Establishment Clause cases?

3. Did the plaintiff, as an un-coerced "offended observer," lack Article III standing?

PARTIES

Petitioners Haskell County Board of Commissioners (also known as Board of County Commissioners of Haskell County, Oklahoma) and Kenny Short, in his official capacity as chairman of the Haskell County Board of Commissioners, were the Defendants-Appellees before the Tenth Circuit.

Respondent James W. Green was a Plaintiff-Appellant before the Tenth Circuit. The American Civil Liberties Union of Oklahoma was a Plaintiff in the United States District Court for the Eastern District of Oklahoma. The District Court held that the ACLU lacked standing. Appendix 85a ("App."). The Tenth Circuit held that the ACLU's argument to the contrary was "inadequately raised," and did not address it. App. 15a n.5.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND POLICIES 1

STATEMENT OF THE CASE 2

A. Facts Material to Consideration of the Questions 2

B. Course of Proceedings 6

REASONS FOR GRANTING THE WRIT 9

I. THE TENTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE NINTH AND EIGHTH CIRCUITS – ALL OF WHICH HELD THAT PASSIVE DISPLAYS OF THE TEN COMMANDMENTS, ALONG WITH OTHER HISTORICAL MONUMENTS ON

GOVERNMENT PROPERTY, DO NOT VIOLATE THE ESTABLISHMENT CLAUSE . 10

A. Conflict with *Van Orden* and Inapplicability of *McCreary*. 11

1. *Van Orden*'s facts are virtually identical to those in this case. 13

2. *McCreary* does not apply to passive acknowledgements of religion. 17

B. Conflict with the Ninth Circuit's Decision in *Card v. City of Everett* 19

C. Conflict with the Eighth Circuit's Decision in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska* 21

II. THE DECISION BELOW MISAPPLIED THE ENDORSEMENT TEST AND CREATED A SPLIT BETWEEN THE TENTH CIRCUIT, AND THE SECOND, SIXTH, SEVENTH, AND EIGHTH CIRCUITS. 22

A. Conflict with the Second Circuit 23

B. Conflict with the Sixth Circuit 23

C. Conflict with the Seventh Circuit 24

D. Conflict with the Eighth Circuit 25

E. Conflict on the Standard of Review 28

III. THE PLAINTIFFS HAVE NOT PROVED SUFFICIENT FACTS TO ESTABLISH STANDING. 30

CONCLUSION 33

APPENDIX

Appendix A: Tenth Circuit Opinion, dated June 8, 2009 . . . . . 1a

Appendix B: District Court Order and Opinion, dated August 18, 2006 . . . . . 56a

Appendix C: Tenth Circuit Order denying rehearing en banc, dated July 30, 2009 . . . 112a

TABLE OF AUTHORITIES

CASES

ACLU Nebraska Found. v. City of Plattsmouth, Nebraska,
419 F.3d 772 (8th Cir. 2005) (en banc) 21

ACLU of Ky. v. Mercer County, Ky.,
432 F.3d 624 (6th Cir. 2005) 9, 17, 23, 24

Alvarado v. City of San Jose,
94 F.3d 1223 (9th Cir. 1996) 26

Am. Jewish Cong. v. City of Chicago,
827 F.2d 120 (7th Cir. 1987) 25

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 31

Barnes-Wallace v. City of San Diego,
530 F.3d 776 (9th Cir. 2008), *petition for cert. filed, Boy Scouts of America v. Barnes-Wallace*,
77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) 32

Books v. Elkhart County, Indiana,
401 F.3d 857 (7th Cir. 2005) 24

Bose v. Consumers Union of the United States,
466 U.S. 485 (1984) 28, 29

Buono v. Kempthorne,
527 F.3d 758 (9th Cir. 2008) 32

Buono v. Salazar,
129 S.Ct. 1313 (2009) 32

Card v. City of Everett,
520 F.3d 1009 (9th Cir. 2008) 19, 20

Clayton v. Place,
884 F.2d 376 (8th Cir. 1989) 25, 26

Clayton v. Place,
889 F.2d 192 (8th Cir. 1989) 25

Croft v. Governor of Texas,
562 F.3d 735 (5th Cir. 2009) 29

Elewski v. City of Syracuse,
123 F.3d 51 (2d Cir. 1997) 23, 29

Lee v. Weisman,
505 U.S. 577 (1992) 32

Lemon v. Kurtzman,
403 U.S. 602 (1971) ..... *passim*

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 30

Lynch v. Donnelly,
465 U.S. 668 (1984) 28

Marsh v. Chambers,
463 U.S. 783 (1983) 29

McCreary County v. Am. Civil Liberties Union of Kentucky,
545 U.S. 844 (2005) ..... *passim*

Myers v. Loudon County Pub. Sch.,
418 F.3d 395 (4th Cir. 2005) 19

O'Connor v. Washburn Univ.,
416 F.3d 1216 (10th Cir. 2005) 19

Pelphrey v. Cobb County, Ga.,
547 F.3d 1263 (11th Cir. 2008) 29

Raines v. Byrd,
521 U.S. 811 (1997) 30

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 31

School Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 16

Staley v. Harris County, Tex.,
461 F.3d 504 (5th Cir. 2006), *vacated by* 485
F.3d 305 (5th Cir. 2007) 19

United States v. Richardson,
418 U.S. 166 (1974) 31, 32

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) 31, 32

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

Washington v. Davis,
426 U.S. 229 (1976) 25

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 16

CONSTITUTION

U.S. Const. amend. I 1

U.S. Const. amend. XIV, § 1 19

U.S. Const. Art. I, § 6, cl. 2 31

U.S. Const. Art. I, § 9, cl. 7 32

STATUTES

28 U.S.C. § 1254(1) 1

OTHER

Esbeck, Carl H., *Why the Supreme Court has Fashioned Rules of Standing Unique to the Establishment Clause*, Engage, Vol. 10, University of Missouri School of Law Legal Studies Research Paper No. 2009-22, Oct. 2009, *available at* SSRN: http://ssrn.com/abstract=1444628 31

