

No. 11-13457-EE

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,**  
*Plaintiff-Appellee,*

**v.**

**DIXIE COUNTY, FLORIDA,**  
*Defendant-Appellant.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
Gainesville Division, Honorable Maurice M. Paul, Judge  
Case No. 1:07-cv-00018-MP-GRJ**

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**BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,**  
in support of Defendant-Appellant,  
supporting reversal

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## **INTEREST OF *AMICUS CURIAE***

WallBuilders, Inc., is a non-profit organization dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First Amendment intended.

## **STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)**

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, WallBuilders, Inc.,

its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief. It is filed with the consent of all parties.

## **SUMMARY OF THE ARGUMENT**

This Brief greatly expands upon an argument made by Dixie County. It explains why—should this Court conclude that Mr. Anderson’s monument is government speech—the monument passes muster under *Van Orden v. Perry*, 545 U.S. 677 (2002). Specifically, it looks at analysis contained in *Van Orden’s* plurality opinion and its three concurring opinions. In so doing, it also applies the concepts found there—the acknowledgment, accommodation, encouragement, and establishment of religion—to Mr. Anderson’s monument.

## **ARGUMENT**

Dixie County correctly argues that the monument at issue in this case is Mr. Anderson’s private speech. However, recognizing that this court could disagree, Dixie County also correctly argues that even should Mr. Anderson’s monument be considered government speech, it does not violate the Establishment Clause. This Brief will examine in greater detail why Dixie County is correct to assert that Mr. Anderson’s monument should be analyzed under *Van Orden v. Perry* and why it passes muster under that analysis.

It is widely—though not universally—believed that Justice Breyer’s concurring opinion is the controlling opinion in *Van Orden*. *See, Freedom from*

*Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1065-66 (W.D. Wis. 2010), vacated & remanded by *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011). However, Chief Justice Rehnquist’s four-vote plurality opinion and each of the concurring opinions help shed light on why Mr. Anderson’s monument passes muster. This Brief will examine each in turn.

**I. MR. ANDERSON’S MONUMENT PASSES MUSTER UNDER CHIEF JUSTICE REHNQUIST’S PLURALITY OPINION.**

Chief Justice Rehnquist’s opinion sets the stage for the other opinions and highlights three important reasons why Mr. Anderson’s monument is constitutional. First, it explains that the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is inapplicable when evaluating passive monuments. *Van Orden*, 545 U.S. at 686 (Rehnquist, C.J., plurality). Second, it distinguishes between the accommodation, acknowledgment, encouragement, and establishment of religion, the first three of which are constitutional. *Id.* at 684 & n.3. Third, it demonstrates that Ten Commandments monuments fall within a long standing and constitutional tradition of such accommodation, acknowledgment, and encouragement. *Id.* at 688-89.

**A. The Plurality Opinion Explains that *Lemon* Does Not Apply.**

Chief Justice Rehnquist categorically stated that *Lemon* does not apply to passive monuments. The plurality instructs that monument cases should instead be decided by examining two things: the nature of the monument and our nation’s

history. *Id.* at 686. Before turning to the historical analysis, it is important to note that there is nothing about Mr. Anderson’s monument that gives it a different nature than the *Van Orden* monument.

The plurality zeroed in on one issue and one issue only when examining the monument’s nature: its passivity. Freely admitting the religious content of the Ten Commandments, the plurality flatly stated that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 690. However, the plurality then discussed limitations to this principle. After mentioning the posting of the Ten Commandments in public schools and prayers in public schools, the plurality explained that “[t]he placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. .... The monument is ... also quite different from the prayers involved in *Schempp* and *Lee v. Weisman*.” *Id.* at 691 (citations omitted). These statements are equally true of Mr. Anderson’s monument.

There are only three differences worth noting between the facts in *Van Orden* and the facts here. First, Mr. Van Orden had frequently walked past the Ten Commandments for six years. *Id.* at 682, 691. Although it is not entirely clear why this fact was included in the passivity analysis, it *is* clear that if a repeated six-

year-long offense cannot destroy passivity, neither can Doe's one-time offense.

