No. 03-5142

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY,
and BART MCQUEARY

Plaintiffs-Appellants,
v.

MERCER COUNTY, KENTUCKY, and
CHARLES H. MCGINNIS, in his official capacity as
Mercer County Judge Executive

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky Lexington Division

REPLY TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

A panel of this Court correctly held that Mercer County, Kentucky and Charles H. McGinnis (hereafter "Mercer County") did not violate the Establishment Clause of the First Amendment by allowing a privately-owned "Foundations of American Law and Government" display (hereafter "Foundations display"), which contains various texts of historic significance to the people of the United States and Kentucky,[1] to be hung in the County Courthouse. The American Civil Liberties Union of Kentucky and Bart McQueary (collectively "the ACLU") contend that the panel's decision conflicts with the Supreme Court's decision in *McCreary County v ACLU of Kentucky*, 125 S. Ct. 2722 (2005). They are incorrect.

In writing for the five-justice majority in *McCreary County*, Justice Souter said:

> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.

McCreary County, 125 S. Ct. at 2737, n. 14.

The panel's decision simply recognizes this distinction and applies it to the facts of this case.

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[1]The Foundations Display includes the Mayflower Compact, the Declaration of Independence, the Ten Commandments, the Magna Carta, the Star-Spangled Banner, the National Motto "In God We Trust," the Preamble to the Kentucky Constitution, the Bill of Rights, and Lady Justice.

In this case, unlike in *McCreary*, the only statements of Mercer County's purpose in the record were entirely secular and the one and only display in the courthouse was one in which the Decalogue was integrated in a wide array of historical symbols and texts. It was incumbent upon the Petitioner to come forward with some evidence showing that the County's real purpose was other than its stated purpose. Because the ACLU did not produce *any* evidence of any religious purpose, let alone a *predominantly* religious purpose, the district court correctly held, and the panel properly affirmed, that Mercer County's unrefuted proof of its secular purpose coupled with the finding that a reasonable observer would not see a predominantly religious purpose behind the County's display, entitled the County to summary judgment.

As argued herein, the panel's decision is completely consistent with *McCreary* and represents no more than a proper application of *McCreary* to a decidedly different set of facts as found in the record before the Court.

I. THE PANEL CORRECTLY APPLIED *MCCREARY'S* PURPOSE ANALYSIS TO THE FACTS OF THIS CASE.

In this case, the ACLU had "ample opportunity to produce evidence [of a religious purpose] and failed to do so." *ACLU of Kentucky v. Mercer County*, 432 F. 3d 624, 632 (6th Cir. 2005). Although the District Court gave the ACLU 120 days to conduct discovery on this very issue, that time elapsed without a single discovery request being made. *Id.* at 628. Rather than producing evidence to

sustain its burden of proof on this issue, the ACLU merely asserted that Mercer County had not sufficiently *disproved* the ACLU's allegation of religious purpose. *See, e.g.,* Petition at 3 (claiming that "[t]he only *evidence of a secular purpose* in the record is government officials' self-serving statement . . .") (emphasis added).

A record devoid of *any* evidence of religious purpose, without more, cannot raise a genuine issue of material fact as to religious purpose. The *McCreary County* Court confirmed this when it held that a plaintiff alleging that "savvy officials had disguised their religious intent so cleverly that the objective observer just missed it"—which is essentially the ACLU's argument here—has failed to meet its burden of proving a religious purpose. *See* 125 S. Ct. at 2735.

Additionally, the ACLU misconstrues *Lemon*'s purpose inquiry by seeking to shoehorn facts from other cases into this litigation. The appropriate inquiry is whether *the defendants in this case* acted with a religious purpose, not how this case fits within the scheme of "Modern Decalogue litigation in Kentucky."[2] The ACLU's basic argument is flawed: since Mercer County posted the same display as McCreary County, and the Supreme Court held that McCreary County acted with a religious purpose, Mercer County's mere act of posting its display shows that it also had a religious purpose. This does not follow.

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[2]*See* ACLU's Petition at 1.