Lorence, Jordan and Jones, Allison, *Nothing to Stand On: "Offended Observers" and the Ten Commandments*, Engage, Vol. 6, Oct. 2005, *available at* http://www.fed-soc.org/publications/pubID.875/pub_detail.asp . 31

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DECISIONS BELOW

The district court, after a bench trial, ruled in favor of defendants and refused to grant plaintiffs any relief. Its decision is reported as *Green v. Bd. of County Comm'rs of Haskell,* 450 F. Supp. 2d 1273 (E.D. Okla. 2006). App. 56a. The decision of the court of appeals reversing the district court's order is reported as *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009). App. 1a. The decision of the court of appeals denying rehearing *en banc* in a 6-6 split with two dissenting opinions is reported at *Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235 (10th Cir. 2009). App. 112a.

JURISDICTION

The Tenth Circuit rendered its panel decision on June 8, 2009. Petitioners filed a petition for rehearing *en banc* on June 19, 2009. The United States Court of Appeals denied the petition for rehearing *en banc* on a vote of six to six on July 30, 2009. Judge Kelly filed a dissenting opinion in which Judges Tacha and Tymkovich joined. Judge Gorsuch also filed a dissenting opinion that was joined by Judges Tacha, Kelly, and Tymkovich. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions

For many years Haskell County, Oklahoma has displayed donated permanent monuments on the County courthouse lawn in Stigler, Oklahoma. App. 58a-59a. The courthouse and lawn are in the middle of one square block. App. 57a. There are currently at least ten displays on the courthouse lawn, including the one at issue in this case.

The War Memorial for World Wars I and II is the largest and first monument to be placed on the lawn. App. 58a. It was erected over 20 years ago, is approximately 12 feet by 12 feet, and, *inter alia,* contains the names of those killed in those wars from Haskell County. App. 58a.

Two smaller monuments for the Vietnam and Korean Wars are in front of the World Wars Memorial. App. 58a. A large marble monument honoring the Choctaw Nation also stands on the front lawn. App. 58a. This monument was erected in 1984.

The courthouse lawn includes a memorial honoring those buried in unmarked graves in Haskell County. App. 58a-59a. This monument was erected by the local historical society in 2004. Two marble benches dedicated to, and installed respectively, by the Class of 1954 and Class of 1955 are also on the lawn. The names of members of the graduating class are inscribed on the tops of the benches. App. 59a. One of the sidewalks contains a section of more than 140 personal message bricks. Each brick expresses a dedication to a loved one or sponsor such as "Earl & Effie Cantrell" or "Oklahoma Natural Gas Company." App. 59a. The courthouse lawn also contains a flagpole and displayed American flag. App. 60a.

Private citizens paid for and erected most of the monuments. App. 58a. All of these monuments are on the same lawn and can be viewed at one time. App. 11a, 52a

Mike Bush, a citizen of Haskell County, had the idea to erect a monument of the Ten Commandments and the Mayflower Compact ("Monument") on the

Courthouse lawn. App. 61a. On September 27, 2004, he approached the County at a regularly scheduled meeting and requested permission to erect a monument containing the Ten Commandments. App. 61a-62a. The District Court found that the County was aware that it had set a precedent of permitting citizens to erect monuments. App. 79a. The Commissioners "discussed the historical aspects of the project," App. 62a, and "view[ed] the Commandments and the Compact as historically significant." App. 74a. It then approved the Monument, which contains the text of The Ten Commandments on the front, along with a statement that it was "Erected by Citizens of Haskell County." App. 63a-64a. The text of the Mayflower Compact is on the back. App. 66a-67a.

Mike Bush designed the Monument and raised money from the community to pay for all expenses related to its display. App. 62a. "The Board never approved, or even reviewed, Bush's design of the Monument or the version of the Commandments that appears on it." App. 68a. And the County did not officially review or approve the addition of the Mayflower Compact, or the language "Erected by the Citizens of Haskell County" to the Monument. App. 68a.

The Monument is not the most prominently placed display. App. 103a-104a. Most people park in the side or rear lots and can only see the back of the Monument (which contains the Mayflower Compact) from a distance as they move from their cars to enter the courthouse. App. 57a, 52a, 63a, 103a. The Monument stands immediately beside, and is less than five feet from, the Unmarked Graves Monument. App. 11a; 521. It is approximately 50 feet from the war

monuments, and 25 ft. from the edge of Highway 9. *Id.*

Mike Bush organized and presided over a dedication ceremony of the Monument on Saturday, November 7, 2004. The ceremony was not sponsored by the Commissioners nor by the County. App. 62a. Two Commissioners, Sam Cole and Henry Few, attended this ceremony, but did not speak, and the District Court found that "[a]pparently, neither gentleman appeared in his official capacity as County Commissioner." App. 62a. Neither of these men is currently a commissioner. App. 61a.

After this lawsuit was filed, Mike Bush organized and presided over a rally on the courthouse lawn on Saturday, November 19, 2005, to encourage the County to stand by its decision to allow the Monument to be displayed. App. 70a-71a. Mr. Cole and Mr. Few attended the rally, but the District Court found "there is no indication they attended in their official capacity as County Commissioners." App. 71a, 100a. Mr. Few spoke briefly at the rally, but he did not say anything religious. App. 71a, 94a. Mr. Cole did not address the crowd. *Id.*

The gatherings for the dedication and rally regarding the Monument were not unusual. "[A] number of public and private events take place on the courthouse lawn and at the gazebo" in front of the courthouse, including those that observe Veterans Day, a Silent March for Victims of Domestic Violence, and Reunion Days. App. 58a, 104a.

