No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.
Respondents.

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

BRIEF OF AMICI CURIAE THE STATES OF INDIANA, ALABAMA, DELAWARE, FLORIDA KANSAS, NORTH DAKOTA, SOUTH CAROLINA, UTAH AND VIRGINIA IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF THE AMICI STATES

The amici states support the decision below upholding the constitutionality of Texas' Ten Commandments display. Nonetheless, we join Texas in urging the Court to grant the petition so as to provide guidance to state and local governments concerning current and future Ten Commandments displays.

All across the country, government buildings and grounds feature displays of the Ten Commandments. Not all displays have the same history or context. Some have been around for decades, others are relatively new. But nearly all should be defensible under the Establishment Clause as tributes to a seminal part of our Nation's history and civilization. Such is the monument at issue in this case: It sits in a park-like setting amidst other monuments reflecting the history and culture of Texas and the Nation.

In addition to Texas, some states, such as Alabama, Colorado, Indiana and Kentucky, themselves have litigated whether their current or proposed Ten Commandments monuments are permissible. Other states that do not now have Ten Commandments displays on state property may wish to have them, or they may be interested in preserving displays on local government property. Unfortunately, the lower courts (including the courts of appeals) are increasingly divided over whether and when Ten Commandments displays are permissible. Amici thus have an interest in this case because they currently have no reliable way of knowing whether current or future Ten Commandments displays will pass Establishment Clause muster.

REASONS FOR GRANTING THE PETITION

Many government entities have been displaying the Ten Commandments for at least several decades, and recently several others have proposed or established new monuments. Unfortunately, both the old displays and a few new ones have in recent years become the subject of a litigation blitz. As a consequence, public debate over the displays has intensified dramatically. Many communities are currently involved in litigation over whether their displays are constitutional, and many more such cases are expected. All the while, a newly refreshed circuit conflict over these displays underscores the unworkability of Establishment Clause doctrine in this area. The Court should grant the petition, but ultimately affirm the decision below, to give much needed guidance to the Nation.

I. Government Ten Commandments Displays Are Numerous, And The Debate Over Their Constitutionality Demands Resolution

1. The debate over government Ten Commandments displays is currently one of a handful of issues that deeply engages the American public. Indeed, an article in MSN's Slate Magazine dubbed the summer of 2003 the "Summer of Decalogues." *See Summer of Decalogues: When is a Ten Commandments Display Unconstitutional?*, MSN's Slate, July 25, 2003, *at* http://slate.msn.com/ID/2086046.

Yet, Ten Commandments litigation is not just a breezy summer pastime; it represents an ongoing and metastasizing philosophical battle, which, far from peaking last summer, may turn this into the "decade of Decalogues." Ten Commandments cases seem to occupy the federal courts with increasing frequency, leaving governments that wish to display the Commandments struggling to address or avoid lawsuits. As Indiana first catalogued in its petition for a writ

of certiorari in *O'Bannon v. Indiana Civil Liberties Union* No. 01-966, *cert. denied*, 534 U.S. 1162 (2002), many pending Ten Commandments cases would benefit from the Court's guidance:

Cases on appeal:

ACLU v. Harlan County, 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1698); *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1693); *ACLU v. Pulaski County,* 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1693); *Society of Separationists v. Pleasant Grove*, No. 2:03-CV-839 (D. Utah May 28, 2004) (order granting judgment on pleadings), *available at* http://www.utd.uscourts.gov/reports /00000034.pdf, *appeal docketed,* No. 04-4136 (10th Cir. June 21, 2004); *Baker v. Adams County*, 2004 WL68523 (6th Cir. 2004), *petition for cert. filed sub nom. Johnson v. Baker*, (U.S. June 14, 2004) (No. 03-1661); *ACLU v. Mercer County,* No. 01-CV-480 (E.D. Ky. Jan. 22, 2003) (order granting summary judgment), *appeal pending,* No. 03-5142, (6th Cir. argued April 27, 2004); *Books v. Elkhart County*, No. 3:03-CV-233 (N.D. Ind. Mar. 19, 2004) (order granting motion for summary judgment), *appeal docketed,* No. 04-2075 (7th Cir. April 26, 2004); *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) (opinion vacated April 6, 2004, pending rehearing *en banc*); *Modrovich v. Allegheny County*, No. 2:01-CV-531 (W.D. Pa. July 28, 2003) (order granting summary judgment), *appeal pending*, No. 03-3571 (3d Cir. argued March 24, 2004); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004), *appeal docketed*, Nos. 04-1321, et al. (7th Cir. Feb. 9, 2004); *ACLU of Ohio v. Ashbrook, et al.,* 211 F. Supp. 2d 873 (N.D. Ohio 2002), No. 02-3667 (6th Cir. argued Oct. 31, 2003).

