

1 IN THE SUPREME Court OF THE UNITED STATES

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3 MCCREARY COUNTY, :

4 KENTUCKY, ET AL., :

5 Petitioners :

6 v. : No. 03-1693

7 AMERICAN CIVIL LIBERTIES :

8 UNION OF KENTUCKY, ET AL. :

9 -----x

10 Washington, D.C.

11 Wednesday, March 2, 2005

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United

14 States at 11:07 a.m.

15 APPEARANCES:

16 MR. MATTHEW D. STAVER, Longwood, Florida;

17 on behalf of the Petitioner.

18

19 MR. DAVID A. FRIEDMAN, Louisville, Kentucky;

20 on behalf of Respondents.

21

22 PAUL D. CLEMENT, ESQ., Acting Solicitor General,

23 Department of Justice, Washington, D.C.; on

24 behalf of United States, as amicus curiae,

25 supporting Respondents.

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1 JUSTICE STEVENS: And we will now hear
2 argument in McCreary County against the ACLU.

3 Mr. Staver?

4 ORAL ARGUMENT OF MATTHEW D. STAVER

5 ON BEHALF OF PETITIONERS

6 MR. STAVER: Justice Stevens and may it
7 please the Court.

8 Before this Court is a setting of law in a
9 courthouse and a display on law that contains the
10 universally recognized symbol of law. Despite the
11 fact that the deck law occupies only one tenth of
12 this otherwise secular display, the Sixth Circuit
13 struck it down. The Court focused solely on the
14 religious aspect of the Ten Commandments and that's
15 aired by ignoring the overall context.

16 The Ten Commandments is unlike most any
17 other acknowledgment. It is in a category
18 essentially all by itself. It is thematic in common
19 places in courthouses while Nativity scenes and
20 menorahs occur occasionally and often gratuitously on
21 public property. The Ten Commandments occurs quite
22 frequently and has for more than a century in
23 courthouses all over this nation. It is associated
24 with courthouses for a clear historic reason, because
25 the Ten Commandments has played an influential role

1 in American law and government and our system of law
2 in this country.

3 The context in this case is clearly
4 important. Yet the Sixth Circuit --

5 JUSTICE SOUTER: May I ask you there
6 basically to comment on the point that Justice Scalia
7 made in the course of the last argument? The
8 context, as we know, has changed pretty radically in
9 the course of litigation over this and it started out
10 with just the Ten Commandments alone and then version
11 2, the Ten Commandments had certain -- were
12 surrounded by certain quotations of religious content
13 from other texts.

14 And finally, as I guess literally is true
15 with a new lawyer and more litigation, we've gotten
16 to the present context. Isn't the problem that you
17 have to face, as I've said before, what Justice
18 Scalia raised before, everybody knows what's going
19 on. Everybody knows that the present context is
20 simply litigation dressing and that the object for
21 what is going on is the object that was revealed in
22 the first place.

23 What is your response to that?

24 MR. STAVER: Several. The display in this
25 case has three different phases. First it was the

1 stand-alone Ten Commandments. They were sued. They
2 could have defended that but they chose instead to
3 switch rather than fight because they wanted to try
4 to comply with this Court's establishment clause
5 jurisprudence, to try to figure out how to be able to
6 display this particular document. They stepped,
7 however, on a land mine admittedly with this second
8 display.

9 JUSTICE SOUTER: Well, they created the
10 land mine basically. I mean --

11 MR. STAVER: They were trying to do the
12 best that they could, trying to follow this ever
13 bending establishment clause jurisprudence especially
14 in the area of displays. Remember this was back in
15 1999.

16 At that time, there were less than a
17 handful of reported decisions ever in this country on
18 the Ten Commandments. The first was in 1973, Stone
19 was in 1980 and there were a couple of others. There
20 are only 30 reported cases in the country or so and
21 23 of those happened from 1999 to the present so they
22 didn't have really any guidance. They were trying to
23 follow Lynch and Allegheny as best as they could but
24 these are governmental officials. They're not
25 jurists schooled in the law. And admittedly they

1 made a mistake. But what they have now is the
2 foundation is display and as the District Court
3 recognized, it is fundamentally different than any
4 previous display.

5 Like this Court's decision in the Sunday
6 law cases, even though it may have started off for a
7 religious purpose, the Sunday laws were continued to
8 be retained for secular reasons.

9 In this case --

10 JUSTICE KENNEDY: Are you saying that the
11 purpose is neutral or that the purpose doesn't
12 matter?

13 MR. STAVER: We're saying that in this
14 case, the purpose is about the display of law. We
15 also have an argument later on that this Court should
16 reconsider the purpose in generally as it relates to
17 the Lemon test.

18 JUSTICE SOUTER: Okay, but if we still
19 have a purpose inquiry, what you say of course is
20 true. The current display includes the display of a
21 lot of legal documents. But is there any reason for
22 anyone to believe that that display of legal
23 documents or anything else would be there for any
24 other purpose than the display of the Ten
25 Commandments, including the religious, the overtly

1 theistic part of the text?

2 MR. STAVER: Yes, Your Honor. The
3 District Court actually recognized that one of the
4 omni intended effects of the history is to educate
5 everyone of the difference between an acknowledgment
6 and an establishment. And even if they had a
7 religious purpose under the second display, that
8 religious purpose has been buried and has been
9 abandoned.

10 They voluntarily accepted the --

11 JUSTICE STEVENS: You're not abandoning
12 the position that you have a right to make this kind
13 of religious display, are you?

14 MR. STAVER: No, we're not.

15 JUSTICE STEVENS: Okay.

16 MR. STAVER: And that's why we said that
17 they could have defended the individual first display
18 which was the Ten Commandments alone, in part because
19 it is the uniquely recognized historic symbol of law
20 and is commonplace and thematic in the courthouse.
21 They could have defended when they were originally
22 sued on that basis alone but instead they chose to
23 modify the display. And when they modified the
24 display, it had excerpted sections around it.