After this lawsuit was filed, the County passed a resolution entitled, "A Policy Governing Placement Of

Plaques, Structures, Displays, Permanent Signs and Monuments On Public Property In Haskell County, Oklahoma." This Policy codifies the policy and practice that Haskell County has followed for many years permitting Haskell County citizens to donate monuments for display on the courthouse lawn upon obtaining permission from the Commissioners. App. 60a n.3.

Green objected to the Monument due in part to statements made by the Commissioners after the monument was erected, not the Monument itself.[1] None of the comments Green contends indicate an impermissible purpose on the part of the Commissioners were made during a Commissioners' meeting or any other setting where they were performing an official function of their office. All were made to newspaper reporters, were made in the Commissioners' individual capacities, and reflected their personal beliefs. App. 12a-13a, 71a.

B. Course of Proceedings

Plaintiffs James Green and the ACLU of Oklahoma filed this action against the Haskell County Board of

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[1] Green also testified that he has a theological objection to the text of the Ten Commandments on the Monument because of their "terroristic origins," referring to Exodus 20:4 which talks about the sins of the fathers being visited upon the sons. App. 69a. But that Bible passage is not contained on the monument, App. 69a n.10, and the district court found "he was inconsistent in his testimony regarding whether he was more offended by the Monument itself or by the Commissioners' alleged statements about the Monument." App. 75a. He conceded that the Ten Commandments have historical significance. *Id.*

Commissioners and its chairman, Sam Cole, in his official capacity, in the United States District Court for the Eastern District of Oklahoma on October 6, 2005. The complaint alleged that Defendants violated the First and Fourteenth Amendments to the United States Constitution when they accepted the donation of a Ten Commandments monument for display on the courthouse lawn along with other donated monuments. Plaintiffs sought declaratory judgment, prospective injunctive relief, attorneys' fees, and costs. After Sam Cole passed away on March 18, 2006, the parties substituted Commissioner Henry Few for Cole as a named Defendant. When Mr. Few was not reelected in 2007, Kenny Short was substituted for him as defendant on March 13, 2007. On April 11, 2006, the district court denied the parties' cross-motions for summary judgment.

The court held a two-day bench trial on May 1 and 2, 2006, and issued an opinion granting final judgment to Defendants on August 18, 2006. It determined that the facts of the case are more closely analogous to *Van Orden v. Perry*, 545 U.S. 677 (2005), rather than *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), based primarily on the location of the Monument outside the courthouse among other historical monuments, and the fact that a private individual initiated, paid for, and installed the monument. The district court also felt constrained by Tenth Circuit precedent to apply the *Lemon* test and found that the County had a secular purpose of acknowledging the historical significance of the Ten Commandments. And the court determined that a reasonable observer would not perceive endorsement of religion because the courthouse lawn is a "community gathering place" that hosts "an array of

monuments with diverse messages ...[that] clearly represent what Haskell County citizens consider the noteworthy events and sentiments of their county, their state and their nation." App. 104a.

Plaintiffs filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit on September 14, 2006. The Court of Appeals entered its opinion reversing the district court on June 8, 2009. Despite numerous factual similarities, the Court of Appeals distinguished *Van Orden*, purported to apply the *Lemon* test as set forth in *McCreary*, 545 U.S. 844 (2005), and held that the Monument impermissibly endorses religion.[2] In doing so, the court considered irrelevant facts such as the age of the monument, how quickly it was challenged, whether it was displayed by a small or large town, and the personal religious views of the government officials who allowed it. Defendants filed a petition for rehearing *en banc* on June 19, 2009, which was denied in a 6-6 vote on July 30, 2009. Judge Kelly filed a dissenting opinion in which Judges Tacha and Tymkovich joined. He urged rehearing *en banc* based on three problems with the panel opinion: (1) it established a rule that new Ten Commandments monuments are always unconstitutional as long as someone sues quickly enough; (2) it assumed smaller towns are more likely to violate the Establishment

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[2] The Tenth Circuit invoked the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as "refined" by Justice O'Connor's Endorsement Test. App. 22a-23a. It defined that test as: "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Id.* at 23a. And it used a distorted version of the "reasonable observer" to determine if endorsement occurred. *Id.* at 28a.

Clause; and (3) it utilized a reasonable observer that is not objective. Judge Gorsuch also filed a dissent, joined by Judges Tacha, Kelly, and Tymkovich. His opinion pointed out the need to avoid a split in the circuits in applying *Van Orden*, and observed that cases like *Van Orden* – such as this one – should come out like *Van Orden*.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's split with the Ninth and Eighth Circuits on whether similar Ten Commandments monuments are constitutional reveals the confusion arising after this Court's decisions in *Van Orden* and *McCreary*. Circuit courts need this Court's guidance on the proper analysis to apply to monuments passively acknowledging religion's historical significance that are part of historical displays on government grounds. Otherwise, these cases will continue to be decided based on irrelevant facts like those that led to the finding of unconstitutionality in this case.

This case provides the Court with an opportunity to correct the doctrinal instability currently existing in religious display cases because of uncertainty about whether to apply the *Lemon* test (as in *McCreary*), or the historical analysis, as in *Van Orden*. As Judge Gorsuch noted in his dissent below, "at least until our superiors speak, we leave the state of law 'in Establishment Clause purgatory.'" App. 134a-135a (quoting *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005)).

