

No. 08-5548

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY;
RAYMOND HARPER; and ED MEREDITH,**
Plaintiffs-Appellees,

v.

GRAYSON COUNTY, KENTUCKY and GARY LODGSON,
In his official capacity as Grayson County Judge Executive,
Defendants-Appellants.

On Appeal from the United States District Court
For the Western District of Kentucky

**BRIEF AMICUS CURIAE OF
THE NATIONAL LEGAL FOUNDATION,**
in support of *Defendants-Appellants*,
Supporting Reversal

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Amicus Curiae The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this case. The NLF has an interest, on behalf of its constituents and supporters, including those in Kentucky, in arguing on behalf of people of faith wishing to express that faith in the public square.

This brief is filed pursuant to consent from all parties.

SUMMARY OF THE ARGUMENT

This Brief expands on one argument made by Appellants Grayson County and Gary Lodgson (hereinafter “Grayson County” or the “County”) and makes one argument not made by the County. *Amicus* first argues that the court below erred by simply not viewing the facts in the light most favorable to the County and by actually construing important factual events against the County. The actions of both the County and the constituent who promoted the challenged display demonstrate an interest in complying with the current state of the law, thereby evincing a secular purpose that is not a sham. *Amicus* next argues that, under the

Marsh exception to the so-called “*Lemon*-test,” the long-standing tradition of public displays including religious content conclusively demonstrates that the County has not violated the Establishment Clause.

ARGUMENT

I. THE COURT BELOW ERRED BY NOT VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE COUNTY AND BY NOT DRAWING REASONABLE INFERENCES IN ITS FAVOR.

A close reading of court’s opinion below demonstrates that the court erred by not viewing the facts in the light most favorable to the County and by, instead, drawing inferences against it. Sadly, the court below took a few ill-advised words—that is, ill-advised in the current Establishment Clause climate—and doomed the County’s effort to commemorate the historical foundations of American law.

A private citizen of Grayson County, a minister, proposed to the County that it authorize the hanging of the Foundations of American Law and Government Display (hereinafter, the “Display”), a series of framed documents including a copy of the Ten Commandments. *ACLU of Ky. v. Grayson County*, No. 01-cv-202, 2008 U.S. Dist. LEXIS 25194 at *3 (W.D. Ky. Mar. 28, 2008). Notably, although he separately referenced the Ten Commandments, his request was to hang the full array of documents. *Id.* The County, unsure of the legality of such a display, and specifically not wanting to get involved in litigation over the matter, consulted the

attorney present at the meeting. *Id.* at *4-5. The attorney warned of possible lawsuits, and stated he desired to “study the results of the hearings” in other counties concerning similar displays before advising the County. *Id.* at *5.

The outcome of the discussion was a motion—however, one that was roundly rejected. One magistrate moved to “place the Ten Commandments in the buildings,” but not one other member of the board out of the six remaining offered a second. *Id.* Following the failed motion, a new motion that listed the items to be displayed did receive a second and did carry, conditioned upon whether the county attorney thought “this could be done without legal action against the County.” *Id.* at *5-6.

Because the case was before the District Court on cross-motions for summary judgment, the court was obligated to view the facts and evidence in the light most favorable to the County and draw all reasonable inferences therefrom when it evaluated the ACLU’s motion. *See ACLU v. Mercer County*, 432 F.3d 624, 628 (6th Cir. 2005); *ACLU v. Mercer County*, 240 F. Supp. 2d 623, 624 (E.D. Ky. 2003). A reasonable inference drawn from the facts stated above when viewed in the light most favorable to the County is that the County simply sought to honor a request from a constituent, provided it could legally do so. There is more, however, worthy of consideration. Several reasonable inferences follow from an examination of the minutes from the September 18, 2001, meeting. First, the

minutes were not meticulous notations of the meeting, nor were they prepared with careful grammatical scrutiny. *Grayson County*, at *4-5. The court below quoted the relevant portion of the minutes as follows:

Reverend Chester Shartzler addressed the Court concerning his desire for the County to place the Ten Commandments in the County buildings. He said there were several Counties in the State who has [sic] them in their Courthouses. He explained that some Counties has [sic] them hanging in a group of other historical documents. He said he thought the Civil Liberties would look more favorable toward it if they were hanging in a grouping with the other historical documents. County Attorney, Tom Goff said there had been some hearings concerning this in some of the Eastern Counties of the State. Judge Logsdon and the Court members expressed the desire to place them in the County buildings and asked the County Attorney if he thought they could do so in a way that would not cause problems for the County. He explained that there could be law suits filed against the County, and that he wanted to study the results of the hearings from the other Counties, before advising them.