25 JUSTICE STEVENS: But is there -- I

1 What is your response to that?

2 MR. STAVIER: The intent has certainly
3 broadened in this case and there is clearly no
4 evidence in this record that this foundations display
5 is solely purposed or intended to be a religious
6 display. In fact, even the respondents of amici that
7 wrote against us said that on the face of this
8 display, it appears secular in nature. It does.

9 In fact, the foundations display not only
10 has numerous other documents of which the Ten
11 Commandments is only one tenth of these many other
12 document but it also has a foundations document that
13 says what the purpose is about. There is only two
14 places that talk about the purpose on the foundations
15 display.

16 On the document itself, which says it's a
17 display about some documents that influenced American
18 law and government, and the undisputed testimony that
19 these are documents that reflect documents that have
20 influenced American law and government. That's the
21 record before this Court on the foundations display
22 and that is fundamentally different --

23 JUSTICE BREYER: Suppose we go back to the
24 first display. If all that was there was the Ten
25 Commandments, now, in your opinion, was that

1 constitutional?

2 MR. STAVER: That is arguably
3 constitutional --

4 JUSTICE O'CONNOR: Do we take it along
5 with the resolution of the counties? Do we look at
6 everything?

7 MR. STAVER: Your Honor, there was no
8 resolution, Justice O'Connor, for the first display.
9 It just went up.

10 JUSTICE STEVENS: So just that first
11 display, what was the purpose of that first one?

12 MR. STAVER: The purpose of that first one
13 is like it is in many courthouses around the country.
14 Both courthouses have numerous documents of his
15 historical nature along the walls, 284 just in the
16 curia alone. And in Pulaski, many, many documents,
17 when they celebrated their 200th anniversary in 1999.
18 So that was one of many documents that's there and
19 that was a document of the Ten Commandments that was
20 meant to show the historic nature of the Ten
21 Commandments, how it has in fact influenced American
22 law and government in the appropriate setting of a
23 courthouse.

24 JUSTICE STEVENS: The original one?

25 MR. STAVER: The original one.

1 JUSTICE STEVENS: Was there anything there
2 that said we're interested in history and what we're
3 not interested in is having this on the wall as -- to
4 encourage people to study the Bible and to encourage
5 them to study religion and to understand that in
6 their lives, religion should be important and this
7 very solemn secular setting. Nonetheless, religion
8 is important. Is there anything like that on the
9 document itself?

10 MR. STAVER: No, it was just the document
11 itself in a frame on a wall amongst almost 300 other
12 documents.

13 JUSTICE SCALIA: What if its purpose were
14 to demonstrate -- and I quote from one of our earlier
15 opinions -- that we are a religious people whose
16 institutions presuppose a Supreme Being. What if
17 that were its purpose? Would that have made it bad?

18 MR. STAVER: I don't believe so, Justice
19 Scalia, because that in fact is an acknowledgement
20 that is part of our history; like in Marsh versus
21 Chambers. That's why this Court has authorized
22 prayers before legislative sessions or suggested that
23 the national motto is constitutional because indeed
24 we are a religious people as this Court has said more
25 than five times. We are a religious people. Our

1 institutions do presuppose the existence of a Supreme
2 Being.

3 JUSTICE KENNEDY: And is it your position
4 that no real harm is inflicted on people who do not
5 agree with that message?

6 MR. STAVER: That's correct, Your Honor.

7 Justice Kennedy, it would not inflict any
8 harm because in this case, it's a passive display in
9 a courthouse in a hallway and you could simply walk
10 past that and avert your eyes once you see this. It
11 inflicts no harm, it does not --

12 JUSTICE GINSBURG: Mr. Staver, what about
13 all the distinctions that have been made between
14 messages that are brief or I think the expression has
15 been minimal or minimum in some of our cases, like in
16 God we Trust, like God save the United States and
17 this Honorable Court, like under God, and a document
18 that is about worshipping the Lord, at least as many
19 words devoted to that topic. So it's not a brief
20 reference. It's a powerful statement of the
21 covenants that the Lord is making with his people.

22 MR. STAVER: Justice Ginsburg, the Ten
23 Commandments is a unique symbol in the area of
24 acknowledgment because of its historic role in
25 influencing our law and government. It is displayed

1 in this context for that unique role. It does have
2 some statements in there about God but, frankly, very
3 few when you look at the overall context.

4 JUSTICE GINSBURG: Have you read the first
5 four commandments and could you say that?

6 MR. STAVER: Sure. And those are
7 definitely and decidedly religious. There is no
8 question that the Ten Commandments is a religious
9 document. There is also no question that it has
10 influenced our American law.

11 JUSTICE SCALIA: Do you think the Ten
12 Commandments are longer than the legislative prayers
13 you've heard at the beginning of congressional
14 sessions?

15 MR. STAVER: No, Justice Scalia. I think
16 they're quite shorter.

17 JUSTICE BREYER: I don't know how much
18 help I can get or not but I was thinking in terms of
19 the involvement of the government, is the government
20 involved in religion when it posts the Ten
21 Commandments alone? Yes, of course it is.

22 Now, there could be a purpose to it, that
23 they want to just show the history of law but it's
24 all by itself and there is a lot more history than
25 that and context may matter a lot. Not everybody

1 will go with the Ten Commandments just by itself
2 there and say, well, gee, this seems to go too far.

3 This is going too far. Why? Because it
4 isn't really related to history, it's the only thing
5 up there, it's involvement in religion, so forth.

6 Now, suppose I go down that track because
7 what I'm really looking for is a key as to what's too
8 far and what's not. But for present purposes, let's
9 assume it's too far.

10 Now, once they've gone too far there, the
11 next thing that happens is they keep changing it but
12 they change it pursuant to the resolution and it
13 seems as if in context, all they've tried to do is to
14 surround what went too far with a number of other
15 things that would somehow make it legal.

16 Now, if it was wrong to begin with, is it
17 wrong to end with?

18 MR. STAVER: No, Justice Breyer, it is not
19 wrong to end with any more than it would be wrong to
20 begin with the Sunday laws based upon the Sabbath
21 commandment which was a commandment about worship and
22 the end with the secular reason for keeping those
23 particular laws as this Court has recognized in
24 McGowan. And in this case, even if they started off
25 with a decidedly and only religious purpose, which we

1 contend they did not, they did not end with one and
2 they've got to, as governmental officials, be able to
3 adjust their missteps whenever they step on a
4 constitutional land mine that is sometimes blurry and
5 confusing to them.