Van Orden's historical analysis should govern here in view of the similarities between the cases. But to

the extent the *Lemon* and endorsement tests have any relevance to passive historical displays that include the Ten Commandments, the Tenth Circuit's opinion shows there is a need to spell out the proper standards for determining whether there is impermissible endorsement. The misinformed and mistaken reasonable observer used by the Tenth Circuit in this case stands in stark contrast to the well-informed reasonable observers employed by the Second, Sixth, Seventh, and Eighth Circuits.

This Court should grant review to resolve these multiple conflicts among the circuits.

This case also presents the issue of whether the doctrine of offended observer standing – unique to Establishment Clause cases – should continue unchecked so as to allow anyone who claims to be annoyed by a religious display to challenge it. This virtually boundless standing rule has contributed to the confusion in Establishment Clause jurisprudence by allowing cases to proliferate without the traditional safeguards to ensure there is a concrete dispute before the court.

I. THE TENTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE NINTH AND EIGHTH CIRCUITS – ALL OF WHICH HELD THAT PASSIVE DISPLAYS OF THE TEN COMMANDMENTS, ALONG WITH OTHER HISTORICAL MONUMENTS ON GOVERNMENT PROPERTY, DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The conflict between this case and decisions of this Court as well as the Ninth and Eighth Circuits is a product of the lower courts deriving inconsistent legal standards from *Van Orden* and *McCreary*. Even a cursory review of the relevant facts surrounding Haskell County's Ten Commandments monument indicates it is almost exactly like the display in *Van Orden*. Both the Ninth and Eighth Circuits, facing similar displays, followed *Van Orden*, did not apply the *Lemon* test, and found Ten Commandments monuments like the one at issue here constitutional. But the Tenth Circuit in this case limited *Van Orden* to cases involving *old* monuments, and – in direct conflict with the Ninth and Eighth Circuits – monuments that are part of displays that have a "unifying" theme. It then became the first circuit court since *Van Orden* to apply *McCreary* and strike down a Ten Commandments monument displayed on government grounds with other historical monoliths.

A. Conflict with *Van Orden* and Inapplicability of *McCreary*.

The plurality opinion in *Van Orden* held that in cases where the government passively acknowledges the historical significance of the Ten Commandments by displaying them on a monument erected near other historical monuments, the test from *Lemon v. Kurtzman*, is not helpful.

> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our

> analysis is driven both by the nature of the monument and by our Nation's history.

545 U.S. at 686. Chief Justice Rehnquist emphasized the historical significance of the Ten Commandments rather than the notoriously difficult to apply *Lemon* test. *Id.* at 688-90. He concluded that the Ten Commandments display did not violate the Establishment Clause without even considering whether the government officials had an improper motive or purpose or there was perceived endorsement of religion. *Id.* at 691-92.

Justice Breyer, whose concurrence supplied the fifth vote for determining there was no Establishment Clause violation in *Van Orden*, also refused to strictly apply the *Lemon* test. "I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." 545 U.S. at 703-04 (Breyer, J., concurring). Justice Breyer emphasized the historical significance of the monument rather than religious purpose or endorsement. He noted that the Ten Commandments

> convey a historical message (about a historic relation between those standards and the law) . . . . [and] [t]he setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics

> and law that the State's citizens, historically speaking, have endorsed.

Id. at 701-02 (Breyer, J., concurring).

1. *Van Orden*'s facts are virtually identical to those in this case.

Judge Kelly observed in his dissent from denial of rehearing *en banc* below that "[t]he disposition in this case cannot be reconciled with *Van Orden*, which ought to control given the substantial similarities between the operative facts in the two cases." App. 116a. These substantial similarities include:

> 1. Display of a Ten Commandments monument was initiated by a private entity. 545 U.S. at 701 (Breyer, J., concurring), App. 61a.
>
> 2. The monument was paid for with private funds. 545 U.S. at 682, App. 61a-62a.
>
> 3. The private donor determined the content of the monument. 545 U.S. at 701, App. 67a-68a.
>
> 4. The monument was displayed along with other historical monuments outside a government building on government property. 545 U.S. at 702, App. 58a-59a.
>
> 5. The monument includes a statement indicating it was donated by private citizens. 545 U.S. at 701-02, App. 64a.
>
> 6. The display area does not lend itself to meditation. 545 U.S. at 702, App. 57a-59a.

7. The monument donors allegedly had a religious purpose. 545 U.S. at 707 (Stevens, J., dissenting), *id.* at 738 (Souter J. dissenting), *id.* at 701 (Breyer, J., concurring), App. 61a.

8. Government officials selected the site for the monument. 545 U.S. at 682, App. 11a.

9. The dedication ceremony for the monument was attended by two government officials. 545 U.S. at 682, App. 62a.

The only significant differences between *Van Orden* and this case actually weigh in favor of finding no Establishment Clause violation. The monument in *Van Orden* contained the Star of David and symbols representing Christ, and the text emphasized "I am the Lord thy God." 545 U.S. at 739 (Souter, J., dissenting). Here, there are no religious symbols, and the only thing on the monument besides the Ten Commandments – other than noting who donated it – is the text of the Mayflower Compact. Moreover, unlike *Van Orden*, none of the commandments is emphasized more than any other. App. 62a-63a, 56. In *Van Orden*, a legislative resolution was passed commending the Fraternal Order of Eagles – the donor of the monument (and a group that required members to believe in a Supreme Being). 545 U.S. at 739 n.3 (Souter, J., dissenting). No such resolution was passed supporting the donor in this case. Finally, the dedication of the monument in *Van Orden* was actually "presided over" by two legislators, 545 U.S. at 682, but in this case, the private donor, Mike Bush, presided over the dedication, and neither of the commissioners who attended the ceremony spoke. App. 62a, 93a.