Id.

Viewed in a light favorable to the County, it seems quite reasonable that once the constituent proposed the Display, the County, including the person taking the minutes, referred to the proposal using the “Ten Commandments” as shorthand for the Display. They would have had no reason at that point to parse their words. Furthermore, the minutes are ambiguous as to their inclusion of the pronoun “them.” The court below, in failing to construe the facts favorably to the County, appears to have assumed that the pronoun “them” was used consistently within the

minutes. In particular, when describing the *constituent's* words, the minute's use of "them" appears to refer to the Ten Commandments document.

Reverend Chester Shartzter addressed the Court concerning his desire for the County to place the Ten Commandments in the County buildings. He said there were several Counties in the State who has [*sic*] *them* in their Courthouses. He explained that some Counties has [*sic*] *them* hanging in a group of other historical documents. He said he thought the Civil Liberties would look more favorable toward it if they were hanging in a grouping with the other historical documents.

See id. (emphasis added). Those several sentences, however, describe situations where the Ten Commandments and other historical documents were hung together in other counties. Thus, when the minutes recorded the *County's* "desire to place *them* in the County buildings," the scrivener quite easily could have changed the pronoun referent to mean the entire Display, with never a thought for the ambiguity it created. *See id.* (emphasis added). Simply put, "them" could easily have been referring to all the documents of the Display when the County was speaking.

The County's desire to follow the law continued through the September 28, 2001, meeting when the County explicitly noted separately all the documents to be placed on display. *Id.* at *5. Although the County did single out the Ten Commandments, a reasonable inference for doing so was that the County was stating a bare forensic fact—six of the documents were primarily historical (notwithstanding the overt religious language contained in some of the documents),

and one document was primarily religious in nature (albeit with significant historical import).

As the County has argued more fully in its brief, the instant case is strikingly similar to the one the court below went to great pains to distinguish. In *American Civil Liberties Union v. Mercer County*, 219 F. Supp. 2d 777, 780 (E.D. Ky. 2002), the county gave permission to a resident hang a “Foundations” display virtually identical to the one at issue in the instant case. There, the stated purpose for the display was that “all of the documents, *including the Ten Commandments*, have played a role in the formation of our system of law and government.” *Id.* (emphasis added). On review in this Court, it was of no significance that the Ten Commandments document was singled out from the other documents, and this Court further acknowledged, as the County here is attempting to do, the commandments’ influence on the American legal system. *Mercer County*, 432 F.3d at 639-40.

Simply put, the court below has sought to draw legal distinctions from what really amounts to a lack of legal sophistication and some cumbersome speech. Had the County devised a statement of purpose which eloquently discoursed on the influences of various documents on the American legal tradition, it would have been safe, even if *every single magistrate* passionately desired to get the Ten Commandments in front of the public to effect subtle religious teaching to unwary

viewers. Instead, the County heard from a concerned citizen, sought a legal way to cooperate and thereby educate the public, spoke openly about the various documents to be considered and the risk of litigation, and, for a few ill-considered or grammatically imprecise words, they fall prey to litigation from an advocacy organization known to this Court for its efforts “to ensure that . . . the government [is kept] out of the religion business.” *Mercer County*, 432 F.3d at 638 (citation omitted).