6 That's what they tried to do in this case,
7 the best efforts to try to follow this Court's
8 decision when there was really no specific guidelines
9 for them to be guiding their direction.

10 The Ten Commandments that Justice Stevens,
11 you had mentioned about the versions, the versions I
12 don't believe, with all due respect, are relevant in
13 this case or any other case regarding the Ten
14 Commandments because if that were the case, you
15 wouldn't be able to teach the Bible in an appropriate
16 context because there are so many different versions
17 and yet Stone and Schempp has indicated that you
18 indeed can teach even the Biblical text with all of
19 its multiple versions.

20 JUSTICE SOUTER: But I assume if you were
21 running a course in a school about the biblical text,
22 you would explain the differences. You would
23 indicate the difference between the Jewish, the
24 Roman, the Protestant, the Lutheran and so on and
25 you're not doing that here.

1 I would have thought your answer might be,
2 well, if that really made a difference, we could have
3 separate versions. But it's not comparable to school
4 teaching.

5 JUSTICE STEVENS: Justice Souter, it would
6 in fact be somewhat comparable because if you're
7 teaching general biblical text, you wouldn't have all
8 the versions lined out.

9 JUSTICE SOUTER: Would you think it was
10 appropriate in a public school course that was
11 otherwise a bona fide course to teach the day on
12 exodus, to teach about simply the Protestant version
13 of the Ten Commandments?

14 MR. STAVER: We would believe that, in
15 fact, in this case, I don't even think they thought
16 about whether there were different versions but we
17 certainly believe that they could have the text there
18 and talk about the Ten Commandments.

19 JUSTICE SOUTER: In a public school,
20 wouldn't it be required, at least for intellectual
21 reasons if not the reasons of the establishment
22 clause to say, well, graven images are dealt with
23 differently in the standard Roman translation and the
24 preamble sections of what may and may not be regarded
25 as commandment number 1 are different in the

1 Christian versus Jewish and so on.

2 Wouldn't that be an intellectually
3 responsible requirement?

4 MR. STAVER: That's in a school context
5 which this is a courthouse context.

6 JUSTICE SOUTER: Exactly. I thought you
7 were equating the two together.

8 MR. STAVER: Not one to one but I think
9 the version issue, if there is a version that flunks
10 the test, it would be this Court's south frieze.
11 It's actually in Hebrew and it speaks only to Jewish
12 people. But yet that's not sectarian such that it
13 violates the establishment clause. That's the
14 acknowledgment as opposed to an establishment.
15 Justice Stevens, if you would like, I would like to
16 reserve the remaining of my time.

17 JUSTICE STEVENS: Yes, you may do so.

18 Mr. Clement, you're welcome to stand up
19 for a second time.

20 ORAL ARGUMENT OF PAUL D. CLEMENT

21 AS AMICUS CURIAE, SUPPORTING PETITIONERS

22 MR. CLEMENT: Thank you, Justice Stevens,
23 and may it please the Court. The display of
24 historical documents here, like the display in the
25 Lynch against Donnelly case of the creche, may

1 include a religious item without running afoul of the
2 establishment clause. As in the --

3 JUSTICE O'CONNOR: Do we have to consider
4 the history of the display at all?

5 MR. CLEMENT: Justice O'Connor, we would
6 urge you not to consider the history of the display.
7 You in your concurring opinion in the Pinette case
8 made the point that in the context of accommodations,
9 the inquiry into religious purpose doesn't make a lot
10 of sense and you urged the Court to drop it in that
11 context. I think so too in the acknowledgment
12 context. Certainly if you have a situation where you
13 don't have -- I think in the acknowledgment context
14 as well, a focus on purpose may not be that
15 productive. But I would like to talk about the
16 purpose --

17 JUSTICE SCALIA: I don't know what you
18 mean by the acknowledgment context.

19 MR. CLEMENT: I think this Court has said
20 that you can accommodate religions. They've also
21 said that you can acknowledge the role that religion
22 has played in our society and I think in both
23 contexts, a focus on purpose is probably not a
24 prudent exercise of judicial resources. But I would
25 like to talk about the purpose here because I think

1 what you have here is a display of a document alone
2 in the first instance that certainly was at least
3 defensible and probably constitutional, yet the
4 courts below got off on the wrong foot by saying that
5 the first display was open defiance of this Court's
6 decision in Stone against Graham and I think this
7 Court's cases themselves suggest that the contextual
8 differences between the school and the courtroom are
9 enough to at least make the display not in open
10 defiance.

11 Now there was the second display and we
12 are not here to defend the second display but that
13 was the display that was in reaction to the lawsuit
14 filed against the first display. Now, I don't know
15 if that second display was the product of bad legal
16 advice or simply frustration at the first lawsuit
17 being filed but I don't think it should make a
18 constitutional difference.

19 In the Lynch against Donnelly case, Mayor
20 Lynch, after the ACLU filed a lawsuit against him,
21 had a rally at the site of the creche, a press
22 conference, where he publicly vowed to fight to keep
23 Christ in Christmas and then he led city workers in
24 carols and said they should sing another one that
25 apparently bothers people.

1 Yet despite that adverse reaction to the
2 litigation being filed against the city of Pawtucket,
3 this Court upheld the display and although the
4 dissent did focus on the mayor's crusade to keep
5 Christ in Christmas, the majority and the concurring
6 opinions did not. And I think that is the proper
7 mode of analysis.

8 Now, the second point I think is should
9 these counties be faulted for trying to bring their
10 practices in compliance with the Constitution? And I
11 think the answer there is clearly not. And I was
12 going to point this Court to the Marsh case that's
13 been talked about quite a bit.

