

No. 04-20667

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**KAY STALEY,**  
Plaintiff-Appellee

v.

**HARRIS COUNTY, TEXAS,**  
Defendant-Appellant

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On Rehearing *En Banc* on Appeal from the United States District Court  
for the Southern District of Texas, Houston Division

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**BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,**  
in support of Defendant-Appellant  
Supporting reversal

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No. 04-20667

KAY STALEY,  
Plaintiff-Appellee

v.

HARRIS COUNTY, TEXAS,  
Defendant-Appellant

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## INTEREST OF THE AMICUS CURIAE

The National Legal Foundation (NLF) is a 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. The NLF is concerned about the outcome of this case because of its effect on Establishment Clause jurisprudence.

This brief is filed pursuant to with the consent of the Counsel of Record for both parties and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

### ARGUMENT

#### **I. THE MONUMENT SHOULD BE FOUND CONSTITUTIONAL BECAUSE THE PANEL MAJORITY MISAPPLIED *McCREARY COUNTY* AND FOUND A PREDOMINATELY RELIGIOUS PURPOSE.**

The panel majority erred by concentrating on part of *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005) and not on *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) or *Marsh v. Chambers*, 463 U.S. 783 (1983). Had the panel properly looked at *McCreary County* and *Van Orden* in their entireties, they would have seen that a *Marsh*-like approach should control, as *Amicus* argued in its brief submitted to the panel in this case. Brief of *Amicus Curiae* The National Legal Foundation, Inc. at 14-29, *Staley v. Harris County*, 461 F.3d 504 (2006) (No. 04-20667). In *Van Orden*, four Justices in the plurality voted for a *Marsh*-like approach by repeatedly citing the *Marsh* analysis to determine the constitutionality

of the monument. These Justices specifically referred to *Marsh* as an example of how the recognition of the role of God in our nation's heritage (and the resulting display or recitation of that recognition) is permissible under the Establishment Clause and had been reflected in prior decisions. *Van Orden*, 125 S. Ct. at 2862. Using *Marsh*-like reasoning, they noted that such recognitions were "deeply embedded in the history and tradition of this country," were "common throughout America," and that they "bespeak the rich American tradition of religious acknowledgements." *Id.* at 2862-63. Justice Breyer, in his deciding fifth vote, also used a very *Marsh*-like approach to find the monument constitutional. He 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*, 125 S. Ct. at 2869.

Even in *McCreary County* there were four votes for a *Marsh*-like approach. *McCreary County*, 125 S. Ct. at 2758-64 (Scalia, J., dissenting). Only because five Justices were concerned about an improper purpose did the case come out the other way. *Id.* at 2727. The *Staley* panel majority purported to use the reasoning in *McCreary County* to find an improper purpose and hold the monument unconstitutional. However, for the reasons detailed below, there is no improper purpose here, and therefore, *Marsh* should control.

A. The panel majority improperly applied *McCreary County* because it misunderstood that Court's purpose analysis.

In divining a predominant religious purpose, the panel majority focused on two years of the monument's history to dispel thirty-nine years of an acknowledged secular purpose. It relied on the most recent "government action" of Judge Devine instead of the thirty-nine years that precede it (or the almost ten years since) to assign a predominantly religious purpose. In discussing the refurbishment of the monument in 1995, the majority concluded, without merit, that "this is the point at which the monument begins to morph into a religious symbol, an occurrence that would have been fully noticed by the objective observer." *Staley v. Harris County, Texas*, 461 F.3d 504, 514 (5th Cir. 2006). The majority discussed the red light that highlights the bible, the presence of ministers at the rededication, and the fact that Judge Devine (and not a museum curator) made the decisions regarding the refurbishment, to prove that this short period of time in the life of the monument indicated "an almost exclusively religious purpose for the restoration." *Id.*

The Court in *McCreary County* says just the opposite. Rejecting the Counties' methodology for determining purpose, the Court found that the Counties "would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties' arguments, or reason supporting them." *McCreary*

*County*, 125 S. Ct. at 2735. The Court in *McCreary County* would not allow the Counties to use a single governmental action (their third litigating position) to prove one purpose when the history of the display and original circumstances proved another. *Id.* at 2736. But in the instant case, the panel opinion did just that. It attempted to prove an exclusively religious purpose, not based on the original circumstances surrounding the dedication of the monument, or the thirty-nine years of litigation-free history, or the ten years since the rededication (the critical fourth period in the memorial's history), or the observance of an observer familiar with the history of the monument, but with the lone state act surrounding the rededication. Just as a single governmental action in *McCreary County* (the last in a series of actions there) did not change the predominate purpose, neither did the one questionable governmental action (the rededication) in the instant case. The Court in *McCreary County* rejected that argument:

They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show.

