No. _____

In the Supreme Court of the United States

JAMES DEWEESE, HON., Sued Here in His Official Capacity as a Judge of the Richland County Court of Common Pleas,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a judge of the Ohio Common Pleas Court, included a poster of the Ten Commandments in a courtroom display among texts, portraits, and symbols illustrating the origins, sources, and development of the Rule of Law. A divided panel of the Sixth Circuit, limiting its holding to the purpose prong of *Lemon v. Kurtzman*, and relying largely on the circuit's decision in *ACLU of Kentucky v. McCreary County*, 354 F. 3d 438, 445 (6th Cir. 2003),[1] held that a state actor who uses the Ten Commandments (among other sources of law) to illustrate his jurisprudential viewpoint in his courtroom reveals a "predomina[nt]" religious purpose which violates the Establishment Clause.

The following questions are presented:

1. Does a judge who displays in his courtroom the Ten Commandments along with other sources and landmarks of our legal history as part of his overall educational efforts violate the Establishment Clause?

2. Does *Lemon's* purpose prong provide an adequate framework for analyzing Establishment Clause challenges to public displays of objects with religious significance?

3. Does the Establishment Clause override a state judge's Free Speech right to express a jurisprudential viewpoint grounded in a theistic worldview by referring to, among

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[1] This Court granted certiorari in *McCreary County* on October 12, 2004. *See* Case No. 03-1693, Order granting petition for writ of certiorari, 125 S. Ct. 310 (2004).

other things, the Decalogue as an emblem of respect for the Rule of Law?

4. Does respondent, whose "injury" consists of no more than the psychological consequences produced by occasional, sporadic observation by one or more of its members of conduct with which such members disagree, have standing under Article III to bring an Establishment Clause challenge?

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are set forth in the case caption. Petitioner, the Hon. James DeWeese, is an individual. *See* Rule 29.6.

Respondent, American Civil Liberties Union of Ohio Foundation, Inc., was plaintiff-appellee below. The County Commissioners, who were defendants in the district court, were not the subject of the district court's order granting plaintiff's motion for partial summary judgment and are not parties to the appeal.

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INTRODUCTION

In this case, a federal court sitting in a courthouse adorned with a magnificent painting of the Ten Commandments flanked by two angels, ordered an Ohio state court judge immediately to remove from his courtroom a small poster containing the plain text of the same Ten Commandments.[2] Despite the uncontradicted testimony of petitioner, Judge James DeWeese, that he had an entirely secular educational purpose for including the Decalogue among the dozens of law-related decorations that hang in and near his courtroom, both the district court and a divided panel of the Sixth Circuit concluded that DeWeese had a "predominate"[3] [sic] religious purpose. The Sixth Circuit affirmed the district court's injunctive order directing DeWeese immediately to remove the Commandments poster from his courtroom.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 375 F.3d 484 (6th Cir. 2004). The decision of the Sixth Circuit denying the petition for rehearing with suggestion for rehearing en banc is unreported. *See* 2004 U.S. App. LEXIS 20700 (6th Cir. Sept. 17, 2004). The decision of the United States District Court for the Northern

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[2] Photographs of the Edwin Blashfield mural, "The Law" which covers one wall of Courtroom 3 of the U.S. District Courthouse in Cleveland are at App. 92a-1, 92a-1; Photographs of Judge DeWeese's poster are at App. 100a-1, 100a-2.

[3] The Sixth Circuit majority in both this case and in *McCreary County* used the grammatically incorrect formulation "predominate purpose" instead of "predominant" purpose. *See McCreary County*, 354 F.3d at 449.

District of Ohio is reported at 211 F. Supp. 2d 873 (N.D. Ohio 2002).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this case on July 14, 2004. The Court of Appeals denied Judge DeWeese's petition for rehearing on September 17, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part 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 . . . .

U.S. Const. amend. I.

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

> 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

Judge James DeWeese is a judge of the Richland County Common Pleas Court, General Division, in Mansfield Ohio.

He has served in that position since 1991. App. 98a. As a judge of the Court of Common Pleas, Judge DeWeese has authority to decorate his courtroom as he sees fit. App. 99-100a.

In the fall of 2000, Judge DeWeese hung two documents on the wall of the spectator section of his courtroom: the Bill of Rights and an abbreviated version of the Ten Commandments. App. 99a. Looking from the rear of the courtroom, the Ten Commandments poster is on the left, the Bill of Rights poster is on the right. App. 99a. The text of these documents is too small to be read from the jury box, the witness stand, or the bench. App. 99a. Each of the documents bears, at its top, the legend: "the rule of law." App. 99a.

Both documents and the frames in which they hang are Judge DeWeese's personal property. App. 99a. Judge DeWeese hung these documents without any public announcement. He did not seek the permission of the county commissioners because he did not need their permission. App. 99a.