14 One of the things that as Professor
15 Chemerinsky said about the Marsh case that this Court
16 emphasized in that case itself and in subsequent
17 cases is the fact that the prayers there were
18 non-sectarian in the sense that they did not directly
19 invoke, say, Christ. But that actually is something
20 of a change that took place after the litigation
21 began.

22 Prior to the litigation, there were
23 explicit references to Christ as Justice Stevens
24 pointed out in footnote 2 of his dissent in that
25 case. But the state of Nebraska, after they had a

1 lawsuit, decided let's make this an easier case for
2 the Court, not a harder case, and they modified their
3 conduct.

4 JUSTICE SOUTER: Okay, but at the end of
5 the day in Marsh, there wasn't any question that what
6 they were doing was praying. And here it seems to me
7 that the change that you're arguing for as
8 significant is only significant unless it is a change
9 in the essential activity because there is no law and
10 it would be crazy law from this Court that said you
11 can engage in religious endorsement, promotions, et
12 cetera, so long as you hide the ball well enough.

13 What this Court basically has said is you
14 can engage in secular objectives that incidentally
15 involve religious figures or references, e.g., Moses
16 up there. What you started with in this case or what
17 the county started with was a pretty
18 religious-looking exercise and the question is, did
19 they go from a totally religious exercise to a
20 secular exercise or did they go from an obviously
21 religious exercise to an obscured religious exercise?
22 And therefore, you can't make context a mere change
23 in physical context dispositive because it ignores
24 that distinction. And that distinction I think is
25 what is driving or what is going to drive possibly in

1 my mind the resolution of this case.

2 What do you say to that?

3 MR. CLEMENT: Justice Souter, I have two
4 points in response.

5 First of all, what I think would be a
6 crazy way of having a jurisprudence is for the Court
7 to say that this display is a foundation to the law
8 document, it's perfectly constitutional in every
9 other county courthouse in Kentucky except for
10 McCreary County and Pulaski County because of their
11 prior conduct.

12 The second point that I think is important
13 in this context is that I think this Court's
14 establishment clause jurisprudence is already
15 difficult enough to apply without creating the First
16 Amendment equivalent of covered jurisdictions under
17 section 5 of the Voting Rights Act.

18 JUSTICE STEVENS: Basically, and I think I
19 understand you, you're saying, and I think you said
20 it earlier, drop the intent clause and basically have
21 a -- try to move toward an objective criterion saying
22 there are some ways you can display religious things
23 and some ways perhaps that you can't and try to
24 develop that kind of objective jurisprudence as
25 distinct from an intent jurisprudence.

1 That's your point, isn't it?

2 MR. CLEMENT: That would be my point,
3 Justice Souter, but I also think independent of that
4 point, it is also not a particular productive
5 jurisprudence to really treat different
6 municipalities differently because the mayor in one
7 case may have started with the creche and decided to
8 add the wishing well or in the other case started the
9 wishing well and added the creche. I don't think it
10 makes any sense that if they end up in the same
11 place, the constitutional rules could be the same.

12 JUSTICE GINSBURG: Mr. Clement, you placed
13 heavy reliance on Marsh, which was prayer and it was
14 undisguised and it was permitted to have since the
15 beginning of our nation.

16 Would it be equally compatible with the
17 establishment clause if this Court opened its daily
18 sessions with prayer?

19 MR. CLEMENT: Justice Ginsburg, I'm not
20 sure that I could the jurisprudence that said this
21 Court could not open its sessions with a prayer but
22 the Capitol can. Now, if there was any difference
23 drawn at all, I would assume it would be a difference
24 based on history.

25 JUSTICE SCALIA: I'm not sure we don't

1 deal with it. I don't know who we're addressing when
2 we say God save the United States and this Honorable
3 Court.

4 JUSTICE GINSBURG: The kind of prayer that
5 is used to open the legislative sessions which this
6 Court has distinguished from in God we trust, God
7 save the United States and this Honorable Court.

8 MR. CLEMENT: And as I said, Justice
9 Ginsburg, I think if there were a difference in
10 principle, it would have to be a difference based on
11 history. But I don't think there is -- in this
12 context, I think it is fair to say --

13 JUSTICE GINSBURG: I'm asking you what
14 your view is of the compatibility of every federal
15 Court in the country having over the bench a replica
16 of the Ten Commandments and opening each session with
17 prayer.

18 MR. CLEMENT: Justice Ginsburg, I suppose
19 if the federal courts decided to do that, we would
20 probably try to defend them on establishment clause
21 grounds. I don't think, though, that -- I think that
22 would obviously be a much tougher case than the
23 posting of the Ten Commandments in the outer hallway
24 along with a variety of other documents which I take
25 it to be the first case here. And then the final

1 display that the Court has before it is actually the
2 Ten Commandments in the context of the other secular
3 historical documents. And I think that kind of
4 display clearly is constitutional for the reasons
5 that the display was constitutional in the Lynch
6 case.

7 JUSTICE O'CONNOR: Do you think we have to
8 amend the Lemon test to reach your approach?

9 MR. CLEMENT: Well, Justice O'Connor, this
10 Court on a variety of occasions has chosen to simply
11 put Lemon to one side as opposed to overtly amending
12 it.

13 JUSTICE O'CONNOR: Do you think, then, we
14 have to either put it aside or amend it?

15 MR. CLEMENT: No, I don't, Justice
16 O'Connor.

17 JUSTICE O'CONNOR: To decide this case?

18 MR. CLEMENT: No, I don't. I think it
19 would be prudent, as I suggested at the outset, to
20 make not necessarily a full amendment and eliminate
21 the first purpose prong of Lemon but at least in the
22 acknowledgment context as in the accommodation
23 context we're not going to focus on that.

24 But independent of that, I think many of
25 these Court's cases that were decided even under

1 Lemon acknowledge the principles that municipalities
2 should be rewarded, not punished, nor trying to
3 change their conduct to try to get things right.

4 In Abbington against Schempp, which I
5 think in many respects is a precursor to Lemon
6 because it talked at least about the purpose and
7 effects test and I gather that's about all that's
8 left of Lemon. In that case, this Court held out the
9 promise that it might be permissible for the
10 government to have some use of the Bible in school.