The Tenth Circuit distinguished *Van Orden* by claiming the monuments in front of the Haskell County courthouse do not have a "unifying, cohesive, secular theme." App. 42a, n.16. But the collection of displays here is remarkably similar to that on the Texas State Capitol grounds in *Van Orden*. The thirteen monuments there are referred to as: Heroes of the Alamo, Volunteer Fireman, Texas Cowboy, Spanish-American War, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. 545 U.S. at 681 n.1.

Haskell County's display includes monuments to veterans of World Wars I and II and the Korean and Vietnam Wars, Pioneers, the graduating classes of 1954 and 1955, Native Americans, and over 140 paving brick memorials to other people who lived and died in the State of Oklahoma. App. 58a-59a. It also contains a flagpole and displayed flag. App. 58a. If the Ten Commandments display along with the historical monuments in *Van Orden* provided a coherent display that "communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed," 545 U.S. at 702, so does the display in the case at bar. Moreover, as Judge Gorsuch observed below, "[t]he display *does* have a unifying theme: it memorializes and celebrates people and ideals important to Haskell County." App. 139a. He goes on to demonstrate that this is just as much a unifying theme as exists in "Congress's collection of monuments in Statuary, which includes likenesses of

George Washington (Virginia), Brigham Young (Utah), and Father Junipero Serra (California)." *Id.*

There is a difference between the setting in *Van Orden* and the one in Haskell County, but it favors upholding the monument. The monuments in Texas are spread over 22 acres, while the area the monuments in Haskell County occupy is small and all monuments are within sight of each other. App. 11a, 52a, 57a. Justice Souter thought the Texas monuments were spread so far apart, each would be taken "on its own terms," instead of part of one display. 545 U.S. at 742-43 (Souter, J. dissenting). There is no such concern in this case.

The Tenth Circuit also distinguishes *Van Orden* based on Justice Breyer's observation that the Ten Commandments monument in that case had been in place for 40 years before any complaints were made. App. 43a; *Van Orden*, 545 U.S. at 679 (Breyer, J., concurring). But there is no indication that a majority of this Court would ever consider this a determinative factor. As Justice Souter noted in *Van Orden*, "I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause." 545 U.S. at 747 (Souter, J., dissenting). This Court has invalidated older practices as violating the Establishment Clause. *See, e.g., School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 270 (1963) (50 year old practice of reading the Bible in Pennsylvania public schools violated Establishment Clause). And it has upheld newer ones. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (voucher program established in 2000 did not violate Establishment Clause). The Tenth Circuit's decision to make this the "determinative" factor

conflicts with the Sixth Circuit's opinion in *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624, 626-27 (6th Cir. 2005), which upheld a Ten Commandments display that was challenged in court the very next month after it was erected. *See* section II(B), *infra*. *Mercer* was decided after *Van Orden* was handed down.

And as Judge Kelly observed, considering the amount of time a Ten Commandments display goes unchallenged "comes perilously close to creating a new bright-line rule: all new Ten Commandments displays are unconstitutional as long as someone is willing to exercise a heckler's veto by filing suit – and, assuredly, there will be someone. . . . [W]hereas old ones will (generally) be deemed constitutional. Such a result is absolutely arbitrary and cannot be the result mandated by the Establishment Clause." App. at 122a (Kelly, J., dissenting).

The absurdity of using the age of the monument as a decisive factor in determining its constitutionality is illustrated well by recent cases from the Ninth and Eighth Circuits (*See* Sections I(B) & (C), *infra*) upholding monuments very similar to the one found unconstitutional here. The only significant difference between those cases and this one is the date the monument was erected.

2. *McCreary* does not apply to passive acknowledgements of religion.

Despite the substantial similarities between this case and *Van Orden*, the Tenth Circuit decided to follow *McCreary* and apply *Lemon*. This mistake of law is grave, but perhaps understandable. Judge

Gorsuch laments that "*McCreary* and *Van Orden's* mixed messages have left the circuits divided over whether *Lemon* continues to control the Establishment Clause analysis of public displays. . . . [And] intermediate appellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments surely have their hands full. . . ." App. at 134a (Gorsuch, J., dissenting).

The need for direction from this Court is evidenced within the Tenth Circuit itself, where the 12 judges were evenly split on whether the Panel reached the proper result. The dissatisfaction with the Panel Opinion by half of the Tenth Circuit judges is not surprising given the substantial *differences* between the facts of this case and *McCreary*. Unlike the monuments in *Van Orden* and the case at bar, *McCreary* considered a Ten Commandments display that was initiated and paid for by the government itself. *McCreary*, 545 U.S. at 851. "When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." *Id.* at 869. The Haskell County Monument was initiated, donated, and erected by a private speaker and, from the outset, displayed amongst other monuments that had various secular messages. Conversely, in *McCreary*, the religious plaque was conceived of and paid for by the government, and was initially displayed alone, and then later as part of a display of excerpts from other historical documents that were selected precisely because of their religious message. *Id.* at 851-54. Moreover, the display in McCreary was purposely placed in a high traffic area inside the courthouse, and authorized by a resolution laced with religious themes. *Id.* None of these facts exist in this case.

Despite these differences, the Tenth Circuit felt obliged to follow its previous decision in *O'Connor v. Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005), which determined that it must apply *McCreary*'s *Lemon* analysis to religious display cases until this Court overrules *Lemon*. This position ignores *Van Orden* and stands directly in conflict with decisions of the Ninth and Eighth Circuits.[3]

B. Conflict with the Ninth Circuit's Decision in *Card v. City of Everett*

In *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008), the Ninth Circuit held "we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context." The court declined to apply *Lemon* while recognizing that it is doubtful any Ten Commandments display could survive scrutiny under that test. *Id.* at 1015-16.

