

The Amicus Brief, Stephen R. Glassroth v. Roy S. Moore, Chief Justice of the Alabama Supreme Court, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Eleventh Circuit on April 28, 2003.

DOCKET Nos. 02-16708-D, 02-16949-D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STEPHEN R. GLASSROTH,
Plaintiff-Appellee

v.

ROY S. MOORE, Chief Justice of the Alabama Supreme Court,
Defendant-Appellant

MELINDA MADDIX and BEVERLY HOWARD,
Plaintiffs-Appellees

v.

ROY S. MOORE, Chief Justice of the Alabama Supreme Court,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
CIVIL ACTION NOS. 01-T1268-N AND 01-T1269-N
THE HONORABLE MYRON H. THOMPSON, PRESIDING

BRIEF OF *AMICI CURIAE* ALABAMA CLERGY,
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, AMERICAN JEWISH
COMMITTEE, ANTI-DEFAMATION LEAGUE, THE COMMISSION ON SOCIAL ACTION
OF REFORM JUDAISM, THE INTERFAITH ALLIANCE, THE INTERFAITH ALLIANCE
OF ALABAMA, AND REVEREND CLIFTON KIRKPATRICK AS STATED CLERK OF
THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT
OF APPELLEES

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....C-1

TABLE OF AUTHORITIES.....iii

INTEREST OF *AMICI*.....1

STATEMENT OF ISSUE.....7

SUMMARY OF ARGUMENT.....7

ARGUMENT

I. THE TEN COMMANDMENTS DISPLAY IN THE STATE JUDICIAL BUILDING OFFENDS THE PURPOSES UNDERLYING THE ESTABLISHMENT CLAUSE.....8

A. The Ten Commandments display violates the freedom of conscience.....9

1. The Ten Commandments display violates the freedom of conscience of those outside the Judeo-Christian faith by endorsing particular sectarian beliefs of that tradition.....10

2. The Ten Commandments display violates the freedom of conscience of many *within* the Judeo-Christian faith by endorsing a particular version of the Commandments to which many Jews and Christians do not adhere13

B. The Ten Commandments display leads to the corruption of religion.....17

1. The Ten Commandments display degrades religion by allowing the government, rather than private individuals or faiths, to define religious practices and beliefs.....18

2. The Ten Commandments display leaves religion vulnerable to the changing political whims of public officials and invites the misuse of religion for political purposes.....20

C. The Ten Commandments display creates social conflict and religious strife.....	22
1. <u>The Ten Commandments display will lead to antagonism and competition for governmental support among religious and non-religious groups.....</u>	23
2. <u>The Ten Commandments display will lead to volatile, unpredictable circumstances at a time when religious hostility is already high.....</u>	26
II. RELIGION PROSPERS BEST WHEN THE SEPARATION OF CHURCH AND STATE IS MAINTAINED.....	28
CONCLUSION.....	31
APPENDIX A – ALABAMA CLERGY SIGNEES	
CERTIFICATE OF COMPLIANCE	32
CERTIFICATE OF SERVICE.....	33