11 Now, when it did that, it didn't except
12 out Abbington township and said, but not for you,
13 Abbington township, because you violated the purpose
14 prong.

15 The Sixth Circuit here has adopted a rule
16 that once mistaken, always condemned and we don't
17 think that has any proper place in this Court's
18 establishment of jurisprudence.

19 JUSTICE STEVENS: Thank you, Mr. Clement.

20 Mr. Friedman?

21 ORAL ARGUMENT OF DAVID A. FRIEDMAN

22 ON BEHALF OF RESPONDENTS

23 MR. FRIEDMAN: Justice Stevens and may it
24 please the Court, three times in the course of a
25 year, McCreary and Pulaski county posted Ten

1 Commandments displays. They variously describe the
2 Ten Commandments as the precedent legal code of
3 Kentucky, the central historic legal document of the
4 State and, finally, as the moral background of the
5 Declaration of Independence and the foundation of our
6 legal system.

7 In the course of the litigation, they
8 announced that under current law, they announced to
9 the court that uncurrent law, America is a Christian
10 nation and they acknowledge that the purpose of their
11 second display was to demonstrate America's Christian
12 heritage. In this context, it is our position that
13 the current courthouse display reveals both a purpose
14 and an effect to endorse religion.

15 This Court has repeatedly and most
16 recently in the Santa Fe case made clear that it is
17 necessary to look at the content, the context and the
18 history of a display in order to gauge whether or not
19 there is a true secular purpose or whether or not an
20 asserted secular purpose is a sham. We submit here
21 that on this record, the District Court and
22 particularly in the context of an appeal from a
23 preliminary injunction, which we have here, that the
24 District Court had ample evidence from which it could
25 conclude that the asserted secular purpose of

1 McCreary and Pulaski counties was indeed a sham.

2 The counties announced their purpose not
3 only in the content of the display itself but in the
4 resolution that the counties enacted, the identical
5 resolutions that the counties enacted within weeks
6 after the filing of this lawsuit. And in that
7 resolution, the counties make clear that they relied
8 on and cited approvingly the Kentucky legislature's
9 reference to Jesus Christ as the prince of ethics.

10 They made clear that they supported the
11 fight of Alabama Supreme Court justice Roy Moore
12 against the ACLU. They made absolutely clear in
13 their legal papers that they deemed this to be a
14 Christian nation under current law and they made
15 clear that they absolutely intended and believed they
16 had the right to display the Ten Commandments. They
17 did so not in a display of history. They asserted
18 and they intended to do so because of the religious
19 nature of the Ten Commandments. There can be no
20 doubt that the Ten Commandments portrays a religious
21 point of view and is profoundly religious.

22 The Court said so in Stone. There is no
23 serious question about that. The question then here
24 is whether or not the counties, in their current
25 display, have done anything to sufficiently

1 neutralize the endorsing message that is contained in
2 this record. And we submit it has not done so.

3 It now announces that the Ten Commandments
4 are the foundation of our legal system, not just that
5 religion is but that the Ten Commandments, a
6 particular religious code, the word of God, it
7 asserts is the foundation of our legal system. It
8 asserts that the Ten Commandments, the revealed Word
9 of God, provides the moral background of the
10 Declaration of Independence. We think it's clear
11 that the content of the Ten Commandments and the
12 content of the Declaration of Independence deal with
13 substantially different topics.

14 JUSTICE KENNEDY: Suppose you had a county
15 100 miles away or a state, a different state, and the
16 same display was put on and the recitation was -- and
17 it was a sincere recitation, that the government
18 simply wanted to recognize that the 10 Commandments
19 has played an important role in the civic lives of
20 our people.

21 Then you have -- they're each up for five
22 years and five years later, some school kids wander
23 by one and they wander by the other. In your view,
24 from what you're telling me, the Commandments are
25 permitted in one location and not the other? I mean,

1 that's the necessary purport of your argument. You
2 may not think that either of them are valid but on
3 this prong of the argument, it seems to me that to
4 differentiate, I just don't understand that.

5 MR. FRIEDMAN: I think to an extent there
6 is a differentiation because this Court has made
7 clear that any assessment must depend on context.
8 There is no fixed per se rule but rather, the context
9 one must both look at the purpose and the effect. In
10 gauging the purpose, one looks at both the litigation
11 history, the social facts, the content and any
12 changes.

13 Here the District Court had not only the
14 display itself but it had the announced purpose of
15 the county. It therefore was in a unique position to
16 gauge the purpose of the -- the true purpose of these
17 counties.

18 Moreover, it was in a unique position to
19 gauge the effects that the reasonable observer in
20 these small rural Kentucky counties, the reasonable
21 observer assessment of this particular display. And
22 the Court -- McCreary County is a county with only
23 17,000 people. Whitley City, the county seat, which
24 is not even incorporated, has 1,100 people.

25 The District Court from its chambers in

1 London, Kentucky was well situated to gauge whether
2 or not the reasonable observer, knowing the
3 litigation history of this case and knowing the
4 changes in the forum and the context of this display,
5 would perceive this to be a neutral recitation of
6 history or simply the third in a series of efforts by
7 this county government to post the Ten Commandments
8 because that is what it wanted to post.

9 JUSTICE STEVENS: Does that mean forever?
10 What I'm thinking -- let me spell it out. The key
11 words in Stone would be that this was posted, the Ten
12 Commandments, because it would lead to, in the
13 circumstances, the students remeditate, venerate,
14 perhaps, and obey. In other words, their reaction to
15 it would likely be a religious reaction.

16 Now, here if you saw it just by itself,
17 perhaps one would be concerned with the intent or the
18 effect of calling to the viewer's mind the sacred
19 character of the law, which is fine for religious
20 people to do but not necessarily fine for the State
21 to do; and that leads them to venerate, perhaps to
22 meditate, perhaps to consider the relationship in a
23 religious way. If that's the problem, that would
24 exist here only because of the history or most likely
25 because of the history. And if that is the problem,

1 that would dissipate over time because it is the
2 smallness of the audience and their familiarity with
3 the history that would likely produce the similar
4 religious reaction to the display.