Given an opportunity to deal with similar improvident words during legislative debate concerning a Texas moment of silence law, a Federal District Court took to heart an admonition resembling one this Court has recently articulated—namely that a court should “defer to the government’s stated purpose, except ‘in those *unusual* cases where the claim was an apparent sham’ and the primary objective is religious.” *Id.* at 631-32 (emphasis by this Court) (citations omitted). There is a built in presumption in favor of the “sincerity of the legislature’s express purpose, although objective evidence may be helpful in “distinguishing a sham secular purpose from a sincere one.” *Id.* at 632 (citation omitted). In *Croft v. Perry*, 530 F. Supp. 2d 825 (N.D. Tex. 2008), the court was able to see past certain clumsy or improvident phrases to appropriately discern the

legislature’s legitimate secular purpose.¹ During the legislative debate, the following statements were made or actions were taken:

1. The Court describing testimony of Senator Wentworth (sponsor):
“Senator Wentworth began by talking about the forty years that had elapsed since the Supreme Court ruled that audible prayer in public schools was unconstitutional.” *Id.* at 839.
2. Representative Edwards: “[W]hen we were pushing this bill and going around the state trying to get people to support prayer back in school, we found that a number of undesirable things happened when we took prayer out of school.” *Id.* at 844.
3. Representative Edwards: “I understand what you’re saying. I just—I just wish that we really could pray aloud.” *Id.*
4. Two separate attempts to amend the bill removing the word “pray” were defeated. *Id.* at 842-44.

¹ Although the Fifth Circuit has not adopted the “predominant purpose” analysis for interpreting the “secular purpose” prong of *Lemon*, the *Croft* court’s analysis would still hold up here. When interpreting an action by a legislative body for which there are multiple motivations by various sponsors and advocates, discerning a secular purpose that is not a sham *could only reasonably be* the purpose that predominates. If the court were to have found that religious motivations did predominate the debate in *Croft*, it is difficult to see how words of secular purpose by a legislator or two would have convinced the court they were not a sham.

Yet in the final analysis, the court was able to conclude that “[f]rom the beginning, proponents of the law expressed fidelity to, rather than defiance of, what they understood were constitutional principles,” and that the secular purpose was not a sham. *Id.* at 840, 847.

The *Croft* court understood what the court below missed. Many people desire many things for many reasons, and to reject a secular purpose because of the particular motivation or statement of a single legislator or constituent is to fail to distinguish “between a real threat and a mere shadow.” *Id.* at 847 (citing *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)). Such is the case here. The court below superimposed the stated purpose of a constituent on a largely silent board, who only ever considered hanging the entire display this Court approved in *Mercer*. Magistrates’ references to the “Ten Commandments” can just as reasonably function as a proxy for the “Display,” especially in light of the County’s complete rejection of the motion seeking to “place the Ten Commandments in the buildings.” *Grayson County*, at *5.

As the *Croft* court noted, because the sponsoring senator “clearly went out of his way to attempt to follow a law² with which he did not agree,” the fact that some legislators and citizens were motivated by a desire to return pray to the public schools did not invalidate the law’s secular purpose. *Croft v. Perry*, 530 F. Supp.

² Law, as used by the court here, refers to court precedent regarding prayer in public schools and not to statutory law.

2d 825, 846 (N.D. Tex. 2008). The same should be the case here. The Ten Commandments appear within the context of a clear, unambiguous display of historically significant documents. The specific motivation of a constituent or an individual magistrate should not invalidate the Display's clear secular purpose.

II. THE COURT BELOW ERRED IN FAILING TO CONSIDER THAT RELIGIOUS DISPLAYS ARE DEEPLY EMBEDDED IN THE HISTORY AND TRADITION OF THIS COUNTRY AND ARE CONSTITUTIONALLY PERMISSIBLE.

Should this Court disagree with the analysis in Section I and conclude that the Display evinces a predominantly religious purpose, it remains entirely lawful under an exception to the *Lemon*-predominant purpose test, namely the test first articulated by the U.S. Supreme Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Newdow v. Bush*, 355 F. Supp. 2d 265, 283 (D.D.C. 2005) (“There are exceptions to the *Lemon* test . . . and one of those exceptions” is *Marsh*); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (referring to *Marsh* as an “exception to the *Lemon* test”); *ACLU v. Capital Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1182 (S.D. Ohio 1998), *aff'd*, 243 F.3d 289 (6th Cir. 2001) (finding *Marsh* an exception to *Lemon*). Notably, the Supreme Court recently took a *Marsh*-type approach in *Van Orden v. Perry*, 545 U.S. 677 (2005), to uphold a Ten Commandments monument on state property.