Second, the plurality noted that "Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government." *Id.* at 691-92. The only difference here is that Texas had already accomplished this task, while Dixie County is just embarking on this task. Dixie County's Guidelines created a forum for "monuments or displays commemorating people, events and ideas which played a significant role in the development, origins or foundations of American or Florida law, or Dixie County." *ACLU of Florida, Inc. v. Dixie County*, No. 1:07-cv-00018 at 3-4 (N.D. Fla. Jul. 15, 2011) (order granting summary judgment [hereinafter "Sum. J. Order"]) (quoting Guidelines). Even under a government speech analysis, the Guidelines control what type of monuments will be erected outside the courthouse. The Guidelines appear facially constitutional. Furthermore, they would be constitutional had the first monument erected under them been devoid of religious content. It cannot be rendered unconstitutional simply because the Ten Commandments monument came first. Such a concern is nowhere to be seen in Justice the plurality's analysis.

Third, just as the number and age of the monuments in *Van Orden* did *not* impact the plurality's passivity analysis; similarly, location does not impact the

analysis. The *Van Orden* monument's location on the Texas State Capitol lawn, 545 U.S. at 681 (plurality), versus Mr. Anderson's monument's placement on the steps is not constitutionally significant. Although not part of its passivity analysis, the plurality noted the permissibility of numerous government buildings with various religious content actually *on or in* them. *Id.* at 688-89 & n.9. With specific regard to the Ten Commandments, this included its own courtroom:

Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

*Id.*

All this is not surprising since our governments have always acknowledged, accommodated and encouraged religion.

B. Mr. Anderson’s Monument—Even if Construed as Government Speech—Does not Establish Religion; At Most, it Acknowledges, Accommodates, or Encourages religion.

1. *A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.*

Mr. Doe claims that he is “[d]eeply disturbed by County’s apparent endorsement of the Christian religion ....” *ACLU of Florida, Inc. v. Dixie County*, No. 1:07-cv-00018 at 3 (N.D. Fla. Aug. 8, 2008) (order denying summary judgment). In effect, Mr. Doe is claiming that he is in a religious minority. The Framers were well aware disputes between majorities and minorities, and a brief look at some history will be instructive in understanding why Mr. Anderson’s monument is permissible under the *Van Orden* plurality’s analysis.

Balancing of the rights of the majority and the minority must never be a matter of “either/or”; it must always be a matter of “both/and.” Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* one reads, “[i]f a majority be united by common interest, the rights of the minority will be insecure.” *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, one reads that the “fundamental

maxim of republican government ... requires that the sense of the majority should prevail.” *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception occurs when that sense violates a constitutional provision put in place to protect the minority.

As discussed above, Mr. Anderson’s monument is part of a long-standing tradition of erecting and depicting the Ten Commandments on and in government property. However, historical acceptance of a particular practice *alone* is never sufficient to justify a challenged governmental action,” *Lynch v. Donnelly*, 465 U.S. 668, 718 (1984) (Brennan, J., dissenting) (emphasis added). Therefore, it is important to note how the Framers balanced the religious rights of the majority and the minority and protected each against the tyranny of the other. They did so by taking into account four concepts that, as we shall see, the plurality mentioned: the acknowledgement, accommodation, encouragement and establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledge, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden. After introducing these concepts, this Brief will note how they animate the plurality’s opinion.

## 2. *True Establishment of Religion is Prohibited.*

Because of present day confusion, it is important to understand the original

concept of establishment. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Joseph Story:

One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833). This definition makes it easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand.

### *3. Acknowledgment of Religion is Permitted.*

One of the most famous explications of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). It is helpful to review some of the historical examples he used:

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had

poured down upon them.”

*Id.* at 100-01 (*quoting* 1 Annals of Cong. 914 (1789)). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101. This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the Thanksgiving proclamation ultimately issued by President Washington:

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.” The Presidential Proclamation was couched in these words:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since

enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

*Id.* at 101-03 (*quoting* 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, at 64 (1897); citations omitted). The opening words of this same Thanksgiving Proclamation are these: “Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor ....”