5 Now, what's your reaction?

6 MR. FRIEDMAN: I think it's a question of
7 degree and while over time the importance of the
8 purpose may diminish, the purpose does not fully
9 diminish and the effect does not change
10 substantially. It is a question of degree, it is a
11 question of line drawing.

12 Here there is not an effort to incorporate
13 the Ten Commandments into a neutral display or a
14 neutral course of study such as a compare and
15 contrast of ancient moral codes or a comparative
16 religion course such as many of us have taken and
17 schools clearly can offer.

18 It is not a neutral display of law givers
19 like the frieze in this Court. It asserts the
20 primacy of the Ten Commandments. It says the Ten
21 Commandments are the moral background of the
22 Declaration of Independence. It doesn't say there is
23 some commonality between the Ten Commandments and
24 some American laws. It talks not only about law. It
25 talks about our system of government. It says the

1 Ten Commandments, the revealed Word of God is the
2 moral foundation of the Declaration of Independence.
3 That in itself is an endorsement of religion in this
4 context and I don't think that can dissipate over
5 time.

6 JUSTICE BREYER: Why is it? It may be
7 true. These pilgrims came for religious reasons. If
8 all you have is a display of the origin of the law in
9 the United States, what would be wrong with saying,
10 this is a historical account? It's like teaching
11 religion in the schools. Of course it stemmed from
12 the religious beliefs of those who came to the
13 United States. You don't mean it religiously. You
14 mean it historically.

15 MR. FRIEDMAN: It's the difference between
16 acknowledgment and endorsement. Of course counties
17 and other governments can acknowledge the role that
18 religion played in history. That is very different
19 from acknowledging religion as a general matter and
20 asserting that a specific code that is central to
21 specific religions is the one -- not only the one
22 religious source but the one source, religious or
23 moral, that provide -- religious or secular that
24 provides the moral background of the Declaration of
25 Independence.

1 JUSTICE SCALIA: I don't care it stands
2 for that. As you heard, the code takes various forms
3 for various religions. And I think all it stands for
4 is the proposition that the moral order is ordained
5 by God. That's all it stands for. And to say that
6 that's the basis of the Declaration of Independence
7 and of our institutions is entirely realistic.

8 MR. FRIEDMAN: What this display says --

9 JUSTICE SCALIA: I don't think they're
10 really saying that the particular commandments of the
11 Ten Commandments are the basis of the Declaration of
12 Independence. That's idiotic. What the commandments
13 stand for is the direction of human affairs by God.
14 That's what it stands for.

15 MR. FRIEDMAN: Whatever the merit of that
16 statement, that is not what these counties have said.
17 What these counties have said in their resolutions is
18 that the Ten Commandments are the precedent legal
19 code of Kentucky and the central historic legal
20 document of the state.

21 What they have said in this display
22 itself, in the explanation of the display, that they
23 are the moral background of the Declaration of
24 Independence, to the exclusion of all others, in
25 effect. When you say the, it doesn't say one of. It

1 says it is the foundation of our legal system. It
2 doesn't say it had an influence on some of our laws.
3 It asserts the primacy, the actual text of this
4 display asserts the primacy of the Ten Commandments.

5 JUSTICE SCALIA: If that's what it means,
6 it's idiotic. I don't think anybody is going to
7 interpret it that way. You can't get the Declaration
8 of Independence out of the Ten Commandments.

9 MR. FRIEDMAN: I would agree with that,
10 Your Honor.

11 JUSTICE SCALIA: And I don't think that's
12 how somebody would normally read it. I think what
13 they're saying is the principle of laws being
14 ordained by God is the foundation of the laws of this
15 state and the foundation of our legal system.

16 JUSTICE O'CONNOR: How long is that
17 resolution going to guide our view of the future
18 displays or even the present one? What about the
19 membership of the board of supervisors is changed?
20 How long do we look to that particular resolution?

21 MR. FRIEDMAN: I think, Your Honor, it's
22 an element that the District Court in the first
23 instance must accept and gauge in determining whether
24 or not the announced secular purpose is indeed a true
25 purpose or is a sham.

1 Where we're talking about a close time
2 period, here three displays in less than a year by
3 the same officials of the same county trying to post
4 the same document, this case becomes very close to
5 the Santa Fe independent school district case where
6 it's a moving target in direct response to pending
7 litigation as an effort to try to get the same end
8 result and changing the operative facts just slightly
9 in the hope that eventually it will be right.

10 JUSTICE SOUTER: May I ask you a question
11 on that point? And I should know the answer. It
12 must be in the briefs but I don't remember. I assume
13 that they rescinded the resolution before version 3
14 of the display was put up, is that correct?

15 MR. FRIEDMAN: That is not correct, Your
16 Honor. The resolution was enacted in early December
17 1999, a couple of weeks after the display. It has
18 never been rescinded.

19 JUSTICE SOUTER: It is still on the books?

20 MR. FRIEDMAN: It is still on the books.
21 A point is made in the reply brief, it is not a
22 binding resolution, it encourages the county judge
23 executive to post the Ten Commandments as part of a
24 historic display. It doesn't say post a display of
25 documents and have a county judge choose to post the

1 Ten Commandments.

2 The initial paragraph of the resolution
3 makes clear that it encourages the county judge to
4 post the Ten Commandments and then as part of a
5 historic display. The county judge did that. The
6 District Court enjoined that display. The county
7 appealed that injunction and then, after getting new
8 lawyers, dropped its appeal.

9 Soon after that, the county posted a third
10 display, again, the Ten Commandments with what it
11 called historic documents, leaving aside how the
12 Stars Spangled Banner or the national motto as a
13 historic document.

14 What it did is wrap the Ten Commandments
15 in the three or four secular documents that we all
16 clearly acknowledge as the root of the American
17 system of government. It did so pursuant to the same
18 resolution. There has never been another resolution,
19 it has not been rescinded. The resolution is there.
20 It cites Jesus Christ as the prince of ethics, it
21 cites legislative allusions to Jesus Christ.