A. Religious symbols and practices are part of our national heritage.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions "is deeply embedded in the history and tradition of this country," and that it had "become part of the fabric of our society." *Id.* at 786, 792. The Court emphasized that long-standing traditions should be given great deference. *Id.* at 788. The *Marsh* test asks whether a long-standing practice, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n.4 (1995) (Powell, J., concurring) (citation omitted). The plurality in *Van Orden* specifically referred to *Marsh* as an example of how the recognition of the role of religion in our nation's heritage is permissible under the Establishment Clause. *Van Orden*, 545 U.S. at 687-88.

Writing for the plurality in *Van Orden*, then-Chief Justice Rehnquist noted that the constitutional analysis of the monument "is driven both by the nature of the monument and by our Nation's history." *Id.* at 686. Justice Rehnquist recognized that, "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). He also cited the deeply

embedded practice of recognizing the role religion has played in our Nation’s heritage. *Van Orden*, 545 U.S. at 687-88.

Rehnquist compared the monument outside the Texas State Capitol with other Ten Commandment displays on government property, describing them as “acknowledgements of the role played by the Ten Commandments in our Nation’s heritage,” *id.* at 688-89, and not as unconstitutional establishments of religion. Thus, the *Van Orden* plurality applied a *Marsh* analysis to the Texas Decalogue and stated that *Lemon* is “not useful” in dealing with a “passive monument.” *Van Orden*, 545 U.S. at 686.³

This Court, in specifically grounding its holding in *Marsh*, approved the display of a state motto containing a religious inscription. *ACLU v. Capitol Square Review & Advisory Board*, 243 F.3d 289 (6th Cir. 2001).

In that case, the ACLU sued to enjoin the placement of the State motto of Ohio, “With God, All Things Are Possible,” and the state seal in a large display in the plaza in front of the state Capitol. *Id.* at 292. Sitting *en banc*, this Court

³ Justice Breyer’s concurrence in *Van Orden* recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 545 U.S. 844 (2005)—the other Ten Commandments case decided the same day—by noting that the *Van Orden* display is “simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document.” *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

rejected the Establishment Clause claim and relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. It specifically noted the following as persuasive for the seal's permissibility: President Washington's congressionally-solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine state constitutions to God or religion, court decisions calling for the veneration of religion, the upholding of blue laws, Thanksgiving Proclamations by presidents other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our currency. *Id.* at 296-301.

Importantly, the *Capitol Square* court took one of *Marsh*'s most cited principles and applied it directly to a passive display case. Having traced acknowledgements of God back to the First Congress, the Court concluded that the Ohio motto display, which also acknowledges God, was constitutional under *Marsh*:

The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the

monument in question clearly passes constitutional muster.

Id. at 300.

Other courts have used *Marsh* in myriad ways: to uphold practices such as public proclamations with religious content, *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army, *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985), and in a sheriff's department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase "in the year of our Lord" on law licenses and on notary public commissions, *Doe v. Louisiana Supreme Court*, No. CIV.A.91-6135, 1992 WL 373566, at *6-7 (E.D. La. Dec. 8, 1992); state involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh*'s "fabric of society" language); prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 27758 (E.D.

Cal. March 26, 2002); *Newdow v. Bush*, 355 F. Supp. 2d 265; and directly in religious display cases, *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988), *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1995), *Conrad v. City and County of Denver*, 724 P.2d 1309, 1314 (Colo. 1986), *ACLU v. Capital Square Review & Advisory Board*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*), and *Murray v. Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia); and to help explain why displays should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 576-77 (Ct. App. 1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

Marsh should control this case because placing a copy of the Ten Commandments within the context of six other historical documents merely acknowledges the role those maxims have played in American life generally and in the life of the law specifically. And such a role is indisputable. Too numerous to mention are all the cases and statutes throughout the American experience that plainly address the subject of a particular commandment and explicitly ground the law's existence in the commandment. *See, e.g., Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia (1610-1611), reprinted in Colonial Origins of the American Constitution: A Documentary History 315-316*