[http://avalon.law.yale.edu/18th\\_century/gwproc01.asp](http://avalon.law.yale.edu/18th_century/gwproc01.asp) (last visited Sept. 26, 2011).

Justice Rehnquist also noted the views of the eminent constitutional

authority, Thomas Cooley:

But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse ....

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative Power of the States of American Union*, 470-71 (1868) (quoted in *Wallace*, 472 U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the acknowledgment of God Himself. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Wallace*, 472 U.S. at 106 (citation omitted).

Acknowledgement is not a hard concept. It meant then exactly what it

means now—to recognize. Government can recognize the reality of God and the importance of religion.

4. *Accommodation of Religion is Permitted.*

Government can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. “[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.” Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed.1932).

Importantly, this very passage was quoted by Justice O’Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O’Connor, J., dissenting). In *Flores*, Justices O’Connor and Scalia debated whether Washington’s sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally *required*. *Cf. id.* at 560-64 (O’Connor, J., dissenting) with *id.* at 541-44 (Scalia, J., concurring in part). However, that is not the concern of this Brief. Rather, the point is that both Justices agreed that many historic practices (that continue to the

present day) constitute an accommodation of religion, and that such accommodation is constitutionally *permitted*. These practices can include exemptions from military service and from oath taking, among others. *Id.* at 560-64 (O'Connor, J., dissenting); *id.* at 541-44 (Scalia, J., concurring in part).

Like acknowledgement, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do. It can take the form of granting exceptions or other adjustments to governmental action.

#### 5. *Encouragement of Religion is Permitted.*

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." <http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html> (last visited Sept. 25, 2011).

However, the Founders did not just talk about encouraging religion; they actually did so. Here again then-Justice Rehnquist's *Wallace v. Jaffree* dissent is instructive. There he noted that

[a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian

education for Indians had reached \$500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that “no tax in any amount” may be levied for religious activities in any form.

*Wallace*, 472 U.S. at 103-04 (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson’s treaty:

The treaty stated in part: “*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion ... [a]nd ... three hundred dollars, to assist the said Tribe in the erection of a church.” From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land “for the Society of the United Brethren, for propagating the Gospel among the Heathen.” The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds “for the support of religion ... and for no other use or purpose whatsoever ....”

*Id.* at 104 n.5.

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sects’ request for an exception or other alteration of government action. It involves looking for ways to encourage the population to engage in religious pursuits. The Framers truly believed that “Religion, morality, and knowledge, being necessary to good government and the

happiness of mankind ....” Therefore, government could encourage religion.

6. *The Historic Concepts Persist in Modern Establishment Clause Jurisprudence, including in the Van Orden Plurality Opinion.*

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the history lesson sets the stage for an important reality: even though watered down, the concepts of acknowledgement, accommodation, and even encouragement have not fallen out of the Supreme Court’s Establishment Clause jurisprudence.

For example, the acknowledgement of both God and the role of religion in society continues to be addressed. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld Nebraska’s legislative chaplaincy program. In so doing, the Court noted that “[t]o invoke Divine guidance on a public body entrusted with making the laws is not ... an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.” *Id.* at 792. This same point was made by the plurality in *Van Orden* when it quoted from the Court’s earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): “‘There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.’” 545 U.S. at 684.

The plurality also discussed accommodation: “‘When the state encourages religious instruction or cooperates with religious authorities by adjusting the

schedule of public events to sectarian needs, it follows the best of our traditions.

For it then respects the religious nature of our people and *accommodates the public service* to their spiritual needs.’” 545 U.S. at 684 (citation omitted).

And of course, that same quotation addresses encouragement: “When the state *encourages* religious instruction ... it follows the best of our traditions.” *Id.* at 684. These words first appeared in *Zorach v. Clausen*, 343 U.S. at 313-14 (garnering six votes). Since then, the words have been quoted in whole or in part in eleven other Supreme Court opinions, garnering the support of many justices.<sup>1</sup>

7. *Mr. Anderson’s Monument Falls Far Short of Establishing Religion.*

The point for the present case is obvious, but important: The reason it is appropriate to create a constitutional safe harbor for passive monuments is because

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<sup>1</sup> *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ., concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring & dissenting); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring & dissenting); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, JJ., concurring & dissenting); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O’Connor’s are positive invocations of this proposition. Justice O’Connor noted that the proposition was inapposite as used by appellants.

such monuments do not establish religion. Rather, they acknowledge, accommodate, and sometimes encourage religion.