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[3] The Fourth Circuit took a similar position to the Eighth and Ninth Circuits in *Myers v. Loudon County Public Schools*, 418 F.3d 395, 402 (4th Cir. 2005), where it did not apply *Lemon* in a case challenging voluntary recitation of the pledge in public schools. *See* App. 134a (Gorsuch, J., dissenting). And after *Van Orden*, the Fifth Circuit applied the *Lemon* test to the display of a Bible as part of a historical monument on a courthouse lawn along with four other historical monuments in *Staley v. Harris County, Tex.*, 461 F.3d 504 (5th Cir. 2006). But that opinion was vacated by the Fifth Circuit *en banc* because the case was mooted by the county's voluntary (but temporary) removal of the monument while the case was pending. 485 F.3d 305, 313 n.5 (5th Cir. 2007).

It went on to uphold a Ten Commandments monument that was donated by a private party – the Fraternal Order of Eagles – which the court found had "a strong interest in the religious aspects of the Ten Commandments." *Id.* at 1019. In addition to the Decalogue, the monument included a Star of David and symbols representing Christ. *Id.* at 1011.

The monument was displayed in front of the Old City Hall building which housed the Police Department. *Id.* The only other monument in front of Old City Hall was a war memorial, but the court considered in its analysis four other monuments across the street – a September 11 memorial (obviously much newer than the Ten Commandments monument), a Medal of Honor memorial, a county war memorial, an Armed Forces monument, and a monument to the common worker. *Id.* at 1010-11. The court did not inquire as to whether the six monuments had a "unifying theme," but emphasized that the setting did not lend itself to the sacred. *Id.* at 1019-21.

The Ten Commandments monument was dedicated at a ceremony where clergy spoke. *Id.* at 1012. And the mayor of the city attended the dedication ceremony in his official capacity to accept the monument. *Id.* The Ninth Circuit determined that *Van Orden* controls on these facts. *Id.* at 1016.

Other than the age of the monument – it was erected in 1959[4] – the only differences between it and

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[4] Unlike *Van Orden*, the City of Everett did receive complaints about the monument years before it was actually challenged in court. *Id.* at 1012.

Haskell County's make the County's monument more obviously constitutional. The County's Monument here is displayed with at least nine other monuments (as compared to five in Everett) and all of the monuments are on the same side of the street, allowing them to be viewed at the same time. The Ten Commandments monument here contains no symbolic references to Christianity or Judaism and no government official took part in the dedication ceremony or even attended in an official capacity.

The only real difference between the monument in the City of Everett and the one in Haskell County is age. As Judge Kelly points out in his dissent, this demonstrates the holding in this case is "absolutely arbitrary and cannot be the result mandated by the Establishment Clause." App. 122a (Kelly, J., dissenting).

C. Conflict with the Eighth Circuit's Decision in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*

The Eighth Circuit's recent decision in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 419 F.3d 772, 773 (8th Cir. 2005) (*en banc*), addressed a monument donated by the Fraternal Order of Eagles in 1965 (6 years after the City of Everett monument was erected). The monument included a Star of David and symbols of Christ. *Id.* at 773. And it was the *only* monument displayed in a 45-acre public park – so there was not even a hint of a "unifying theme." *Id.* at. 777 n.7. The Eighth Circuit found that *Van Orden* controlled and *Lemon* was inapplicable. *Id.* at 777, 778 n.8 (though it would uphold under *Lemon* if it were to apply it).

Like the monument in the Ninth Circuit case, the only differences between Plattsmouth's monument and Haskell County's – other than age – make the Haskell County monument more obviously constitutional. Haskell County's monument does not include any references to Christianity or Judaism and is displayed along with at least nine other historical monuments in about an acre of land where all the monuments can be viewed together.[5] The different results in *Plattsmouth* and *Green* can only be explained by the age of the monument – an arbitrary and unreasonable factor upon which to base an important constitutional decision.

The facts of this case provide this Court with an opportunity to resolve these conflicts, eliminate the confusion created by *Van Orden* and *McCreary*, and confirm that the arbitrary factor of monument age and subjective determination of a unifying theme should not be used to determine constitutionality.

II. THE DECISION BELOW MISAPPLIED THE ENDORSEMENT TEST AND CREATED A SPLIT BETWEEN THE TENTH CIRCUIT, AND THE SECOND, SIXTH, SEVENTH, AND EIGHTH CIRCUITS.

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[5] One other difference is the monument in *Plattsmouth* was displayed in a public park, while the one in this case is on a lawn in front of the county courthouse. But this is not a significant distinction here because the lawn is used as a public park by the citizens of Haskell County. The district court determined that "a number of public and private events take place on the courthouse lawn and at the gazebo" in front of the courthouse, which is a "community gathering place." App. 58a, 104a.

Even if *Lemon* did provide the proper test for this case, the Tenth Circuit's application of it conflicts with holdings in the Second, Sixth, Seventh, and Eighth Circuits. Judge Gorsuch observed in his dissent that, in utilizing the endorsement test's reasonable observer (an initial mistake), the Panel erred further in assuming the observer would make the mistake of considering evidence that has no bearing on whether an impermissible endorsement has occurred, and "[t]he result is not simply a misapplication of the reasonable observer test: it is a rewriting of that test in a manner inconsistent with our sister circuits' application of it." App. 141a.

A. Conflict with the Second Circuit

For example, the Second Circuit in *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), found that a holiday display that included a crèche was not an impermissible endorsement because the reasonable observer was deemed to be aware of all the other parts of the display. The court held that a "reasonable observer doesn't wear blinders," but knew that the city displayed other, non-religious items around town – even though they were not even in the same park as the crèche. *Id.* at 53-55. This is at odds with the Tenth Circuit's "reasonable" observer, who focuses exclusively on the Ten Commandments display and doesn't consider the other nine monuments on the courthouse lawn, all of which are only feet away. App. 11a, 52a.