TABLE OF AUTHORITIES

CASES

<u>Abington Sch. Dist. v. Schempp</u> , 374 U.S. 203 (1963).....	11, 18 - 19, 29
<u>American Civil Liberties Union v. Hamilton County</u> , 202 F. Supp. 2d 757 (E.D. Tenn. 2002).....	16, 29
<u>American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook</u> , 211 F. Supp. 2d 757 (E.D. Tenn. 2002).....	16
<u>County of Allegheny v. American Civil Liberties Union</u> , 492 U.S. 573 (1989).....	16
<u>Engel v. Vitale</u> , 370 U.S. 421 (1962).....	8, 18 - 20, 23, 28
<u>Everson v. Board of Educ.</u> , 330 U.S. 1 (1947).....	9, 23
<u>Freethought Society v. Chester County</u> , 191 F. Supp. 2d 589 (E.D. Pa. 2002).....	15, 25
<u>Glassroth v. Moore</u> , 229 F. Supp. 2d 1290 (M.D. Ala. 2002).....	12 - 13, 19, 21, 24, 26
<u>Harvey v. Cobb County</u> , 811 F. Supp. 669 (N.D. Ga. 1993), <u>aff'd mem.</u> , 15 F.3d 1097 (11th Cir. 1994).....	14, 29
<u>Larson v. Valente</u> , 465 U.S. 228 (1982).....	16
<u>Lee v. Weisman</u> , 505 U.S. 577 (1992).....	9 - 10, 18, 21, 24 - 25, 28
<u>Lemon v. Kurtzman</u> , 403 U.S. 602 (1971).....	8, 22, 24
<u>Lynch v. Donnelly</u> , 465 U.S. 668 (1984).....	11, 17
<u>Santa Fe Indep. Sch. Dist. v. Doe</u> , 530 U.S. 290 (2000).....	22, 24
<u>School Dist. of Grand Rapids v. Ball</u> , 473 U.S. 373 (1985).....	18
<u>Stone v. Graham</u> , 449 U.S. 39 (1980) (per curiam).....	10

Wallace v. Jaffree, 472 U.S. 38 (1985).....8, 11

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).....25

Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).....8 - 9, 23

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Copeland, Larry, <u>States Move to Allow Public Display of the Ten Commandments</u> , USA Today, Mar. 30, 2000, at 1A.....	27
Davis, Derek H., <u>The Ten Commandments as Public Ritual</u> , 44 J. Church & St. 221 (Spring 2002).....	15, 17
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Henry, Marilyn, <u>Kentucky Senate Wants Ten Commandments in Schools</u> , Jerusalem Post, Feb. 20, 2000, at 4.....	27
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Madison, James, <u>A Memorial and Remonstrance to the Honourable the General Assembly of the Commonwealth of Virginia (1785)</u> , in <u>Church and State in American History</u> (John F. Wilson & Donald L. Drakeman, eds. 1987).....	10, 17, 19 - 22

Moore, Roy S., <u>Religion in the Public Square</u> , 29 Cumb. L. Rev. 347 (1998-1999).....	13, 25
<u>Prayers in Public Schools Opposed</u> , 69 Christian Century 35, Jan. 9, 1952.....	19
Rawls, Phillip, <u>Religion Weighty in Ala. Gov. Race</u> , AP Online, June 2, 2002.....	21
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Saunders, Jessica, <u>Some Concerned by Judge’s Christian-only Stance as Rally Looms</u> , Associated Press Political Service, Apr. 8, 1997.....	12
Sheler, Jeffery L., <u>Spiritual America</u> , U.S. News & World Report, Apr. 4, 1994.....	30
U.S. Census Bureau, <u>Statistical Abstract of the United States: 2000</u>	11, 29
U.S. Census Bureau, <u>Statistical Abstract of the United States (1962)</u>	29

INTEREST OF *AMICI*

Alabama Clergy are religious leaders (clergy and lay leaders) in Alabama who share the interest of preserving a clear and careful distinction between church and state powers. Alabama Clergy believe that church and state authority should be held apart from one another because such an arrangement was intended by the Framers of the United States Constitution and best serves the vitality of all faith traditions. Moreover, Alabama clergy recognize that those who serve the state from the dominant Judeo-Christian faith tradition are at risk of granting preferential regard to those who share their personal faith tradition. Because the nature of religious zeal often demands absolute loyalty, Alabama Clergy caution against the casual mix of religion and political power. A list of Alabama Clergy signees is included in Appendix A.

The **Baptist Joint Committee on Public Affairs** (“BJC”) serves various cooperating Baptist conventions and conferences in the United States. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. BJC’s supporting bodies include: Alabama Cooperative Baptist Fellowship, Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of

North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention Inc., Religious Liberty Council, and Seventh Day Baptist General Conference.