Other decorations outside the bar, in the spectator section of the courtroom, include three framed posters in which Jefferson, Madison and Hamilton praise the jury trial system. App. 99a. In front of the bar, flanking the judge's bench, are the United States and Ohio state flags. A portrait of Lincoln hangs on one side of the bench. Directly behind the bench and above the judge's chair is the seal of the State of Ohio

with a ribbon-like device bearing the words of Ohio's motto: "With God All Things Are Possible."[4]

Visitors to Judge DeWeese's courtroom observe other documents and decorations in the hall outside the courtroom. These documents make up what is called a "Freedom Shrine" and were donated by the Exchange Club of Mansfield, Ohio. App. 99a. The "Freedom Shrine" includes a plaque which reads as follows: "Freedom Shrine — created by the Exchange Club to strengthen citizen appreciation of our American heritage." The documents which make up the shrine contain the text or excerpts from some two dozen important or noteworthy events in American history.[5]

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[4] The constitutionality of Ohio's adoption and use as its official motto of this sentence from the Gospel of Matthew was affirmed by the Sixth Circuit in *American Civil Liberties Union of Ohio, et al. v. Capitol Square Review and Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (en banc).

[5] At least half of the Freedom Shrine texts contain explicit references to the connection between religion and the civic order. A few examples:

> ". . . the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained . . ." Washington's First Inaugural, 1789.

> "enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence . . ." Jefferson's First Inaugural, 1801.

> "And yet the same revolutionary beliefs for which our forbears fought are still at issue around the globe — the

Judge DeWeese's purpose for posting these documents was to use them occasionally in educational efforts when community groups come to the courtroom and ask him to speak to them. He finds them useful in illustrating his remarks to such groups about the origins of the law, legal philosophy and about the rule of law as opposed to the rule of man. App. 100a. He has not used these documents in resolving any of the cases that come before him. *Id.*

B. Proceedings Below

Plaintiff, ACLU of Ohio, brought this action pursuant to 42 U.S.C. §1983, alleging that DeWeese's courtroom display violated the Establishment Clause, and seeking declaratory and injunctive relief.

Although no individual ACLU member was identified in the Complaint, in support of its motion for summary judgment plaintiff supplied a Declaration of Bernard Davis, Esq. Mr. Davis is an attorney who practices in Richland County and has occasion to appear in Judge DeWeese's courtroom. He is also a member of the ACLU of Ohio. He says that the Ten Commandments poster "offends" him and diminishes his enjoyment and use of the courtroom. App. 61a.

1. The District Court

The district court found that the ACLU of Ohio had standing based on the affidavit of its member, Mr. Davis. The court held that Davis's allegation of personal offense was sufficient to confer standing on him and, derivatively, upon the ACLU. App. 61-62a.

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belief that the rights of man come not from the generosity of the state, but from the hand of God." Kennedy's Inaugural, 1961.

On the merits, applying the familiar *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the court held that, despite DeWeese's uncontroverted characterization of his purpose for the display as being educational, his purpose is "at heart, religious in nature." App. 76a. According to the court: "[A] state actor officially sanctioning a view of moral absolutism in his courtroom *by particularly referring to the Ten Commandments* espouses an innately religious view . . ." and thus violates the Establishment Clause. App. 77a (emphasis in original). The court then held that DeWeese's display likewise failed the "effect" or "endorsement" prong of *Lemon* because a "reasonable courtroom observer might conclude that the Judge would be less favorably disposed to a lawyer or litigant whose religious views or affiliation do not have Judeo-Christian roots." App. 81a.

In addition, the district court held that Judge DeWeese's display enjoys no protection under the First Amendment's Free Speech Clause, finding that DeWeese's speech cannot be considered private speech for purposes of First Amendment analysis. App. 86-87a.

The court ordered DeWeese to remove the poster from his courtroom.

2. The Court of Appeals

A divided panel of the Sixth Circuit affirmed.

The Sixth Circuit held that plaintiff, ACLU of Ohio, had standing because one of its members, although not a party, practices law in Judge DeWeese's courtroom "from time to time." App. 10a. The court held that this non-party ACLU member's "direct, unwelcome contact with the Ten Commandments display" App. 10a, constituted an Article III injury, and that, since the ACLU's challenge to the display was germane to the ACLU's purpose of "the preservation of

the constitutional separation of church and state," the ACLU of Ohio had standing to sue. App. 10a.

The court proceeded to analyze the case under *Lemon v. Kurtzman's* three-prong test.[6] The court found that DeWeese had "not posted his display with a permissible secular purpose," App. 14a, quoting the following testimony of DeWeese in support of this conclusion:

> My intent in posting these documents was to use them occasionally in educational efforts when community groups come to the courtroom and ask me to speak to them. These documents are useful in talking about the origins of law and legal philosophy and about the rule of law as opposed to the rule of man. App. 14a.

The court also interpreted some excerpts of DeWeese's testimony regarding the display as revealing a purpose on his part to (1) instruct individuals that our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments and (2) to help foster debate between the philosophical positions of moral absolutism and moral relativism. App. 14a. The panel majority concluded that DeWeese had not "described a role for the Ten Commandments poster in his educational errand other than to admonish participants in talks or programs in his courtroom to look to the Commandments as a source of law . . ." App. 15a.