(David S. Lutz ed., 1998) (first commandment); *General Laws and Liberties of New Hampshire* (1680), reprinted in *Colonial Origins of the American Constitution: A Documentary History* 6 (second commandment); “Of Profane Cursing and Swearing,” Rev. Stat. 673, Art 6, reprinted in George C. Edwards, *Treatise of the Powers and Duties of the Justices of the Peace and the Town Officers in the State of New York* 379-80 (1836) (third commandment); *Bertera’s Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200-01 (Pa. 1967) (fourth commandment); *Ruiz v. Clancy*, 157 So. 737, 738 (La. Ct. App. 1934) (fifth commandment); *Young v. Commonwealth*, 53 S.W. 963, 966 (Ky. Ct. App. 1932) (sixth commandment); *Hardin v. State*, 46 S.W. 803, 808 (Tex. Crim. App. 1898) (seventh commandment); James Kent, 1 *Commentaries on American Law*, 7 (1826) (eighth commandment); *Watts v. Gerking*, 228 P. 135, 141 (Or. 1924) (ninth commandment); and *Weinstock, Lubin & Co. v. Marks*, 42 P. 142, 145 (Cal. 1895) (tenth commandment).

B. Displaying the Ten Commandments in or on public buildings is part of our national heritage.

Indeed, this nation has enjoyed a long tradition of adorning its governmental buildings and grounds with monuments and displays that contain religious references and symbols, including the Ten Commandments. Chief Justice Rehnquist himself pointed out several such examples in *Van Orden*:

The apex of the Washington Monument is inscribed “Laus Deo,” which is translated to mean “Praise be to God,” and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two . . . inscriptions [which] include . . . extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as “the year of our Lord 1804. . . .”

Van Orden, 545 U.S. at 689 n.9.

To say that this nation has a long-standing tradition of inscribing religious sentiments and scriptural references on government property is a bit of an understatement. Examples abound beyond Justice Rehnquist’s list, but the following illustrates the point:⁴

1. In the House of Representatives Chamber, in our nation’s Capitol, directly above and behind the Speaker’s Chair is the inscription, “In God We Trust.”
2. Directly opposite the Speaker’s Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, this one has the most prominent position.
3. In the Capitol is a private room dedicated for use by members for prayer and meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.
4. In the main reading room of the Library of Congress are two statues, one of Moses, and one of “Paul, Apostle to the Gentiles.”
5. The Lincoln Memorial, on its north wall, bears the words of Lincoln’s Second Inaugural Address, in which he uttered a number of religious sentiments and quoted directly from scripture, including the verse from the Old Testament: “The Judgments of the Lord are righteous and true, altogether.”

⁴ The examples are drawn from Catherine Millard, *God’s Signature Over the Nation’s Capital* (1988).

Displaying the Ten Commandments on a wall in a courthouse is in no way different from these practices.

Government use of religious symbolism and language is not only present in its buildings; in fact, its use is well nigh ubiquitous in its military cemeteries. Since the end of World War I—almost ninety years—the government, upon request of the family, has engraved the Latin cross as an emblem of belief on its headstones in its national cemeteries. *See* History of Government Furnished Headstones and Markers, <http://www.cem.va.gov/cem/hist/hmhist.asp> (last visited October 10, 2008). Unidentified soldiers who fell in battle are honored by Arlington’s Tomb of the Unknown Soldier, which reads, “Here Rests in Honored Glory an American Soldier Known but to God.” *See* The Tomb of the Unknowns, Arlington National Cemetery, http://www.arlingtoncemetery.org/descriptions/tous_back.html (last visited October 10, 2008). Memorial crosses marking unknown graves at overseas military cemeteries bear the same epitaph. *See, e.g.*, <http://www.abmc.gov/cemeteries/cemeteries/ff.php>, Flanders Field American Cemetery & Memorial Booklet at 5. Virtually all of the overseas military cemeteries are overwhelmingly dominated by a single memorial symbol—rows upon rows of white, Latin crosses. *See* <http://www.abmc.gov/home.php> (ABMC Video, “Fields of Honor.”) (last visited November 18, 2008).