22 I think the resolution, which is cited in
23 the joint appendix of the docket number, makes it
24 clear that the purpose of this county was to post the
25 Ten Commandments and to do so because of the

1 Kentucky. The District Court also was there in the
2 community and could see both the public reaction, the
3 letters to the editor, the keep the Ten Commandments
4 signs on yards throughout the county.

5 JUSTICE STEVENS: Is all of that in the
6 record?

7 MR. FRIEDMAN: That is not in the record.

8 JUSTICE STEVENS: Then I don't think we
9 should talk about it.

10 MR. FRIEDMAN: The District Court was well
11 situated to understand the social fact, historical
12 record and arguments of both the lawyers and the
13 parties and the statements of the parties.

14 JUSTICE STEVENS: Mr. Friedman, can you
15 tell me where in the joint appendix the resolution
16 appears?

17 MR. FRIEDMAN: Joint Appendix page 1,
18 number 5, and it's Exhibit 1 attached to it. And
19 that's the one of the counties.

20 The other one is -- and these are the
21 docket entries. The document itself is not in the
22 joint appendix. And the other county is joint
23 appendix page 28, number 6. They're both Exhibit 1s
24 attached to those documents. Those documents are the
25 county's motions to dismiss in the District Court.

1 JUSTICE STEVENS: It's not printed?

2 MR. FRIEDMAN: It is not in the appendix
3 itself, no. The resolution is not in there. The
4 citation to it from the index is there.

5 JUSTICE O'CONNOR: It is in the record
6 which we have?

7 MR. FRIEDMAN: It is in the record. It
8 was submitted in fact by the petitioners in this
9 case. They submitted the resolution in support of
10 their arguments defending the second display, the
11 display that surrounded the Ten Commandments with the
12 religious text. They made clear in that brief that
13 they were asserting their right to display the Ten
14 Commandments as part of their argument that the
15 purpose was to demonstrate America's Christian
16 heritage.

17 I submit that in that brief, in that
18 resolution, in the repeated statements of the county
19 officials and of their counsel, the District Court
20 was well within its discretion to determine that the
21 purpose here was religious, was not secular and that
22 the effect, as viewed by the reasonable observer, was
23 religious -- was to endorse religion, not secular.

24 If there are additional questions, I would
25 be happy to answer it.

1 JUSTICE STEVENS: The other question I
2 have is assuming you didn't have any of this history
3 and they started off with plan 3, would that have
4 violated the establishment clause?

5 MR. FRIEDMAN: Yes, Your Honor, I think it
6 would. It would be a closer question but in this
7 context, what we have is the assertion that the Ten
8 Commandments are the source, the moral background of
9 the Declaration of Independence, the foundation of
10 our legal system. It is not incorporating the Ten
11 Commandments as part of a neutral course of study.
12 It is not like having Moses along with 15 other or 15
13 law givers. It is the assertion of the primacy of
14 the Ten Commandments.

15 JUSTICE STEVENS: I don't understand the
16 difference. I mean it seems to me it would violate
17 the establishment clause, it would equally do so if
18 you said it's a major part of or even a part of.

19 Now, maybe it makes it wrong to say it's
20 the exclusive one. It may make it more wrong but
21 we're not grading papers here. It seems to me that
22 whether it violates the establishment clause depends
23 upon whether you're endorsing -- whether you're
24 proselytizing religion.

25 MR. FRIEDMAN: I think that's correct,

1 Your Honor.

2 JUSTICE STEVENS: What does primacy have
3 to do with it?

4 MR. FRIEDMAN: I think it makes it an
5 easier case when it asserts this is the one rather
6 than one of several or one of many.

7 JUSTICE STEVENS: But your real position
8 is they wouldn't have to have done that as long as
9 they had the Ten Commandments in the display, that
10 would be enough?

11 MR. FRIEDMAN: I think it depends on the
12 content and context of the display.

13 JUSTICE STEVENS: Exactly what we've got
14 in Exhibit 3 or whatever it is, that we don't have
15 the statement of purposes, we don't have them saying
16 it's the sole source of the primacy. They say it's a
17 source.

18 Does that still violate the establishment
19 clause?

20 MR. FRIEDMAN: I think it does, Your
21 Honor.

22 JUSTICE BREYER: Since you have a minute,
23 give me your opinion to the right standard if
24 hypothetically you start with the Goldberg-Schempp
25 idea, that the government is not absolutely forbidden

1 by the establishment clause to recognize the
2 religious nature of the people nor the religious
3 origins of much of our law and so forth but it's easy
4 to go too far and it's easy in this area you are
5 trading on eggs to become far more divisive than you
6 hoped and really end up with something worse than if
7 you stayed out in the first place. In other words,
8 it's a very delicate matter and it's very easy to
9 offend people.

10 Now, suppose you start with that. You're
11 trying to define what is too far constitutionally
12 speaking. What's your test? Of the many that have
13 been in our opinions, which do you think works the
14 best for that purpose or some other?

15 MR. FRIEDMAN: I think the Court's
16 endorsement test has stood the test of time and has
17 worked well. It allows the District Courts that are
18 most familiar with what is actually happening to look
19 at both the purpose and the effect of a particular
20 display. I don't think there can be an ironclad
21 rule. There can be presumptions. There can be
22 brighter line tests perhaps. But I think
23 ultimately --

24 JUSTICE GINSBERG: Within reason outline
25 an approach that would say a religious display is

1 presumptively for -- is a presumptive endorsement. I
2 think with the Baptist brief. Would you endorse that
3 test?

4 MR. FRIEDMAN: We think that test can work
5 very well in a context like this where we're talking
6 about the display of religious texts rather than just
7 symbols. And the point I think is well worth
8 considering, that we assume that when people post
9 signs or displays, bumper stickers, buttons, that
10 they endorse the content of that text and that the
11 presumption then would place a burden on government
12 to make sure that it is neutralizing the endorsing
13 effect of displaying text. I think that is a very
14 workable text in a context like this where we're
15 talking about the posting of core religious texts.

16 JUSTICE SOUTER: Would you explain why you
17 distinguish text and symbolize them? You distinguish
18 text from the crucifix and so on. Why?