The Sixth Circuit determined that DeWeese's deposition testimony (the only quoted portion of which is set forth above) "belies the secular purpose he wishes to ascribe to it,"

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[6] The first case cited by the majority in its purpose prong analysis is *ACLU of Ky. v. McCreary County*, 354 F. 3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004).

App 15a, and that DeWeese's "stated purpose for the display must guide the decision in this matter." App. 15a. Holding that DeWeese had a predominantly "non-secular purpose for the display," the court ruled that the display constituted a violation of the Establishment Clause. App. 15a.

The Sixth Circuit then proceeded to the second, "effect" prong of *Lemon* which it saw as interchangeable with this Court's "endorsement" test. App. 15-20a. The court of appeals, relying largely on the case of *ACLU of Ky. v. McCreary County*, 354 F. 3d 438 (6th Cir. 2003),[7] concluded that DeWeese's display could be seen as an impermissible endorsement of religion; App. 19a, however, the court chose to not rule on that ground, expressly limiting its holding to a finding that the district court did not err in deciding that DeWeese's display violated *Lemon's* purpose prong. App. 20a.

Finally, the Sixth Circuit rejected DeWeese's alternative argument that, as "part of the fabric of our society," *see Marsh v. Chambers*, 463 U.S. 783 (1983), depictions of the Decalogue found on government property such as DeWeese's courtroom (as well as this Court's courtroom and the courthouse in which the district court sat) should not, without more, be held to violate the Establishment Clause. App. 20-21a.

Judge Batchelder's dissent noted that, despite repeated attempts by the lower courts to distinguish (or ignore) this Court's clear statements in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), this Court has never reversed its holding in that case. App. 23a. The dissent further observed that the

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[7] Petition for certiorari granted, 125 S. Ct. 310 (2004).

particular "victim" in this case was not even identified by the plaintiffs until well into the litigation, leading to the following candid assessment:

> It is quite obvious from the filings that the ACLU in fact "roamed the country in search of wrongdoing," filed suit in the present case, and later, only after being prompted to do so, produced the affidavit of a member claiming to be offended by the display. App. 29a (quoting *Valley Forge*, 454 U.S. at 487).

Turning to the merits, the dissent observed that *Lemon*'s purpose prong, as explicated in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984), may be satisfied if "a" secular purpose can be articulated. App. 32a. Second, as the case was decided on cross-motions for summary judgment, the court was required to view the factual evidence in the light most favorable to DeWeese. App. 32-33a. Third, the court was required to defer to the government actor's assertion of a legitimate secular purpose in the absence of clear evidence to the contrary. App. 32a. Judge Batchelder observed that the panel majority ignored all three of these principles. App. 37a.

Judge Batchelder explained that neither *Stone v. Graham,* 449 U. S. 39 (1980), nor any of this Court's other precedents can be fairly read to create the kind of presumption of unconstitutionality for Decalogue displays applied by the district court and the panel majority. App. 33-34a. Further, the dissent sharply disagreed with what is certainly the core of the majority's decision, namely, its characterization of DeWeese's jurisprudential philosophy as "innately religious." App. 36a.

Judge Batchelder also rejected the panel majority's handling of the "endorsement test."[8] The dissent pointed out that the majority's narrow focus on the Commandments poster is expressly forbidden by this Court in its numerous explanations of the endorsement test's parameters:

> Taken as part of the larger display both within the courtroom and extending into the hallway and lobby, the Decalogue poster is merely one part of a forty-piece display that "signals respect not for great proselytizers but for great law givers." (Citation omitted). App. 40a.

Finally, the dissent was unimpressed by the majority's dismissive attitude toward DeWeese's argument that his display of the Commandments was akin to the practice of legislative prayer upheld by this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983), as well as the majority's cavalier handling of DeWeese's First Amendment claim, pointing out that, given the multitude of forms of expression which have been deemed protected by this Court and the Courts of Appeals, it is incongruous to forbid the kind of expression DeWeese wishes to engage in: "It is not unconstitutional to make observations of historical fact." App. 47a.

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[8] As noted previously, while devoting more space to the endorsement test than any other aspect of its opinion, the panel majority expressly limited its holding to *Lemon's* purpose prong. App. 20a.

REASONS FOR GRANTING THE WRIT

I. THE BASIS OF THE SIXTH CIRCUIT'S DECISION HAS BEEN DIRECTLY CALLED INTO QUESTION BY THIS COURT'S GRANT OF REVIEW IN *MCCREARY COUNTY v. ACLU OF KENTUCKY*

On October 12, 2004, this Court granted review in two cases involving displays of the Ten Commandments on public property. *See McCreary County v. ACLU of Kentucky*, 125 S. Ct. 310 (2004); *Van Orden v. Perry*, 125 S. Ct. 346 (2004).

McCreary County is a Sixth Circuit case. The panel majority in this case cited *McCreary County* no less than eleven times. App. 11a, 12a, 16,a, 17a, 18a, 19a, 20a. It is fair to say that the Sixth Circuit's decision in this case rests to a large extent on *McCreary*.