The **American Jewish Committee** (“AJC”), a national organization of over 150,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, AJC filed an *amicus* brief opposing the mandatory display of the Ten Commandments in Kentucky public schools with the U.S. Supreme Court in *Stone v. Graham*, where the court recognized the religious nature of the Ten Commandments, stating: “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of supposed secular purpose can blind us to that fact.” AJC accordingly joins in this brief in opposition to the placement of a monument purporting to declare “the sovereignty of God over the affairs of men” in the Alabama State Judicial Building where citizens of many faiths and of no faith come to seek justice.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious

prejudice in the United States, the **Anti-Defamation League** ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among the ADL's core beliefs is strict adherence to the separation of church and state embodied in the Establishment Clause of the First Amendment. Separation, the ADL believes, preserves religious freedom and protects our democracy. In furtherance of this belief, the ADL has participated as an *amicus curiae* before the Supreme Court in many of the major church-state cases of the last half-century. The ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, the ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each.

The **Commission on Social Action of Reform Judaism** (CSA) is a joint instrumentality of the Union of American Hebrew Congregations (UAHC) and the Central Conference of American Rabbis (CCAR). The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,800 Reform rabbis. The CSA establishes policy for the Religious Action Center of Reform Judaism, an office in Washington, D.C. established to

advocate for social and political policy in keeping with Jewish law and theology as understood by Reform Judaism.

As Jews, we have long shared in and benefited from America's unparalleled tradition of religious freedom. After centuries of harassment and persecution in every corner of the globe, we understand and appreciate that for more than two centuries, America's tradition of religious freedom has been a tremendous gift to people of faith. For much of American Jewry, the struggle to protect religious liberty, to ensure that we, and our neighbors, are free to follow the dictates of our conscience, is a core issue. Our history, so often marked by oppression at the hands of societies intolerant of minority religions, has taught us that we have an obligation to protect religion from governmental interference. In 1991, the UAHC and CCAR reaffirmed our conviction that “the separation of church and state is the bulwark of religious freedom.” The UAHC, the CCAR, and the CSA have long urged Congress, the Courts and local officials to protect and defend these fundamental liberties for Americans of all religions.

With its national headquarters in Washington, D.C., **The Interfaith Alliance** is the nation’s largest non-partisan, clergy-led grassroots organization dedicated to promoting the positive and healing role of religion in the life of the nation and challenging those who manipulate religion to promote intolerance. With more than 150,000 members drawn from over 65 faith traditions, local Alliances in 38 states,

and a national network of religious leaders, The Interfaith Alliance promotes compassion, civility and mutual respect for human dignity in our increasingly pluralistic society.

As the United States enters a new era where politics is not averse to embracing a religious identity, our mission of emphasizing these shared religious values is more important now than ever. Whether it is through our work on Capitol Hill, with local clergy-led Alliances and online activists or through national media outreach, The Interfaith Alliance promotes its mission by working to safeguard religious liberty, ensuring the civil rights of all Americans, restoring good government, strengthening public education, and eradicating poverty.

Located in Pelham, Alabama, **The Interfaith Alliance of Alabama** is a clergy-led, non-profit organization that seeks to promote the positive role of religion as a healing and constructive force in public life. Since its founding in 1998, The Interfaith Alliance of Alabama has worked to educate people of faith and good will on issues of religious freedom, economic and social justice, and the promotion of civility in political discourse. The organization has been a consistent and reliable challenger of the misuse and display of sacred texts in the public square, including public schools and courthouses. The Interfaith Alliance of Alabama is an independent affiliate of The Interfaith Alliance.

The **Reverend Clifton Kirkpatrick, as Stated Clerk of the General Assembly**, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) (“Presbyterian Church” or “PC(USA)”) is the largest Presbyterian denomination in the United States, with approximately 2,500,000 active members in 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination’s members. In 1988, the General Assembly took action opposing “the permanent or unattended display of religious symbols on public property as a violation of religious neutrality required of government.” “God alone is the Lord of Conscience,” Minutes, PC(USA), 1988.

STATEMENT OF THE ISSUE

1. Whether the Ten Commandments monument in the Alabama Judicial Building has an impermissible religious purpose or impermissible effect of advancing religion.