This argument also ignores the fact that the Supreme Court's analysis in *McCreary County* focused exclusively on the evolution of McCreary County's display. The Court did not impute to McCreary County the motives of other governments whose displays have been challenged under the Establishment Clause. Had the Court chosen to examine "Modern Decalogue litigation in Kentucky" rather than the facts of the case before it, it might have imputed Mercer County's secular purpose to McCreary County and upheld the display. As the Court explained, "[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id*. at 2737 n.14. Thus, while both counties ended up with a Foundations display, their actions are judged differently because Mercer County's display lacks the "sectarian heritage" of McCreary County's display. The panel properly rejected the ACLU's invitation to impute McCreary County's motives to Mercer County.

The panel noted that, in *McCreary*, the Supreme Court did "not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter." *Mercer*, 432 F. 3d at 632, quoting *McCreary County*, 125 S. Ct. at 2741. Further, the panel observed that the *McCreary* Court emphasized that the district court should be willing to modify its judgment should McCreary and

Pulaski Counties later demonstrate a predominantly secular purpose. From this, the panel drew the logical conclusion:

> If the counties involved in *McCreary County* may purge themselves of the impermissible purpose, it follows a fortiori that Mercer County may act free of the *McCreary County*-taint. Furthermore, the sins of one government should not be revisited on other governments. There is quite simply no basis in law or fact for such imputation."

Mercer County, 432 F.3d at 632, n.6.

Moreover, other recent Ten Commandments cases weigh heavily in favor of finding that Mercer County *lacked* any religious purpose. As the panel decision explained, the case most analogous to the present case is *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005). *Elkhart County* involved a Foundations display that was "substantially similar" to the one at issue here.

The Seventh Circuit held that "[t]he County's stated purposes—to educate its citizens in the history of American law and politics and provide moral uplift—are secular, and we see no good reason to doubt the County's sincerity." As the court explained, the key difference between that case and *McCreary County* was the displays' development: "[o]ur case differs from *McCreary County* in that the displays in Kentucky originated as displays of the Ten Commandments alone rather than in combination with other documents in an exhibit; after litigation was commenced, the displays were modified to include the additional documents." *Id.*

at 862, n.2. As the Seventh Circuit did in *Elkhart County*,[3] this Court should deny the ACLU's Petition because there is simply no conflict.

In the cases where this Court has held a Ten Commandments display unconstitutional, the Ten Commandments were isolated at some point or strongly emphasized over other documents and the government often changed the content or emphasis of its display once litigation began.[4] In stark contrast, Mercer County has never had a stand-alone monument, and the Ten Commandments document within its Foundations display is the same size, style, and format as all of the other documents.

The ACLU's Petition should be denied because the mere existence of a comprehensive historical display that includes the Ten Commandments does not imply that the government acted with the predominant purpose of advancing religion, and the ACLU has offered no other evidence to suggest that Mercer County acted with an impermissible purpose.

II. A REASONABLE OBSERVER WOULD CONCLUDE THAT MERCER COUNTY'S DISPLAY DOES NOT HAVE THE EFFECT OF ENDORSING RELIGION.

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[3] *Books v. Elkhart County*, No. 04-2075, 2005 U.S. App. LEXIS 7544 (7th Cir. Apr. 28, 2005) (order denying petition for rehearing with suggestion for rehearing en banc).

[4] *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 493-95 (6th Cir. 2004); *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003); *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 929 (6th Cir. 2002); *Adland v. Russ*, 307 F.3d 471, 482 (6th Cir. 2002).

The panel properly held that a reasonable observer would conclude that Mercer County's Foundations display does not have the primary effect of endorsing religion. As the ACLU noted repeatedly in the *McCreary County* litigation, judges on the U.S. District Court for the Eastern District of Kentucky are uniquely capable of determining the effect a government display would have on a reasonable observer living in rural Kentucky.[5] As the district court explained in this case in rejecting the ACLU's arguments:

> [t]he context and affidavit of Judge McGinnis convey that the Commandments are part of the city's celebration of its cultural and historical roots and not a promotion of religious faith.

ACLU of Kentucky v. Mercer County, 219 F. Supp. 2d 777, 794 (E.D. Ky. 2002). Since "the reasonable observer would quite simply be aware of the absence of Mercer County's attempt to post the Ten Commandments alone," it is no surprise that the same district court which held that McCreary County had acted with a religious purpose also held that Mercer County's Foundations display lacked a religious purpose and did not endorse religion. *Id.* at 790.