In the instant case, as noted above, the purpose of the Guidelines (and of monuments erected pursuant to it) is to commemorate “‘people, events and ideas which played a significant role in the development, origins or foundations of American or Florida law, or Dixie County.’” Sum. J. Order at 3-4 (quoting Guidelines). Thus, Mr. Anderson’s monument *acknowledges* the role of religion in American law, just as the *Van Orden* monument did. 545 U.S. at 681 (plurality).

Furthermore, the placing of the monument at the courthouse *accommodates* the religion of those whose tenets include the Ten Commandments. Indeed, whether Mr. Anderson’s monument is seen as his own speech or government speech, the monument only stands because Mr. Anderson challenged the County to make this accommodation. As the court below noted, one of Mr. Anderson’s workers asked the Chairman of the County Commissioners whether “‘the board would have the courage *to allow Anderson* to put a monument displaying the Ten Commandments on the courthouse steps ....” Sum. J. Order at 1-2 (emphasis added).

Finally, Mr. Anderson’s monument may even *encourage* religion. The monument declares “‘Love God and keep His Commandments.” *Id.* at 2. But as the plurality pointed out, encouragement is not establishment. Furthermore, this

simple admonition is far less an encouragement than the spending of funds under Jefferson's treaty. *See Wallace*, 472 U.S. at 103-04 & n.5 (Rehnquist, J., dissenting). Indeed, it is not even as much an encouragement as the released time program at issue in *Zorach v. Clausen*, 343 U.S. 306, 314 (1952), about which the Court wrote "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." . Mr. Anderson surely intended to "widen the effective scope of religious influence," *id.* But Dixie County is not required to "throw its weight against [that] effort," *id.*, even if by allowing the erection of the monument, the monument became government speech.

The permissibility of government encouragement of religion may seem strange in light of certain prior pronouncement from the Supreme Court. However, the plurality dealt with this point, too:

Despite Justice Stevens' recitation of occasional language to the contrary, we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion. Even the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion.

545 U.S. at 684, n.3.

## **II. JUSTICE SCALIA'S CONCURRENCE PROVIDES ADDITIONAL INSIGHT INTO THE CONSTITUTIONALITY OF MR. ANDERSON'S MONUMENT.**

Not including citations, Justice Scalia's opinion was two sentences long. In

the first he joined the plurality. In the second he wrote:

I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.

*Van Orden*, 545 U.S. at 692 (Scalia, J., dissenting).

The plurality gave a constitutional safe harbor for passive religious monuments; Justice Scalia would give a constitutional safe harbor to all nonproselytizing displays of the Ten Commandments. This approach also honors the distinctions between the concepts of acknowledgment, accommodation, encouragement, and establishment.

The plurality had already covered the ground of “favoring religion generally [and] honoring God.” *Id.* Justice Scalia seemingly added veneration of the Ten Commandments to clarify the distinction between the “what is” and the “what should be” of Establishment Clause jurisprudence. The plurality, despite accurately describing many instances of governmental acknowledgment, accommodation, and encouragement of religion; had nonetheless included a footnote in its opinion, noting that the Court “need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case.”

545 U.S. at 691. Justice Scalia, on the other hand, was clear that under an historically faithful interpretation of the Establishment Clause, government itself—and not just its citizens—can acknowledge God. Furthermore, it can do so in a way that takes into account the rights of the majority. At the end of his concurrence, Justice Scalia added a citation to his opinion in *ACLU v. McCreary County*, 545 U.S. 844, 894 (U.S. 2005) (Scalia, J., dissenting), the other Ten Commandments case decided by the Court the same day:

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, “a tolerable acknowledgment of beliefs widely held among the people of this country.” The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

*Id.*

Justice Scalia then added a footnote that explains his reference to “nonproselytizing” use of the Ten Commandments in his *Van Orden* concurrence:

This is not to say that a display of the Ten Commandments

could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.