SUMMARY OF THE ARGUMENT

The Ten Commandments display in Alabama's State Judicial Building is unconstitutional under the Establishment Clause and harmful to religious liberty. The display violates several purposes underlying the Establishment Clause. First, the display shows disrespect for religious diversity and the freedom of conscience of those outside the Judeo-Christian faith by endorsing particular sectarian beliefs of that tradition. The display of the Ten Commandments sends a message of exclusion to those who do not share the Judeo-Christian religious tradition and a message of favoritism to those who do. Second, the display degrades religion by allowing the state, rather than private individuals or faith communities, to shape religious practices and beliefs. The display offends the believer as well as the nonbeliever because the devout believer fears secularization as government drains their religious practices and beliefs of their spiritual significance. Finally, the display fosters social conflict and religious strife. It creates divisiveness and

competition for governmental approval of various religious views. *Amici* assert that religion prospers best when the separation of church and state is maintained.

ARGUMENT

I. THE TEN COMMANDMENTS DISPLAY IN THE STATE JUDICIAL BUILDING OFFENDS THE PURPOSES UNDERLYING THE ESTABLISHMENT CLAUSE.

Three distinct objectives underlie the Establishment Clause of the First Amendment: a) protecting the freedom of conscience, see Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985) (“[T]he First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. . . . [T]he Court has identified the individual’s freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.”); b) avoiding the corruption of religion, see Engel v. Vitale, 370 U.S. 421, 431-32 (1962) (“The Establishment Clause thus stands as an expression of principle . . . that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”); and c) deterring social conflict and religious strife, see Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (“[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”); see also Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2499, 2501 (2002)

(Souter, J., dissenting) (listing the three purposes behind the Establishment Clause as “respect for freedom of conscience,” “sav[ing] religion from its own corruption,” and avoiding establishment’s “inextricable link with social conflict”). The display of the Ten Commandments in the State Judicial Building threatens each of these objectives.

A. The Ten Commandments display violates the freedom of conscience.

A fundamental principle to be protected by the Establishment Clause is the freedom of conscience. That principle is evident in one of the seminal statements on the meaning of the Establishment Clause by Supreme Court Justice Hugo Black. “[I]t means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The Supreme Court has further explained that the Establishment Clause commands the State “to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” Lee v. Weisman, 505 U.S. 577, 592 (1992); see also Zelman, 122 S. Ct. at 2499 n.22 (Souter, J., dissenting) (“As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause.”). James Madison warned that government establishment of religion “degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the legislative

authority.” James Madison, A Memorial and Remonstrance to the Honourable the General Assembly of the Commonwealth of Virginia [hereinafter Memorial and Remonstrance], in Church and State in American History at 71 (John F. Wilson & Donald L. Drakeman, eds. 1987). To safeguard the freedom of conscience and show respect for religious diversity, “the State may not favor or endorse either religion generally over nonreligion or one religion over others.” Lee, 505 U.S. at 627 (Souter, J., concurring). The government’s display of the Ten Commandments monument in the State Judicial Building not only endorses religion but also endorses a particular religious perspective.

1. The Ten Commandments display violates the freedom of conscience of those outside the Judeo-Christian faith by endorsing particular sectarian beliefs of that tradition.

The display of the Ten Commandments in the State Judicial Building flouts the Establishment Clause’s command to respect the freedom of conscience because it endorses the Judeo-Christian religious tradition to the exclusion of all others.

The Supreme Court has recognized that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths.” Stone v. Graham, 449 U.S. 39, 41 (1980). The display of the Ten Commandments thus impermissibly sends a message of exclusion to those who do not share the Judeo-Christian religious

tradition and a message of favoritism to those who do. As Justice O'Connor explained,

[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Wallace, 472 U.S. at 69 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).