Further, in the *McCreary County* case, two of the "Questions Presented" read as follows:

> 3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.
>
> 4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

The Sixth Circuit expressly limited its holding to a finding that DeWeese's display failed to satisfy the purpose prong of the *Lemon* test. App. 20a. This Court's grant of review in *McCreary County,* along with the "Questions Presented," indicate that *Lemon's* applicability is — at least for now — open to question. Thus, both the specific (*McCreary County*) and general (*Lemon*) legal foundations of the Sixth Circuit's decision are currently under examination by this Court. It

would be a manifest absurdity to permit the Sixth Circuit's opinion to stand as the last word in this case while there exists a legitimate possibility that one or both of its supporting legs may be cut out from under it by the end of this Court's current term.

This Court should grant review or, in the alternative, hold this case pending the disposition of *McCreary County* and *Van Orden*, and then either grant plenary review or grant and remand for further consideration.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS ON THE PUBLIC DISPLAY OF OBJECTS WITH RELIGIOUS SIGNIFICANCE.

A. Mechanical Application of *Lemon's* Three-Part Test has Been Abandoned by This Court.

Whatever else may be said about this Court's adherence to the three-prong test of *Lemon v. Kurtzman,*[9] 403 U.S. 602 (1971), it is clear that this Court has long since abandoned the

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[9] The "persuasive criticism" of *Lemon* noted by Justice Kennedy in 1989, concurring in part and dissenting in part in *Allegheny*, 492 U.S. at 656, has not diminished in the years since then; if anything, the criticism has increased in volume and intensity both on and off the Court. *See Lamb's Chapel v. Center Moriches*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in judgment) ("For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced"). Most recently, Justice O'Connor reiterated her view that the endorsement test — not *Lemon* — should be the test in cases involving challenges to government-sponsored speech or displays of objects with religious significance. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (O'Connor, J., concurring in the judgment).

kind of mechanical application of *Lemon* engaged in by the court below, especially in cases involving the public display of objects with religious significance. Indeed, striking down such a display — as the panel majority did here — on the basis of *Lemon's* purpose prong alone has something of an anachronistic flavor about it. *See Edwards v. Aguillard*, 482 U.S. 578, 612 (1987) (Scalia, J., dissenting) (observing that Court has "said little about the first component of the *Lemon* test," and that "[A]lmost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause").

Beginning with *Lynch v. Donnelly*, this Court has unmistakably moved away from *Lemon*'s formalistic purpose-effect-entanglement inquiry in religious display cases. In *Lynch*, a five justice majority held that Pawtucket, Rhode Island did not violate the Establishment Clause by erecting a Nativity scene as part of its annual Christmas holiday observance. While paying lip service to *Lemon*'s prongs, the majority noted that "we have repeatedly emphasized our unwillingness to be confined to any single test or criteria in this sensitive area." *Lynch*, 465 U.S. at 679. Rather than describing *Lemon's* test in mandatory or normative terms, the majority described the three-pronged test as something it has "often" found "useful" in evaluating practices challenged under the Establishment Clause, pointing out that the Court has not always even applied the *Lemon* "test" (tellingly placing quotation marks around the word "test"). *Id.*

The *Lynch* majority's indication of a retreat from rote adherence to *Lemon* was carried further by Justice O'Connor's concurrence in which, for the first time, Justice O'Connor articulated what has become known as the

"endorsement test."[10] *Lynch*, 465 U.S. at 687-94. Described as "a clarification of our Establishment Clause doctrine," the endorsement test effectively discards the purpose prong of *Lemon* by collapsing it into the effect prong and shifting the inquiry from one which asks whether government has a secular purpose for a challenged activity to one which asks "whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691.

In *Allegheny*, a case involving challenges to a governmental display of a crèche and a separate display of a Christmas tree and menorah, this Court simply bypassed the purpose prong of *Lemon*, analyzing the case exclusively under the endorsement test of Justice O'Connor's concurrence in *Lynch*. 492 U.S. at 578-622. It is noteworthy that, despite the patchwork of concurrences, partial concurrences and partial dissents in *Allegheny*, not a single justice opined that *Lemon's* purpose prong was the appropriate place to start or decried his or her fellow justice's failure to inquire into Allegheny County's purposes for its various holiday decorations.

In *Capitol Square Review and Adv. Bd. v. Pinette*, 515 U.S. 753, 780 (1995), while members of this Court differed sharply about the degree of knowledge to be imputed to the hypothetical reasonable observer of the endorsement test, not one justice expressed the view that the analysis of the constitutionality of the Ku Klux Klan's display of a cross in Ohio's Capitol Square should begin with, much less be determined by, the purpose prong of *Lemon*.

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[10] Justice O'Connor was one of the five-justice majority in *Lynch*, i.e., without her concurrence, the result of the case would have been the opposite.