*Id.*, n.4.

Thus, Justice Scalia's opinion helps to further clarify why Mr. Anderson's monument is constitutional: Just as the secular documents and the explanation in *McCreary County* showed the Ten Commandments were being used in a nonproselytizing manner; so in the instant case, the facts demonstrate that Mr. Anderson's monument is being used in a nonproselytizing manner. First and foremost, Mr. Doe has made no such allegation. Secondly, as the court below found, Dixie County had no involvement in deciding which version of the Ten Commandments was used. Sum. J. Order at 7 (noting that the monument was "was designed exclusively by Mr. Anderson ...."). Thirdly, the County's Policy requires a disclaimer stating that the County does not endorse the monument. *Id.* at 4. Such action is incompatible with advocating that the version of the Commandments chosen by Mr. Anderson is "authoritative."

### **III. JUSTICE THOMAS'S CONCURRENCE PROVIDES YET MORE INSIGHT INTO THE CONSTITUTIONALITY OF MR. ANDERSON'S MONUMENT.**

Justice Thomas, like Justice Scalia, joined the Chief Justice's opinion in full.

545 U.S. at 692 (Thomas, J., concurring). He wrote separately, however, to make two additional points: 1) the Establishment Clause should not be incorporated against the states, and 2) the Ten Commandments monument cannot violate the Establishment Clause when the word “establishment” is properly understood. *Id.* While this Court is not free to adopt Justice Thomas’s first premise, his second premise provides additional insight into the constitutionality of Mr. Anderson’s monument.

Justice Thomas, like Chief Justice Rehnquist and Justice Scalia before him, started with the distinction between acknowledgment and establishment. *Id.* at 692, 695, 697. However, Justice Thomas also emphasized another concept that this Brief has already introduced—coercion:

The Framers understood an establishment necessarily [to] involve actual legal coercion. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty* [ ]. In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers. And government practices that have nothing to do with creating or maintaining ... coercive state establishments” simply do not implicate the possible liberty interest of being free from coercive state establishments.

*Id.* at 693-94 (citations and internal quotation marks omitted).

This view is entirely accurate in light of the three types of establishment delineated by Justice Story above. And this view also helps demonstrate the constitutionality of Mr. Anderson’s monument. First, no one is forcing Mr. Doe to

do anything. As Justices Story and Thomas make clear, merely having to walk past—or know of the existence of—a monument with religious content is not coercion. Furthermore, as the court below found, no government money has been or will be spent on Mr. Anderson’s monument. Sum. J. Order at 7.

#### **IV. MR. ANDERSON’S MONUMENT PASSES MUSTER UNDER JUSTICE BREYER’S (PRESUMABLY) CONTROLLING OPINION.**

Justice Breyer, unlike Chief Justice Rehnquist and Justices Scalia and Thomas, instead of examining the meaning of “establishment” or history, started with a review of conflicting principles from prior Establishment Clause cases. He therefore found *Van Orden* a “borderline case.” 545 U.S. at 700 (Breyer, J., concurring). However, Justice Breyer did agree that *Lemon* was inapplicable to the case. Indeed, he refused to employ any test and instead employed independent “legal judgment.” *Id.* The two keys to that judgment were how the text of the Commandments was used and the context in which it occurred. *Id.* at 701.

Justice Breyer wrote that in various contexts, displays of the Ten Commandments can convey various messages: religious, secular moral, and historical. *Id.* Thus, Justice Breyer’s analysis is very much a “totality of the circumstances” approach. A display can have some features in common with the *Van Orden* display and still—under Justice Breyer’s approach—be unconstitutional. Conversely, a display can lack some features or have opposite features from the *Van Orden* display and remain constitutional. After all, Justice

Breyer spoke of “factors,” not “elements.” *Id.* at 702.

Justice Breyer examined three factors: the circumstances surrounding the placement of the monument, the physical setting, and the monument’s age. *Id.* at 701. This Brief will examine each and apply them to Mr. Anderson’s display.