Cases in district court:

ACLU v. Monroe County, No. 3:04-CV-00048 (E.D. Tenn. filed January 28, 2004); *Doe v. Barrow County*, No. 03-CV-156 (N.D. Ga. filed September 16, 2003); *Card v. City of Everett*, No. 2:03-CV-02385 (W.D. Wash. filed July 23, 2003); *Chambers v. City of Frederick*, No. 1:03-CV-01865 (D. Md. filed June 24, 2003); *Twombly v. Fargo*, No. 02-CV-137 (D. N.D. filed Nov. 27, 2002); *ACLU v. Garrard County*, No. 01-CV-481 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Grayson County,* No. 01-CV-202 (W.D. Ky. filed Nov. 27, 2001); *ACLU v. Rowan County,* No. 01-CV-220 (E.D. Ky. filed Nov. 27, 2001).

In addition, several more governments are attempting to negotiate compromises in order to avoid threatened lawsuits. *See* Julie Sheldon, *Group Helping to Keep Memorial*, Evening Sun (Hanover, PA), June 10, 2004, at A3; Alan Choate, *Group Wants 'Cornerstone of Law' Proposal Put Into Writing*, The Daily Inter Lake (Kalispell, MT), June 8, 2004, *available at* http://www.dailyinterlake.com/NewsEngine/SelectStory_AD.tpl?command=search&db=News.db&eqskudata=88-808567-18; Brendan Burke, *Ten Commandments Plaza Delayed a Year*, Casper Star-Tribune (Wyoming), June 8, 2004, *available at* http://www.casperstartribune.net/articles/2004/06/08/news/casper/2615dcd22ee4731c87256ead00053429.txt. The frequency of Ten Commandments-related Establishment Clause lawsuits (and threatened lawsuits) is thus already very high.

2. Nor is this issue likely to fade. Not only do hundreds of government Ten Commandments displays already exist across the country (*see Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000)), but there is also a resurgent popular (and hence government) interest in Ten Commandments displays. At least five states have enacted legislation authorizing displays of the Ten Commandments

in historical contexts on public grounds or in public schools. *See* Ind. Code §§ 4-20.5-21-2 and 36-1-16-2; Ky. Rev. Stat. § 158.195; N.M. Stat. §§ 22-15-15 to 22-15-20; N.C. Gen. Stat. § 115C-81(g)(3b); and S.D. Codified Laws § 13-24-17.1. Furthermore, in the past year, legislatures in Alabama, Florida, Georgia, Idaho, Maryland, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee and Virginia all reportedly considered taking steps to support, permit or require government or public school displays of the Ten Commandments. *See* Americans United for Separation of Church and State: All 50 States (tracking current state legislation), *at* http://www.au.org/site/PageServer?pagename =advocacy_states (last visited June 18, 2004).

Congress has also put promoting the Ten Commandments on its agenda. In 1997, the House of Representatives passed a Resolution expressing its sense that "(1) the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society; and (2) the public display, including display in government offices and courthouses, of the Ten Commandments should be permitted." H.R. Con. Res. 31, 105th Cong. (1997). In 1999, the House (but not the Senate) passed the Ten Commandments Defense Act, which would have approved posting the Ten Commandments on state and local government property. H.R. 1501, 106th Cong. § 1202 (1999). Congress has continued to pursue this issue. *See* H.R. 3895, 107th Cong. (2002) and H.R. 2045, 108th Cong. (2003).

These legislative endeavors highlight the importance of government Ten Commandments displays to the American public. It follows that granting certiorari to resolve the constitutionality of such displays is also of great public interest.

II. The Circuits Are In Conflict Over Government Ten Commandments Displays, And The Applicable Doctrine Is In Disarray

1. Government Ten Commandments displays have been upheld not only in the decision below, but also in the Third and Tenth Circuits, as well as in the Colorado Supreme Court.[1] Such displays have been held unconstitutional in the Sixth, Seventh, and Eleventh Circuits.[2] An Eighth Circuit panel decision also found a Ten Commandments display unconstitutional; however, that decision was vacated pending *en banc* rehearing. *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) (opinion vacated, April 6, 2004, pending rehearing *en banc*).