Completely ignoring this Court's retreat from *Lemon's* purpose-effect-entanglement trilogy in cases involving government displays of objects with religious significance, the Sixth Circuit in this case began its opinion with the familiar (albeit outdated) hornbook recitation of *Lemon's* three prongs, App. 10-11a, and proceeded to dispose of the merits of the case on the purpose prong *alone*.[11] App. 20a. Leaving aside for the moment the court of appeals' misunderstanding and misapplication of *Lemon's* purpose prong (*see infra*), the lower court's inexplicable departure from this Court's teaching regarding the test to be applied in such cases warrants this Court's review.

B. The Sixth Circuit's Application of *Lemon's* Purpose Prong Conflicts With This Court's Precedents.

Assuming, *arguendo*, that *Lemon*'s purpose prong is the correct place to start the analysis of Establishment Clause challenges to displays of objects with religious significance, the Sixth Circuit's opinion both misstates and misapplies this Court's precedents.

The Sixth Circuit formulated *Lemon*'s purpose prong as follows:

Thus, a plaintiff must show that the predominate [sic] purpose for a challenged display is religious, although a totally secular purpose is not required. App. 12a (citing *ACLU of Kentucky v. McCreary County*, 354 F. 3d 438 at 446 (6th Cir. 2003), and *Adland v. Russ*, 307 F. 3d 471, 477 (6th Cir. 2002)).

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[11] While it is true that the Sixth Circuit did conduct its version of the endorsement test, by expressly limiting its holding to the purpose prong of *Lemon*, the majority effectively rendered its entire endorsement analysis so much *obiter dicta*. App. 20a.

That is not the law. This Court has consistently held that *Lemon*'s requirement of a secular purpose means *a* secular purpose. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984):

> The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, *but only when it has concluded that there was no question that the statute or activity was motivated wholly by religious considerations*. (Emphasis supplied)

The Court in *Lynch* further explained:

> The city contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon v. Kurtzman* (citation omitted) requires. *Id.* at 681 n.6.

This Court has never deviated from this statement of *Lemon's* purpose prong: *a* secular purpose is enough to satisfy the test. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Stevens, writing for the Court, specifically addressed the question of a statute or action with a partially religious and partially secular purpose:

> For even though a statute that is motivated in part by a religious purpose may satisfy the first criteria [citation omitted] the First Amendment requires that a statute must be invalidated if it is *entirely motivated* by a purpose to advance religion.

Id. at 56 (emphasis supplied).

In place of this Court's clear teaching on the question, the court below substituted a predominant purpose standard. As the dissenting judge points out, this sets "a higher bar than that either required or permitted by the Supreme Court." App. 37a. In fact, the lower court's standard is not merely

contrary to precedent, it is entirely subjective, demanding that a court somehow weigh two concurrently held purposes (one secular, one religious) in order to determine which purpose preponderates (or, predominates) over the other.[12]

The only direct evidence of DeWeese's purpose in this case came from DeWeese. That evidence consisted of his Affidavit, App. 98-100a, and deposition testimony, App. 102-127a, in which he stated that his purpose was educational, i.e., to use the poster, along with the matching Bill of Rights poster, to illustrate educational talks he gives to community groups who visit the courthouse from time to time. This evidence of DeWeese's purpose was unrefuted. It was only by blurring the distinction between DeWeese's personal beliefs and his motives for the display that the court below arrived at its finding of impermissibly religious purpose. App. 36a.

Even so, as the dissent observed, the lower court's blurring of the distinction between DeWeese's beliefs and his purpose for the display — assuming such blurring to be proper — should have been only part of the inquiry even under the Sixth Circuit's blatantly mistaken formulation of the purpose prong:

> It proves neither that DeWeese did not have *a* secular purpose nor that his stated secular purpose was not the

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[12] The difficulty, if not impossibility, of ascertaining the "purpose" or motivation behind a governmental official's acts is discussed at length by Justice Scalia, dissenting in *Edwards v. Aguillard*, 482 U.S. at 636-40. In the instant case, the Sixth Circuit, like the district court, avoided this difficulty by ignoring Judge DeWeese's unrefuted affidavit and, in the absence of any evidence whatsoever of insincerity or dissembling on DeWeese's part, purported to peer into his "heart" and discover therein an unstated predominant religious purpose. App. 76a and App. 15a.

predominant purpose for the display. App. 36a (emphasis supplied).

The Sixth Circuit's misunderstanding or rejection of this Court's teaching led it to the erroneous conclusion it reached in this matter.

III. THE SIXTH CIRCUIT' CHARACTERIZATION OF DEWEESE'S PURPOSE AS IMPERMISSIBLY RELIGIOUS CONFLICTS WITH THE HISTORY OF OFFICIAL RECOGNITION BY GOVERNMENT OF THE DECALOGUE'S SECULAR INFLUENCE.

The Sixth Circuit summarized what it saw as DeWeese's unlawful religious purpose: "to admonish participants in talks or programs in his courtroom to look to the Commandments as *a* source of law." App. 15a (emphasis supplied). This is what the majority found to be an unlawful non-secular purpose for the display.