19 MR. FRIEDMAN: It does depend entirely on
20 context, to be sure, but symbols are subject to
21 alternative interpretation. Text is not. Or text
22 rarely is. And text such as this, religious text,
23 cannot be seen as anything other than the revealed
24 Word of God. I mean, here we have 120 words in the
25 first four Commandments, 142 in the first five

1 Commandments of this display that is a profound,
2 detailed explication of core religious content, core
3 religious meaning.

4 JUSTICE SOUTER: I understand the text
5 part but why not adopt the same test for the symbols?
6 For example, why not adopt it for the Moses? The
7 burden would be on the government to show that it was
8 not approving, endorsing, et cetera, and in this
9 context, that would be pretty easy. Why not have the
10 same test?

11 MR. FRIEDMAN: There is no reason why it
12 couldn't be applied just as well. My point was
13 simply that it's even easier to do it when there is
14 text. The Court doesn't need to go so far as to
15 decide whether to apply it to both text and symbol,
16 though it certainly could.

17 It need only go so far as say when
18 government posts religious texts, it must be presumed
19 to endorse the content of that text. It's a little
20 more difficult when you're talking about symbols,
21 depending on what the symbols are. Some symbols are
22 far more sectarian such as the Cross, such as the
23 Star of David, than other symbols. At least when
24 there is text involved, one presumes that the display
25 of text is an endorsement of the content of that text

1 unless the content and the context make clear that it
2 is neutralizing.

3 The examples are obvious. The display of
4 religious art in a government owned art museum, the
5 playing of religious music by a government symphony
6 orchestra, the context of the orchestra, the context
7 of the museum are sufficient to neutralize the
8 religious message that is contained in the display
9 itself.

10 Here -- and the same thing I think would
11 be said of a comparative religion course or a compare
12 and contrast ancient moral code course. There there
13 is not an endorsement of a particular code, a
14 particular text but rather a neutral educational
15 display about several alternative ones.

16 That is different from taking one
17 religious code, one revealed Word of God, placing it
18 next to the revered documents that frame the American
19 Republic and saying, these are all alike, these are
20 worthy of equal reverence. That is simply wrapping
21 the Ten Commandments in the flag and, with all due
22 respect, that constitutes endorsement.

23 Thank you.

24 JUSTICE STEVENS: Thank you, Mr. Friedman.

25 Mr. Staver, you have about three minutes

1 left.

2 REBUTTAL ARGUMENT OF MATTHEW D. STAVER

3 ON BEHALF OF PETITIONERS

4 MR. STAVER: Justice Stevens, the argument
5 before this Court was unlike anything that went down
6 in the District Court or the Circuit Court of Appeals
7 because never was a resolution ever mentioned. Never
8 did the District Court or the Sixth Circuit ever
9 discuss the resolution. It was not mentioned in this
10 Court until this answer brief by respondents was
11 filed. It is not part of the District Court's
12 decision, it was not part of the Circuit Court of
13 Appeals. The District Court said that what imprinted
14 every action thereafter with defiance in a taint is
15 the mere posting of the first display. There was no
16 resolution for that display, none is needed. There
17 is no resolution for the foundations display.

18 JUSTICE O'CONNOR: Was there a resolution,
19 Counsel?

20 MR. STAVER: For the second display, yes,
21 Your Honor, there was.

22 JUSTICE O'CONNOR: And whatever is in the
23 record is that resolution?

24 MR. STAVER: It is that resolution but it
25 is specific to the second display because it

1 specifically mentions what kind of documents are in
2 that display. It is not a general display regarding
3 posting of documents.

4 In this case, when of the Court --

5 JUSTICE STEVENS: But is it correct that
6 it was not amended when the third display was
7 created?

8 MR. STAVER: It was not amended because it
9 was not -- it was relevant and fact-specific in the
10 display itself.

11 JUSTICE STEVENS: It is the last
12 expression of the governing body's intent?

13 MR. STAVER: No, Your Honor. What's the
14 last expression is the foundations display which
15 clearly a reasonable observer would see. And if
16 there is any doubt regarding --

17 JUSTICE O'CONNOR: But there hasn't been a
18 new resolution.

19 MR. STAVER: There is not a new
20 resolution.

21 JUSTICE O'CONNOR: And that one wasn't
22 rescinded?

23 MR. STAVER: That one died, Your Honor,
24 with the Court's ruling.

25 JUSTICE O'CONNOR: It was adopted and it

1 still is there, presumably?

2 MR. STAVER: Presumably. There is nothing
3 in the record that suggests what happened to it.
4 Whether it was repealed or not. But it was specific
5 factually only to that second display, not to the
6 foundations display which the District Court found
7 was fundamentally different. And if there is any
8 doubt regarding the history of purpose, we would
9 suggest, Justice O'Connor, your suggestion in the
10 Wallace, that if there is any doubt regarding
11 purpose, to look to the effects prong. And I think
12 when you look to the effects prong, a reasonable
13 observer will see that this is a constitutional
14 display.

15 This case is one in which the Sixth
16 Circuit drew the most difficult hate, it imposed it
17 in a subsequent action in the most difficult area of
18 the establishment clause and clearly the public
19 officials have substantially and fundamentally
20 changed. They can't live under this taint forever.
21 They tried but they could to correct their way. They
22 tried what they could to display this in a
23 constitutional manner so that anyone passing by would
24 see this as one document among many others. In
25 addition to the display itself, with all the other

1 hundreds of documents that are on the wall, this
2 display has a specific stated purpose.

3 JUSTICE O'CONNOR: So presumably these
4 things are open if it goes on to the final hearing?
5 The preliminary injunction stage?

6 MR. STAVER: Yes, the preliminary
7 injunction. And the fact that the resolution is
8 technically latent on the books, they are will repeal
9 that, they repudiate that resolution.

10 Thank you.

11 JUSTICE STEVENS: Thank you. The case is
12 submitted.

13 CLERK OF Court: The honorable Court is
14 now adjourned until Monday next at 10 o'clock.

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