Justice Breyer noted that the group that donated the monument had joint interests, the Ten Commandments’ religious aspect and their role in civic morality. *Id.* He also noted that the text was a nonsectarian version and the monument prominently acknowledged the monument’s donation, which distanced the State from religious aspects of the message. In the instant case, there are adequate indicia of Dixie County distancing itself from the religious aspect of Mr. Anderson’s monument. First, the County has placed a sign stating that it does not endorse the content of any display that is, or may in the future be, placed on the steps. Sum. J. Order at 4. Second, there is an additional sign specifically stating that the monument was “PLACED OWNED AND MAINTAINED BY JOE ANDERSON, JR.” *Id.* at 7. Third, whether this Court ultimately decides the County was successful or not, the County’s *intention* was to open forum for *private* ““monuments or displays commemorating *people, events and ideas which played a significant role in the development, origins or foundations of American or Florida law, or Dixie County.*”” *Id.* at 3-4 (quoting Guidelines) (emphasis added). Again, these are adequate indicia of the County’s distancing itself from the religious

aspects of Mr. Anderson's monument.

Justice Breyer's second factor was physical setting. Here, his main point was that the setting—not the monument itself—“suggest[ed] little or nothing of the sacred.” 545 U.S. at 702. Justice Breyer arrived at this conclusion based upon the size of the park, and the number and diversity of monuments in it. Here, because Mr. Anderson's monument is the first one to be erected in the forum, the number and diversity of monuments is inapplicable. This, of course, is not the same as saying that the lack of multiple diverse displays weighs against the monument. Rather, it means this Court can look at the range of expected displays (based upon the Guidelines) and give that assessment whatever weight it deems appropriate.

However, Justice Breyer also noted that the 22-acre park “does not readily lend itself to ... religious activity.” *Id.* Surely, the court house steps are even less conducive to religious activity.

Justice Breyer's third factor was the age of the monument and its non-controversial history. Again, it is important to note that a monument's age (and history) is not an element, but rather a factor. In fact, in Justice Breyer's analysis, the age analysis has very much an “icing on the cake” feel: “*If* these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor [age] is determinative *here*.” Actually, non-controversy was for Justice Breyer a proxy for

what citizens thought:

those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to “engage in” any “religious practic[e],” to “compel” any “religious practic[e],” or to “work deterrence” of any “religious belief.”

*Id.* at 702 (citation omitted).

Laying aside the fact that four of Justice Breyer’s colleagues believed government *can* promote religion over nonreligion, Dixie County has not done so. To be sure, erecting a new Ten Commandments display could *sometimes* cause *some* people to believe the government has favored religion. For example, the Third Circuit has noted that a decision to keep an old display of the Ten Commandments can be motivated in part by historic preservation. *Freethought Soc’y v. Chester County*, 334 F.3d 247, 265 (3d Cir. 2003). Because that possibility does not exist when erecting a new display, it may seem “*more likely* that the County Commissioners were motivated by religion.” *Id.* (emphasis added). However, the Third Circuit added that this is “especially [true] where there is nothing else in the context of the display that would change the views of the reasonable observer ....” *Id.* In the instant case, there *are* other things in the

context that would change the observer's view.<sup>2</sup> At a minimum, these include things that have already been mentioned: the two disclaimer signs, and the County's intent to open a forum for private speech relating to non-religious topics.

## CONCLUSION

Whether examined from the point of view of *Van Orden*'s four-vote plurality opinion or of Justice Scalia's or Justice Thomas's additional insights or of Justice Breyer's concurrence, Mr. Anderson's monument passes constitutional muster. For the foregoing reasons and those stated in the County's Brief, the judgment of the District Court should be reversed.

Respectfully submitted,  
This 26th day of September, 2011

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<sup>2</sup> In the Third Circuit's example, "context" referred to other content of the display. But as noted already, context for Justice Breyer includes everything discussed under his three factors.

## **CERTIFICATE OF COMPLIANCE**

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,981 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

s/ Steven W. Fitschen  
Steven W. Fitschen  
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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *American Civil Liberties Union of Florida, Inc. v. Dixie County, Florida*, No. 11-13457-EE on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on September 26, 2011, addressed as listed below. The required number of paper copies was filed in the same manner on the same date.

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