The majority's conclusion flatly ignores what this Court has called the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. What is true of religion in general is no less true of the Decalogue in particular. On at least seven occasions, members of this Court have specifically recognized that the Ten Commandments are, in fact, *a* source of law. *McGowan v. Maryland*, 366 U.S. 420 (1961) (Frankfurter, J.) ("Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibitions of murder, theft and adultery reinforce commands of the Decalogue"); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *Stone v. Graham*, 449 U.S. at 45 (Rehnquist, J. dissenting) (the Ten Commandments,

undeniably, "have had a significant impact on the development of secular legal codes of the Western World"); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (Ten Commandments have played both a secular and religious role in the history of Western Civilization); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 652-53 (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part) (carving of Moses with Ten Commandments on wall of Supreme Court's courtroom alongside famous secular lawgivers is a fitting message for a courtroom); *Books v. City of Elkhart*, 532 U.S. 1058 (2001) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) ("Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes"); *Lynch v. Donnelly*, 465 U.S. at 677 (Burger, C.J., writing for the Court, noting with approval the presence of depiction of Moses and Ten Commandments on Supreme Court's wall).

This Court has displayed no constitutional squeamishness about conducting its business since the 1930s in a building which contains at least three depictions of Moses and the Decalogue as a source of law.[13] Nor have other courts and public bodies across the nation shied away from having

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[13] In addition to the courtroom frieze mentioned in both *Lynch* and *Allegheny*, the Commandments appear on the West Pediment as part of the depiction of John Marshall, and on the East Pediment where the figure of Moses holding the tablets is central and in the forefront gazing down on pedestrians and traffic along 2d Street. *See* Office of the Curator, United States Supreme Court.

visitors look to the Commandments as *a* source of law.[14] Acknowledgments of the same by Presidents, legislators and state court judges are legion.[15]

In fact, use of the Decalogue as a symbol of law is so widespread as to fit DeWeese's display comfortably within the framework of this Court's decision in *Marsh v. Chambers*, where the Court upheld the Nebraska legislature's practice of opening legislative sessions with prayer. This Court looked

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[14] In addition to the Edwin Blashfield painting of "The Law" which is in the courthouse where the district court decided this case, App. 92a, depictions of Moses and/or the Decalogue can be found in at least the following courthouses and public buildings: U.S. Courthouse/Federal Building in Cleveland, Ohio; U,S. Courthouse in Indianapolis, IN; Pennsylvania Supreme Court in Harrisburg, PA; Cuyahoga County Courthouse in Cleveland, OH; U.S. District Courthouse in Washington, D.C.; Chester County Courthouse, West Chester, PA; Minnesota Supreme Court in St. Paul, MN; Michigan Supreme Court, Lansing, MI; Allegheny County Courthouse, Pittsburgh, PA; Tennessee Supreme Court, Knoxville, TN; New York State Appellate Court, Brooklyn, NY; Allen County Courthouse, Fort Wayne, IN; Nebraska State Capitol, Lincoln, NE; Library of Congress, Washington, D.C.; National Archives, Washington, D.C.

The U.S. House chamber features 23 marble relief portraits of "historical figures noted for their work in establishing the principles that underlie American law." According to the House Curator, the "eleven profiles in the eastern half of the chamber face left and the eleven in the western half face right, so that all look towards the full-face relief of Moses in the center of the north wall." *Source*: Office of the Curator, U.S. House of Representatives.

[15] *See Freethought Society v. Chester County*, 334 F.3d 247, 267-69 (3d Cir. 2003) (listing examples).

to the "unambiguous and unbroken history of more than 200 years" in concluding that the practice of legislative prayer "has become part of the fabric of our society." *Marsh*, 463 U.S. at 792. Moreover, the principle underlying *Marsh* was incorporated into Justice O'Connor's endorsement test in *Lynch* as an element which looks to the "history and ubiquity" of a practice challenged under the Establishment Clause. *Lynch*, 465 U.S. at 692-93; *see also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion"); *Capitol Square Review and Adv. Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring); *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (O'Connor, J., concurring) ("in examining whether a given practice constitutes an instance of ceremonial deism, its 'history and ubiquity' will be of great importance").

It is partly because of their history and ubiquity as part of "our Nation's cultural landscape," *Newdow*, 124 S. Ct. at 2322, that this Court has noted that the following practices are not violative of the Establishment Clause: Thanksgiving and Christmas national holidays, paid military chaplains, legislative invocations, "In God We Trust" as national motto, "One Nation Under God" in Pledge of Allegiance, executive proclamations of days of prayer and thanksgiving, displays of religious art in public museums, provision of chapels in U.S. Capitol for worship and meditation, and this Court's permanent display of Moses with the Ten Commandments. *Lynch*, 465 U.S. at 674-78. Judge DeWeese's inclusion of the Decalogue among the numerous symbols and emblems of law and lawgivers found in and near his courtroom is no more, and, in fact, is far less "religious" than many of the foregoing

practices described by this Court as tolerable acknowledgements of beliefs widely held among the people of this country. *Marsh*, 463 U.S. at 792.