*Id.* at 2736-37 (citations omitted). Here there is fifty years of history. If the reasonable observer will remember the two years that the panel zeroed in on, then he or she will remember the other forty-eight years as well.

The panel majority’s decision further denied the deference the Court in *McCreary County* gave to both the original purpose and context of the monument and to the reasonableness of the observer. Based only on the circumstances surrounding the rededication ceremony, the majority found that “the reasonable observer would conclude that the monument, with the Bible outlined in red neon lighting, had evolved into a predominately religious symbol.” *Staley*, 461 F.3d at 514. The majority continued that this observer “would conclude that Judge Devine and his allies essentially had commandeered the monument for religious purposes, and that the primary purpose of the monument had now become religious.” *Id.* at 515. The Court in *McCreary County* used a different standard, however, to reject the Counties’ similar argument of one government action changing the primary purpose of the display—one of common sense: “The Counties’ position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer ‘to turn a blind eye to the context in which the policy arose.’” *McCreary County*, 125 S. Ct. at 2737 (footnote and citation omitted).

*McCreary County* further explained the proper relationship between purpose and context. The Court held that “purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day

in a court of law any more than in a head with common sense.” *Id.* at 2741. But the panel majority in *Staley* did not follow this guidance. It conveniently divided the monuments history into three separate time periods and used the smallest of those time periods (two years) to assign a predominately religious purpose to the monument. *Staley*, 461 F.3d at 514. Furthermore, the panel completely ignored the ten most recent years, during which the County did not maintain the monument. *McCreary County*, on the other hand, took all the time periods into account when it found a predominately religious purpose. *McCreary County*, 125 S. Ct. at 2740. The *McCreary County* rationale, as the *Staley* dissent pointed out, “is only sensible, because religious purpose will *always* predominate if one restricts the search for purpose to the most suspect period of the monument’s history.” *Staley*, 461 F. 3d at 518 (Smith, J., dissenting) (italics in original).

Again, the *Staley* panel majority abandoned the above *McCreary County* rationale for determining the predominant purpose of the monument. As explained by the panel dissent, “[a] religious purpose appearing for the first time nearly forty years after the foundation of a monument can hardly classify as ‘predominant.’” *McCreary* lends no support to the proposition that a newfound religious purpose automatically supersedes an original secular one.” *Id.* at 517.

The panel majority diverged from the *McCreary County* reasoning in another, more subtle way. It examined Judge Devine’s rhetoric of “putting

Christianity back in government” while still a candidate for office and projected that onto the monument itself to help produce a predominately religious purpose. *Id.* at 514. The majority psychoanalyzed Judge Devine and found his motivation for restoring the monument to be “purely religious” and not to honor William Mosher, despite testimony and facts to the contrary (both Judge Devine and his court reporter, Karen Friend, testified to their secular motives). *Id.* But *McCreary County* warned against such analysis when it discussed statutory interpretation: “[b]ut scrutinizing purpose does make practical sense, as in *Establishment Clause* analysis, where an understanding of official objective emerges from readily discoverable facts, without any judicial psychoanalysis of a drafter’s heart of hearts.” *McCreary County*, 125 S. Ct. at 2734. The *Staley* panel dissent summed it up, “[w]e have never before rejected an admittedly secular purpose as a sham merely because the state actor, while still a candidate for office, ran on a general platform of putting Christianity back into government.” *Staley*, 461 F. 3d at 519 (Smith, J., dissenting).

But more importantly, even if the panel majority was correct that Judge Devine tried to “commandeer” the previously secular monument for religious purposes, this is exactly the result that *McCreary County* prohibited. In the overall history of the monument, Judge Devine’s actions equated to the last position taken by the Counties in *McCreary County* to defend the third version of the courthouse

displays. Just as the Counties' litigating position would not have changed the reasonable observer's evaluation of predominant purpose when put into the full context of the display, neither should the actions of Judge Devine.