Chapels also mark the centerpiece of many of the overseas cemeteries and are adorned with Bible verses and religious prose. At the chapel at the Flanders Field cemetery near Waregem, Belgium, for instance, the outer wall explicitly notes the builder of the chapel—the United States of America, an inscription written in English, Flemish, and French. *See* <http://www.abmc.gov/cemeteries/cemeteries/ff.php>, Flanders Field American Cemetery & Memorial Booklet at 8. It is difficult to discern a governmental purpose for building a chapel that was not predominantly religious. Further, the chapel’s interior contains an altar bearing the words of the Divinity: “I WILL RANSOM THEM FROM THE POWER OF THE GRAVE. I WILL REDEEM THEM FROM DEATH. (Hosea, XIII:14)” *Id.* at 9. Quotations from scripture such as this one from Hosea, lacking further context, presumably evince a religious motive. Finally, the ceiling of the chapel is decorated with a mosaic depicting religious themes—“The beauty of the interior [of the chapel] is enhanced by the mosaic ceiling, which depicts a lighted oil lamp under the stars of Heaven with doves of peace flying toward the light” *Id.* at 10.

Arlington National Cemetery contains a number of memorial crosses erected there, *e.g.*, the Argonne Cross Memorial, which is a memorial to the soldiers of the

World War I American Expeditionary forces in France,⁵ and the Canadian Cross of Sacrifice, which honors U.S. citizens who served in the Canadian forces in the First, Second World Wars and Korean War.⁶ There are countless crosses emblazoned on the tombstones of fallen servicemen and women, and other religious symbols adorn memorials as well.⁷

Therefore, even if this Court attributes a strong religious purpose to the inclusion of the Ten Commandments in the Display, then in light of these authorities its inclusion would be valid under *Marsh*. As noted above, the historical acceptability and longevity of the government's use of religious language and symbols means that the analysis here should begin with the presumption that the County's use of the Ten Commandments within its Display is constitutional. Any decision to the contrary would be in direct conflict with the intentions of the Framers of the First Amendment and with deeply rooted practices and traditions of this nation.

⁵ See http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited October 10, 2008).

⁶ See http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited October 10, 2008).

⁷ This Court may take judicial notice of the official websites and their recorded facts and photographs cited here in Section II.B., because they are issued by a public authority and as such are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Throughout our nation's history our government has openly recognized religion on its property, especially in judicial centers. That history is a source of pride to some, and of embarrassment to others, but it is our history, nonetheless. This Court should decide this case in the light of that history. Courthouse displays containing the Ten Commandments will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell,⁸ or the national motto on our coins. In fact, it is almost quaint to think that a framed piece of paper hanging in a government building in a small Kentucky town which contains the *very words* that are symbolically and dramatically depicted in a frieze containing Moses holding two tablets in the Supreme Court of the United States is somehow an establishment of religion.

This Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored devotion to the concept of neutrality," *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would deny the citizens of Kentucky this symbol of remembrance and acknowledgement of a significant foundation of American law.

⁸The Liberty Bell is inscribed with the following Bible verse, "Proclaim LIBERTY Throughout All the Land Unto All the Inhabitants Thereof (Leviticus, 25:10)." See Liberty Bell Center, <http://www.nps.gov/inde/liberty-bell-center.htm> (last visited October 8, 2008).

CONCLUSION

For the foregoing reasons, as well as those presented by the County, this Court should reverse the decision of the District Court and grant the County's Motion for Summary Judgment.

Respectfully submitted
This 20th day of November 2008

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* The National Legal Foundation certifies in accordance with F.R.A.P. 32(a)(7)(B) that this brief contains 5,178 words of Times New Roman (14 point font) proportional type as calculated on the word count function of Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2008, I electronically filed the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *ACLU, et al., v. Grayson County, et al.*, No. 08-5548, with the clerk of the court by using the CM/ECF system. I further certify that the following were served by electronic CM/ECF notification:

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