The panel decision appropriately stated "[w]e will not presume endorsement from the mere display of the Ten Commandments" because the reasonable person

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[5]ACLU's Brief for Respondents, 2005 U.S. S. Ct. Briefs LEXIS 78 at *71 ("The district court was uniquely positioned to assess social facts . . . From its chambers in rural southeastern Kentucky, it was most familiar with the tone and content of public discourse."); *id.*, Transcript of Oral Arguments, 2005 U.S. Trans. Lexis 20 at *27, *35 (Mar. 2, 2005) (statement of counsel for respondents).

"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." 432 F.3d at 639-40. The reasonable observer, cognizant of American history and tradition, would reject the ACLU's claim that "the influences on early American law are largely secular." Petition at 7. This characterization of Anglo-American law stands in sharp contrast with numerous statements by the Supreme Court and its Justices acknowledging that religious belief has always shaped American law and government. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983); *Stone v. Graham*, 449 U.S. 39, 45 (Rehnquist, J., dissenting); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The ACLU improperly focuses on one small aspect of the overall display: the statement that the profound influence of the Ten Commandments on the formation of the Anglo-American legal system can be seen in the Declaration of Independence. The reasonable observer does not approach a display with a fine-toothed comb looking for the slightest perceived inaccuracy and eager to find that the government has endorsed religion. As the district court explained, "[t]he context of the government display *in its entirety* and whether this context as a

whole sends an objective message that endorses religion is the appropriate constitutional analysis." 219 F. Supp. 2d at 793. "While there is always someone who might perceive a particular action as an endorsement of religion, that person does not personify the reasonable observer." *Ashbrook*, 375 F.3d at 503 (Batchelder, J., dissenting). The ACLU "incorrectly presumes that the reasonable observer is one who wants to rid government and the public square of any and all reference to religion." *Mercer County*, 219 F. Supp. 2d at 796.

The ACLU's history lesson makes interesting reading; it is, however, legally irrelevant. The only way it could be relevant in this context is if the historical point it makes were so utterly beyond any rational dispute that the Foundations display's historical claims could only be seen as a mere sham or pretext to disguise a covert religious purpose. But that this is plainly not the case is proven by the fact, acknowledged explicitly by Justice Stevens dissenting in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), that the Supreme Court itself "has subscribed to the view that the Ten Commandments influenced the development of Western legal thought." *Id.* at 2876, n.9 (Stevens, J., dissenting). To be sure, Justice Stevens goes on to write that the more specific claim that the Decalogue played a significant role in the Nation's foundational documents is not something the Court has "officially endorsed;" Stevens acknowledged, however, that "at the very least the question is a matter of intense scholarly debate." *Id.*, citing and contrasting the

amicus curiae briefs submitted by Legal Historians and Scholars and the American Center for Law and Justice.[6] Thus, the historical claims being attacked by the ACLU in its Petition are views to which the U.S. Supreme Court has long "subscribed" or which the Court recognizes as a respectable part of "intense scholarly debate."[7] *Id.* It would seem, then, that it is the ACLU's view which conflicts with *McCreary County* and other controlling precedent, not the view of Mercer County nor that of the panel in this case.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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[6]The latter amicus brief was co-authored by Prof. Harold J. Berman, Emeritus Professor of Law of Harvard University and one of the world's leading authorities on comparative legal history and jurisprudence. Among other things, the brief argued for recognition of the Decalogue's foundational role in the development of Anglo-American legal culture. Brief of American Center for Law and Justice as *Amicus Curiae* in Support of Petitioners, *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005) (No. 03-1693), 2004 U.S. S. Ct. Briefs LEXIS 774.

[7]One member of this Court (and a member of the panel in this case) has previously pointed out the inadequacy of the ACLU's historical claims on this question *See ACLU of Ohio v. Ashbrook, et al.*, 375 F. 3d 484, 503-507 (6th Cir. 2004) (Batchelder, J., dissenting) (noting the importance of the Commandments in the "development of law in our secular society," and perceptively recognizing that even the so-called "exclusively religious" parts of the Decalogue have played and continue to play an influential role in American society).