The Sixth Circuit's holding that looking to the Decalogue as a source of law bespeaks an impermissible religious purpose requiring invalidation under the Establishment Clause is a misinformed observation which flies in the face of not only this Court's precedents but much of the nation's history and civic traditions.

IV. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING JUDICIAL SPEECH AND VIEWPOINT DISCRIMINATION.

A careful reading of the Sixth Circuit's decision shows that the court's focus was not, in fact, the display itself but, rather, what DeWeese *says* about the display when speaking in a non-adjudicative role to community groups who visit his courtroom, and even what DeWeese *thinks* or *believes* about the Commandments as a private citizen. Lacking even a scintilla of evidence of anything other than an eminently secular purpose for the display, the court latched onto excerpts from DeWeese's deposition in which he explained his personal views about "the ultimate authority in law." App. 14a and App. 75a. The court below then loosely paraphrased[16] DeWeese's testimony regarding what he says

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[16] As the dissent put it, the Sixth Circuit majority summarily adopted the errors of the district court which "carefully parsed statements in DeWeese's deposition testimony concerning *his privately held beliefs* to divine an additional, unstated religious purpose for the display that is not apparent from the testimony taken as a whole." App. 33a (emphasis in original).

when speaking to community groups before adopting the district court's conclusion that:

> [a] state actor officially sanctioning a view of moral absolutism in his courtroom *by particularly referring to the Ten Commandments* espouses an innately religious view . . . App. 15a (emphasis in original)

Thus, for the majority, it is the words DeWeese says about the display which violate the Establishment Clause.

By shifting the focus of its analysis from the display itself and the circumstances surrounding its appearance to statements of opinion made by DeWeese (based on beliefs privately held) while acting in a non-adjudicatory role, the Sixth Circuit implicated the First Amendment's Free Speech Clause. Thus, the court erred by dismissing DeWeese's free speech claim in a footnote. App. 11a.

The lower court ignored this Court's decision in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). In striking down Minnesota's "announce clause," this Court recognized that the mere donning of the judicial robe (or campaigning to do so) does not deprive a citizen of the right to voice an opinion, especially on matters related to disputed legal issues and general judicial philosophy.[17] *Id.* at 779. Given this recognition of a judge's First Amendment right to speak on disputed legal and political issues, DeWeese's right to voice his general jurisprudential viewpoint deserves at least as much protection.

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[17] Like the ABA Code of Judicial Conduct and the Minnesota Code at issue in *Republican Party*, the Ohio judicial canons not only permit but encourage judges to speak, write, *lecture*, and *teach* on "the law, the legal system, and the administration of justice." Ohio Code of Judicial Conduct, Canon 2(A)(1).

By invalidating DeWeese's display *solely* on the basis of his statements of his philosophical viewpoint (informed to some degree by his religious beliefs), the Sixth Circuit engaged in the very censorship this Court has held to be violative of the Free Speech Clause:

> [T]o scrutinize the content of . . . speech, lest the expression in question — speech otherwise protected by the Constitution — contain too great a religious content . . . raises the specter of governmental censorship, to ensure that all . . . [speakers] meet some baseline standard of secular orthodoxy. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995).

This Court's denunciation of viewpoint discrimination, as well as its oft-repeated statement that mere fear of an Establishment Clause violation does not justify the restriction of First Amendment freedoms, are well-settled. *Good News Club v. Milford Central School Dist.*, 533 U.S. 98 (2001); *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The Sixth Circuit's censorship of DeWeese's viewpoint becomes even more difficult to justify when one considers that the viewpoint in question is a philosophical or jurisprudential viewpoint rather than some esoteric theological tenet or sectarian dogma.

DeWeese's viewpoint regarding the "ultimate authority in law" does not differ in any respect from the viewpoint expressed by Washington, Hamilton, James Wilson and most of the Framers, a viewpoint assumed by Jefferson in drafting the Declaration, often described as a "Natural Law" viewpoint. *See* Charles Haines, *The Revival of Natural Law Concepts* (Harvard University Press 1930) Lloyd Weinreb, *Natural Law and Justice* (Cambridge, MA. 1987); Harold

Berman, *Individualistic and Communitarian Theories of Justice*: *An Historical Approach*, 21 U. Cal. Davis L. Rev. 549 (1988).

Hamilton's articulation will suffice to illustrate the viewpoint which he shared with the other Framers — a viewpoint the Sixth Circuit now holds to be "unconstitutional" when expressed by DeWeese:

> Good and wise men, in all ages, have embraced a very dissimilar theory. They have supposed, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever.
>
> This is what is called the law of nature, "which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original."

Alexander Hamilton, *The Farmer Refuted*, 23 Feb. 1775, *quoting* Blackstone, *Commentaries on the Laws of England* (reprinted in *The Founders Constitution*, Vol. 1, pp. 90-91).