Notwithstanding this conflict, in recent years this Court has declined to hear several cases in which a local or state government's Ten Commandments display was adjudged to violate the Establishment Clause. *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied,* 538 U.S. 999 (2003); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S.Ct. 497 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied,* 534

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[1] *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *State of Colorado v. Freedom From Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995); *see also Suhre v. Haywood County*, 55 F. Supp. 2d 384, 399 (W.D. N.C. 1999) (upholding a courtroom display that included the Ten Commandments).

[2] *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.2d 766 (7th Cir. 2001); *Glassroth v. Moore*, 355 F.3d 1282 (11th Cir. 2003).

U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F. 3d 292 (7th Cir. 2000), *cert. denied,* 532 U.S. 1058 (2001). But while each of those displays came to the court having been enjoined below, here the Fifth Circuit *upheld* a display. This holding demonstrates that the circuit conflict concerning such displays is vital, fresh and deep.

2. Fueling this conflict, as well as the raging public debate over the Ten Commandments, is confusing and oft-criticized Establishment Clause doctrine. In Indiana's Ten Commandments case a few years ago, the district court remarked that sorting through the merits was "no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent." *Indiana Civil Liberties Union v. O'Bannon*, 110 F.Supp. 2d. 842, 848 (S.D. Ind. 2000).

Lemon v. Kurtzman, 403 U.S. 602 (1971), is the seminal decision for Establishment Clause cases, but this Court itself has sometimes eschewed *Lemon* in favor of more subjective, if doctrinally less rigorous, analyses, with seemingly conflicting results. *Compare Marsh v. Chambers*, 463 U.S. 783, 786-792 (1983) (upholding the common practice of legislative prayer based on "common sense" that government was not promoting religion) *with Lee v. Weisman,* 505 U.S. 577, 586-87 (1992) (invalidating commonplace public school graduation prayers because government was so obviously sponsoring religious practice). More recently, the majority opinion in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), did not even mention *Lemon*.

It should therefore not be surprising that lower courts frequently struggle just to determine what precedent to apply. At least one court wondered whether Ten Commandments displays discriminate among religions and thus trigger the "strict scrutiny" standard from *Larson v. Valente*, 456 U.S. 228 (1982). *See ACLU Nebraska Found. v. City of Plattsmouth,* 358 F.3d 1020, 1032-34 (8th Cir. 2004)

(opinion vacated, April 6, 2004, pending rehearing *en banc*); *see also Glassroth v. Moore*, 335 F.3d 1282, 1299 n. 3 (11th Cir. 2003). Others have decided Ten Commandments issues using the Court's reasoning in both *Lemon* and *Marsh*. *See ACLU Nebraska*, 358 F.3d at 1034, 1042; *Glassroth*, 335 F.3d at 1295, 1297-98; *see also Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 779 (7th Cir. 2001) (Coffey, J., dissenting) (citing *Marsh* for the proposition that, "[w]here a religious symbol has a landmark foundation and meaning in the history of our country," the government may display a symbol regardless of analysis under *Lemon*).

This uncertainty surrounding *Lemon*'s meaning and vitality has been exacerbated by the endorsement test from *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring), and *Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989). *Adland*, for example, explained esoterically that the Sixth Circuit has used the endorsement test as "a refinement or modification of the first and second prongs [of *Lemon*], a clarification of the first prong [of *Lemon*], . . . as a modification of the entire *Lemon* test," and "as a refinement of the second *Lemon* prong." *Adland,* 307 F.3d at 479 (internal citations omitted).

It was therefore a dramatic understatement for the Third Circuit to observe in a Ten Commandments display case that Establishment Clause doctrine "is somewhat murky . . . ." *Freethought Society v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003). In fact, expressing dissatisfaction with *Lemon* and its progeny has become de rigueur in Establishment Clause opinions. *See Glassroth*, 335 F.3d at 1295 ("We follow in the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned.").

The Court last directly addressed the circumstances in which government may display the Ten Commandments in

Stone v. Graham, 449 U.S. 39 (1980). *Stone* invalidated particular types of Ten Commandments displays in public school classrooms, but its rationale applies only in that narrow context. *Id.* at 42. *Lynch* and *Allegheny* address government displays of other religious objects to the general public, but those cases are of limited use because they address temporary displays concerning religious celebrations, not permanent displays related to history and culture. Only by reviewing a general public Ten Commandments display case can the Court provide the necessary guidance.

This case bears all the hallmarks of being worthy of review: The doctrine is jumbled, the litigation is growing, the public is engaged, and the Fifth Circuit has just freshened the conflict. It is time to resolve the Ten Commandments issue.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should affirm the decision below.

Respectfully submitted,

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