B. Conflict with the Sixth Circuit

The Sixth Circuit in *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624 (6th Cir. 2005), upheld

a Ten Commandments display inside a courthouse, and observed that "[f]ortunately, the reasonable person is not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions." *Id.* at 639-40 (citation omitted). This is contrary to the Tenth Circuit's "reasonable" observer in this case, which "is an admittedly *un*reasonable one. He just gets things wrong." App. 136a (Gorsuch, J., dissenting).

C. Conflict with the Seventh Circuit

The Seventh Circuit in *Books v. Elkhart County, Indiana*, 401 F.3d 857, 869 (7th Cir. 2005), upheld the Ten Commandments displayed along with other historical documents inside the county's main administrative building. The court found there was no endorsement of religion, emphasizing that "[t]he effect of a display of a religious object on public property is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended. . . . [W]e ask whether an objective, reasonable observer, aware of the history and context of the community and forum in which the religious display appears, would fairly understand the display to be a government endorsement of religion." *Id.* at 867 (citation and quotation marks omitted). *Books* stands in conflict with the "reasonable" observer in the case at bar, who is "unreasonable," bases his conclusions on speculation instead of facts, "forgets" important facts, makes factual errors, leaps to

conclusions, and performs badly as an art critic.[6] App. 136a-141a (Gorsuch, J, dissenting).

D. Conflict with the Eighth Circuit

Lastly, the holding in this case directly conflicts with the Eighth Circuit's application of the endorsement test to similar facts in *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989). School board members in *Clayton* made numerous statements regarding their personal religious convictions on allowing dancing at the school. *Clayton v. Place*, 889 F.2d 192, 193-94 (8th Cir. 1989) (Gibson, J., dissenting from denial of rehearing *en banc*). These statements were made in conjunction with a board meeting where a vote was taken on whether to keep a ban on dancing in place. But the Eighth Circuit found that there was no endorsement in violation of the second prong of the *Lemon* test, explaining its rationale as follows.

> We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. Cf. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a

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[6] Presaging Judge Gorsuch's comment, Judge Easterbrook observed that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

> participant in the decisional process."). To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. . . . We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards.

Clayton, 884 F.2d at 380.[7]

Unlike the board members in *Clayton*, none of the statements made by the Commissioners in this case regarding the Ten Commandments indicate that they voted to allow the display because of their religious beliefs, and no religious statements were made by the Commissioners at Commissioners' meetings or in their official capacities. App. 7a, 93a-94a, 99a-101a. The Tenth Circuit asserts that the personal religious views of the Commissioners are relevant here because Haskell County is rural and Stigler, Oklahoma is a small town. App. 35a. But *Clayton* arose out of Purdy, Missouri, "a small, primarily rural community in southwestern Missouri." 884 F.2d at 378. The Tenth Circuit fails to cite a single case holding that Establishment Clause concerns are heightened in

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[7] *See also Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir. 1996) (where statements at an unveiling ceremony made by city council members indicating their spiritual response to a statue of an ancient Aztec god displayed in a city park did not render the statue "religious" for purposes of the Establishment Clause).

small towns. This sets a hazardous precedent that imperils the acts of small town officials.

Moreover, only information in the "text, legislative history, and implementation of the statute, or comparable official act" can be used to determine legislative purpose. *McCreary*, 545 U.S. at 862 (quotation marks omitted). None of the statements made by the Commissioners in this case was made at a board meeting or in any official capacity. Judge Gorsuch points out that "a single county commissioner ...made religious remarks, all phrased in the first person. As the panel opinion acknowledges, these statements were made in the commissioner's private capacity, and he was under no obligation to censor his personal views. Panel Op. at 34 [App. 34a]. Nevertheless, our observer *erroneously* attributes these remarks to the county government. *Id.* at 34-35, [App. 34a-35a]." App. 137a.

Contrary to the reasonable observer utilized by the Second, Sixth, Seventh, and Eighth Circuits, the observer in the Tenth Circuit is decidedly uninformed and anything but objective.[8] This observer concludes the Ten Commandments monument endorses religion by looking at "the private donor's intent, the statement of a single commissioner in his concededly private capacity, the county's refusal to buckle to litigation pressure, and the county's perceived lack of artistic taste. None of this, of course, is evidence that the

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[8] The published opinions in these cases from other circuits indicate that the government defendants there vigorously defended their displays from Establishment Clause challenges. But the Tenth Circuit here actually considers such defense as evidence of endorsement of religion. App. 37a.

Constitution was violated. But to our observer, apparently it can be *mistaken* for such evidence." App. 140a (Gorsuch's, J., dissenting). *Certiorari* should be granted to resolve this split on how *Lemon* and the endorsement test are applied.

E. Conflict on the Standard of Review

This case also provides the Court with the opportunity to clarify the standard of review to be applied to Establishment Clause cases where the district court has conducted a trial. There is currently a three way split among the circuits regarding whether the standard is *de novo* or clear error.

This Court applied the clearly erroneous standard to the Establishment Clause claim in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Five justices signed on to this opinion, including Justice O'Connor, who wrote separately only "to suggest a clarification of our Establishment Clause doctrine." *Id.* at 687. The four dissenting justices also agreed this was the proper standard of review. *Id.* at 704 n.11 (Brennan, J., dissenting).

Just one month later, this Court used the *de novo* standard of review in the free speech case, *Bose v. Consumers Union of the United States*, 466 U.S. 485 (1984). This Court held that the clearly erroneous standard of review does not apply to a trial court's determination of "special facts that have been deemed to have constitutional significance." *Id.* at 504-05. The holding was based on the principle that "the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the

common quest for truth and the vitality of society as a whole." *Id.* at 503-04.