The Sixth Circuit's error is further compounded by its failure to appreciate that what it refers to as DeWeese's "educational errand" is far from being a one-sided lecture or sermon admonishing his listeners that they should adopt his view; rather, a fair and full reading of his testimony shows that DeWeese presents his viewpoint in the context of encouraging an ongoing debate about the basis of our legal system. Contrasting the views of moral absolutism and moral relativism, DeWeese says:

> Neither one of those world views is any less religious than the other. That's why I think this is a debate which should not be silenced. You cannot say either view is right or wrong, but you can say it's a debate which should continue . . . App. 111-112a.

This Court held in *Republican Party* that the Free Speech Clause overrides a state's undoubted interest in judicial integrity and prohibits states from muzzling judicial candidates and incumbent judges who wish to announce their views on disputed legal or political issues.[18] At least in that context there is a logical connection between the state's interest and the conduct sought to be restricted, *viz.*, a judge's expression of an opinion about a specific legal issue might lead citizens to question his impartiality or openmindedness when that issue comes before him.

But if the Free Speech Clause outweighs that government concern, it must certainly outweigh the highly attenuated concern in the present case that a judge, acting in a non-adjudicatory role, in furtherance of his duty to educate, lecture and teach about the law, who gives voice to the jurisprudential view of Hamilton and the other Framers in the context of encouraging an ongoing debate about the basis of our legal system, somehow "crosses the line created by the Establishment Clause" (a clause adopted by the very Framers whose viewpoint is now held to be unmentionable). A "line" which has been described by members of this Court as "blurred, indistinct, and variable," *Lemon*, 403 U.S. at 164, "crooked," and "wavering," *Lamb's Chapel*, 508 U.S. at 399, which even this Court can only "dimly perceive," *Tilton*

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[18] In *Republican Party*, the lower courts had construed the scope of the "announce clause" to permit discussions of "judicial philosophy." 536 U.S. at 772.

v. Richardson, 403 U.S. 672, 678 (1971), is hardly a sufficient basis for squelching the free speech rights of any citizen, or for failing even to recognize that those rights are implicated in this context.

Neither is there a principled distinction to be made because part of DeWeese's speech is written and part is oral. ACLU member Davis objected only to this one of Judge DeWeese's posters, because of its content — what was written on it. But that written speech has historic relevance both to American law and to the philosophical debates discussed by Judge DeWeese.

Penalizing DeWeese's speech about the origins and basis of the Rule of Law is viewpoint discrimination pure and simple. *Rosenberger*, 515 U.S. at 819 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"). *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The egregious nature of the action of the lower courts in this case is perhaps best captured by dissenting Judge Batchelder's observation:

> Nor do I agree with the majority's incredible assumption that fostering debate between the philosophical positions of moral absolutism and moral relativism "crosses the line created by the Establishment Clause." A great many state educational institutions will be shocked, I suspect, to learn that fostering debate between philosophical positions is now unconstitutional in the Sixth Circuit. App. 36a.

The "shock" will not be confined to "state educational institutions."

V. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS ON ARTICLE III STANDING.

Respondent, ACLU of Ohio, brought this action on behalf of unidentified members of the organization. *See Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977). During the litigation, respondent proffered an affidavit of one of its members, Bernard Davis, an attorney who has occasionally appeared in Judge DeWeese's courtroom and who claims that the Commandments poster "offends [him] personally." App. 61a. Under this Court's standing jurisprudence, respondents have standing only if Davis would have standing to sue in his own right. *Id.*; *see also Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Respondents and Davis have alleged no injury other than the "psychological consequences presumably produced by observation of conduct with which one disagrees." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S, 464, 485 (1982). As this Court said in *Valley Forge*: "That is *not* an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86 (emphasis added). This Court reiterated this principle in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998): "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."

In the instant case, the ACLU and Mr. Davis do not even claim that the presence of the Decalogue in DeWeese's courtroom forces Davis to avoid using the courtroom — a contention by which numerous circuit and district courts have

erroneously attempted to distinguish *Valley Forge*.[19] Instead, respondents rely on circuit precedent which — in the face of this Court's clear teaching to the contrary — permits standing to rest on unwelcome contact with some government activity which is "offensive" to the psyche or sensibilities of the viewer.[20] The dissent correctly stated that the cases relied on by the majority "are inconsistent with the holdings in *Valley Forge* and *Steel Co.*, and in that regard were wrongly decided." App. 26a.

The Sixth Circuit's finding of Article III standing in this case is in direct conflict with this Court's unambiguous teaching. This Court should grant review.

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[19] *See, e.g.*, *Gonzales v. North Township*, 4 F.3d 1412, 1416-17 (7th Cir. 1993) (plaintiff avoids area of the park); *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991) (plaintiff alters travel routes).

[20] *See, e.g., Washegesic v. Bloomingdale Public School*, 33 F.3d 679 (6th Cir. 1994); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985).

CONCLUSION

This Court should grant the petition, or, in the alternative, hold this case pending the disposition of *McCreary County* and *Van Orden*, and then either grant plenary review or grant and remand for further consideration.

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