Finally, in direct opposition to the holding in *McCreary County*, the panel majority used the two years of the monument's history (between the rededication in 1995 and the time the Star of Hope Mission retained control of the operation of the memorial in 1997) to forever taint the previously predominant secular purpose that had survived for thirty-nine years. In *McCreary County*, the Counties unsuccessfully attempted to change the predominately religious character of the original resolutions and display but the evidence did not support this change in purpose. *McCreary County*, 125 S. Ct. at 2741. However, the Court specifically noted that the Counties past actions would not "forever taint any effort on their part to deal with the subject matter." *Id.* *Staley* called for just the opposite result. The majority allowed the actions by Judge Devine during a two year period to forever taint the admittedly secular purpose held for the remaining forty-five years of the memorial's history (conveniently leaving out of the analysis the critical fourth period of the memorial's history where the state relinquished control and operation of the memorial). As discussed *supra*, this is not in line with the holding in *McCreary County*. There, the Court held open the chance that the Counties could take further action that would adequately mitigate the previous predominately

religious connotation of the display and make it constitutionally acceptable, but the Counties just hadn't done enough to establish the predominately secular purpose yet. *Id.* In the instant case, the memorial's long-standing secular purpose, and the fact that the operation and maintenance was returned to the Star of Hope Mission from 1997 to the present, overcome any taint applied to the memorial by the rededication ceremony.

B. The Monument should be upheld under *Marsh* because it fits within two long-standing traditions.

The panel majority in *Staley* incorrectly applied the reasoning of *McCreary County*. If correctly applied, *McCreary County* would have led to the opposite result. Additionally, had the majority properly looked at *McCreary County* and *Van Orden* in their entireties, they would have seen that a *Marsh*-like approach controlled. As *Amicus* argued in its brief submitted to the panel, Brief of *Amicus Curiae* The National Legal Foundation, Inc. at 14-29, *Staley v. Harris County*, 461 F.3d 504 (2006) (No. 04-20667),<sup>1</sup> under *Marsh*, the memorial would have been found constitutional for two reasons. First, because it is part of a long-standing tradition of inscribing religious references on public property and second because it is part of a long-standing tradition of government acknowledgement of the role of

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<sup>1</sup> *Amicus'* present Brief also incorporates by reference to its earlier Brief its argument that Establishment Clause claims are not properly brought under 42 U.S.C. § 1983. Brief of *Amicus Curiae* The National Legal Foundation, Inc. at 1-13, *Staley v. Harris County*, 461 F.3d 504 (2006) (No. 04-20667).

religion in society and of God.

There are many examples of the first tradition, but the following list is illustrative:<sup>2</sup>

- ◆ 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."
- ◆ 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, it is the most prominent.
- ◆ 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.
- ◆ In the main reading room of the Library of Congress are two statues, one of Moses, and one of "Paul, Apostle to the Gentiles."
- ◆ 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.”

Examples of the second tradition are also numerous, but the following list illustrates the wealth of this tradition:

- ◆ *Thomas Jefferson’s Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: “Whereas, Almighty God hath created the mind free”; and makes reference to “the Holy Author of our religion,” who is described as “Lord both of body and mind.”<sup>3</sup>
- ◆ *The Declaration of Independence* acknowledges our “Creator” as the source of our rights, and openly claims a “firm reliance on the protection of Divine Providence.” It also invokes “God” and the “Supreme Judge of the world.”
- ◆ *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily “prayers imploring the assistance of Heaven,” lest the founders fare no better than “the builders of Babel.”<sup>4</sup>
- ◆ *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was “the *duty* of all nations to acknowledge the providence of

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<sup>2</sup> Examples are from Catherine Millard, *God’s Signature Over the Nation’s Capital* (1988).

<sup>3</sup> Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reproduced in *5 The Founder’s Constitution* 77 (U. of Chicago Press 1987).

Almighty God. . . .”<sup>5</sup>

- ◆ *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in “supplications” to “that Being in whose hands we are.”<sup>6</sup>

Therefore, whether the instant memorial be characterized as acknowledging the role of religion in American life generally, or as acknowledging God, it is well within a long-standing tradition validated by *Marsh*. The panel majority, however, chose to pursue the path that Justice Breyer warned against in his concurrence in *Van Orden*. Judicial removal of a long standing monument leads the law “to exhibit a hostility toward religion that has no place in our *Establishment Clause* traditions . . . [and] it could thereby create the very kind of religiously based divisiveness that the *Establishment Clause* seeks to avoid.” *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).

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<sup>4</sup> *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

<sup>5</sup> *Thanksgiving Proclamation*, October 3, 1789 in *I Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Six other examples, from Washington can be found at *id.* at 43, 47, 131, 160, 191, 213.

<sup>6</sup> Second Inaugural Address in *I Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court and find the memorial constitutional under *McCreary County, Van Orden, and Marsh*.

Respectfully Submitted,  
this 19th day of December, 2006

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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 *Staley v. Harris County, Texas*, 04-20667 on all required parties by depositing the required number of paper and electronic copies in the United States mail, first class postage, prepaid on December 19, 2006, addressed as listed below. The required number of paper and electronic copies were filed in the same manner on the same date.

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