Here, the Tenth Circuit considered the findings on each part of the *Lemon* test to be "constitutional facts," and applied the *de novo* standard of review that *Bose* determined is appropriate for *free speech* cases. App. 20a. But this conflicts with at least the Second, Eleventh, and Fifth Circuits.

The Second Circuit rule is that the clearly erroneous standard applies to the secular purpose prong of *Lemon*, but the issue of endorsement is reviewed *de novo*. *Elewski*, 123 F.3d at 53-55. The Fifth Circuit agrees with the Second that the clearly erroneous standard applies to the secular purpose determination. *Croft v. Governor of Texas,* 562 F.3d 735, 742 (5th Cir. 2009). The Eleventh Circuit held in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1269 (11th Cir. 2008), that the clearly erroneous standard of review applies to appeals of Establishment Clause trials. It was analyzing legislative prayer under *Marsh v. Chambers*, 463 U.S. 783 (1983), but determined whether there was any advancing or disparaging of religion, similar to the second inquiry in *Lemon*. *Id.* at 1277-78.

This disagreement among the circuits as to even what standard of review to apply adds to the cloud of uncertainty currently enshrouding Establishment Clause cases. The *writ* should be granted to clarify this issue as well.

III. THE PLAINTIFFS HAVE NOT PROVED SUFFICIENT FACTS TO ESTABLISH STANDING.

One of the irreducible constitutional minimums to pass the threshold of standing to sue in federal court is that the plaintiff suffer an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "personal injury [must be] fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997).

Green presented conflicting testimony concerning whether he was primarily opposed to the Monument itself, or to the Commissioners' comments about the Monument. App. 75a.[9] Even if it was the Monument itself, he conceded the historical significance of the Monument, App. 75a, and said his offense stems from a theological disagreement with "terroristic" origins of the Commandments, as reflected in Exodus 20:5, which is not on the Monument. App. 69a. Mr. Green is not coerced to view the Monument when visiting the courthouse since it is situated on the front of the lawn. App. 52a. Most people park in the side or rear lots and can only see the back of the Monument (which contains the Mayflower Compact) as they move from their cars to enter the building. App. 57a, 52a, 63a, 103a. And neither Mr. Green nor his primary witness even noticed when changes were made to the

[9] If it is merely the statements of Commissioners that gave offense, the only Commissioner who made a statement about his personal religious beliefs passed away, and there would be no remedy a court could award that would redress any alleged harm to the Plaintiff (who has not sought damages).

Monument – a fact that belies both the contention that the monument is unavoidable, and the idea that Mr. Green was suffering any injury whatsoever. App. 69a-70a.

Absent actual coercion, being "offended" by something with which one disagrees should not be sufficient to confer standing on the Plaintiff. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616 (1989).[10] In no other area of the law are plaintiffs allowed this much latitude in proving standing. The general rule is that when plaintiffs allege as injury only that something is happening with which they disagree, the courts refuse to allow standing precisely because it turns the courts into a super-legislature to review generalized grievances with the executive and legislative branches of government where there is no case or controversy involved. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no standing to challenge reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution); *United*

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[10] Esbeck, Carl H., *Why the Supreme Court has Fashioned Rules of Standing Unique to the Establishment Clause* (Oct. 13, 2009), Engage, Vol. 10, p. 83, Oct. 2009; University of Missouri School of Law Legal Studies Research Paper No. 2009-22. Available at SSRN: http://ssrn.com/abstract=1444628 (explaining that "unwanted exposure" standing should be narrowly construed). *See also* Lorence, Jordan and Jones, Allison, *Nothing to Stand On: "Offended Observers" and the Ten Commandments*, Engage, Vol. 6, p. 138, Oct. 2005. Available at http://www.fed-soc.org/publications/pubID.875/pub_detail.asp (arguing that offended observer standing should be abandoned).

States v. Richardson, 418 U.S. 166 (1974) (no standing to challenge reporting rules governing CIA as violation of requirement under Art. I, § 9, cl. 7 of the Constitution for regular statement of account of public funds).

A narrowing of offended observer standing is needed to slow down the current proliferation of lawsuits by plaintiffs who have not been injured in any way that is different than the rest of the population. *See, e.g.*, *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Buono v. Salazar*, 129 S.Ct. 1313 (2009) (argued October 7, 2009) (challenge to a veterans memorial erected on government property and including a cross); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008), *petition for cert. filed, Boy Scouts of America v. Barnes-Wallace*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222) (challenge to Boy Scouts lease of park facilities in San Diego). This expansion of offended observer standing ignores this Court's admonition that "[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge*, 454 U.S. at 471. Moreover, a demanding standard for those offended by passive displays would do nothing to raise standing hurdles for those actually coerced by unlawful government action. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992). Instead, it would limit standing in this context to those with particularized injuries.

Defendants respectfully submit that Mr. Green does not meet the threshold requirement of standing because he only asserted a generalized grievance with the government, and offended observer standing, at

minimum, must be restricted to exclude cases such as this. If the Court does not take up the standing issue in *Buono*, it should do so in the *Boy Scouts of America* case. And if the Court chooses not to address standing in either of those cases, it should consider the matter here.

CONCLUSION

"Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in these cases, we should all be able to agree that cases like *Van Orden* should come out like *Van Orden*." App. 143a (Gorsuch, J., dissenting). The Eighth and Ninth Circuits followed this simple logic, but the Tenth Circuit failed to do so here – creating a circuit split.

The Tenth Circuit is also in conflict with the Second, Sixth, Seventh, and Eighth Circuits in its application of the endorsement test to religious displays. This case presents a straightforward opportunity to resolve these conflicts, and address the recent explosion of Establishment Clause cases resulting from a broad application of offended observer standing.

Respectfully submitted,

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