Like the nation as a whole,¹ Alabama enjoys great religious diversity, and includes many who do not adhere to the Judeo-Christian tradition and thus who do not believe in the Ten Commandments. See American Religion Data Archive, State Report (Alabama): Religious Affiliations, 1990, available at: <http://www.thearda.com>. "There are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 283 (1963) (Brennan, J., concurring). Many faith communities in Alabama, including Hindus, Buddhists, and Muslims, do not adhere to the tenets of Judaism or Christianity and thus do not share the faith from which the Ten Commandments are taken. Further, according

¹ The United States has over 75 religious faiths with at least 60,000 members. U.S. Census Bureau, Statistical Abstract of the United States: 2000, at 61.

to a recent study, six percent of Alabamans surveyed belong to no religion at all.

American Religious Identification Survey (2001), available at:

http://www.gc.cuny.edu/studies/key_findings.htm. To these people, the Ten Commandments display—an official endorsement of Judeo-Christian religious beliefs—conveys precisely the message of exclusion that the Establishment Clause prohibits.

The present dispute arises in a context that clearly reveals an unconstitutional attempt by government to promote religion. In fact, Justice Moore has unequivocally proclaimed his sectarian agenda. His avowed purpose in designing the monument at issue was to depict the moral foundation of law, reflecting the sovereignty of God. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002). The display appears to reflect a particular religious perspective and in essence, to be a monument to God. See id. at 1296. “By God, the Chief Justice specifically meant the Judeo-Christian God of the Holy Bible and not the God of any other religion.” Id. at 1294. Justice Moore has stated, “We are not a nation founded upon the Hindu god or Buddha. . . . It is a particular deity we are talking about.” Jessica Saunders, Some Concerned by Judge’s Christian-only Stance as Rally Looms, Associated Press Political Service, Apr. 8, 1997. In addition, Justice Moore’s writings reveal that he believes the Supreme Court has erred in its “assumption that, under the Establishment Clause, religion could

include Buddhism, Hinduism, Taoism, and whatever might occupy in man's life a place parallel to that filled by God." Roy S. Moore, Religion in the Public Square, 29 Cumb. L. Rev. 347, 366-67 (1998-1999); see also Glassroth, 229 F. Supp. 2d at 1312. Justice Moore's effort to promote his particular religious perspective through the governmental display at issue violates the freedom of conscience of those outside the Judeo-Christian faith.

2. The Ten Commandments display violates the freedom of conscience of many *within* the Judeo-Christian faith by endorsing a particular version of the Commandments to which many Jews and Christians do not adhere.

In addition to offending the liberty of conscience of the non-religious and of those who belong to religions outside of the Judeo-Christian tradition, the Ten Commandments monument sends a message of exclusion to the many Jews and Christians who do not subscribe to the particular version of the Commandments exhibited in the State Judicial Building. No uniform version of the Ten Commandments exists; rather, each sect adheres to a version with particular phrasing, composition, and ordering. According to one scholar, at least five different versions of the Ten Commandments exist, each representing distinct theological points of view. See Steven Lubet, The Ten Commandments in Alabama, 15 Const. Comment. 471, 474 (Fall 1998). As Professor Lubet stated:

[T]he relevant chapter of Exodus actually contains 17 separate verses, with no indication as to how the parts should be numbered or

organized. So boiling them down to ten distinct, plaque-sized commandments, especially given the need for abbreviation on a wall-mounted display, requires some considerable elision and interpretation. Consequently, the choice of a specific text or organization must denote a choice of one tradition over others.

Id. at 475. Indeed, different versions of the Commandments abound, both among Protestant, Catholic, Lutheran, and Jewish faiths, and among various sects within these traditions. For example, the typical Jewish version includes in the First Commandment the words, “I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage.” See Walter Harrelson, The Ten Commandments and Human Rights 47, 51 (1980). Most Christian versions, on the other hand, omit this text or include it in a prologue. Id. Further, while the Hebrew translation of the Sixth Commandment reads, “Thou shalt not murder,” Christian translations generally state, “Thou shalt not kill.” See Harvey v. Cobb County, 811 F. Supp. 669, 672 (N.D. Ga. 1993) (“As Rabbi Lewis testified, this [‘Thou shalt not kill’] version of the Sixth Commandment is a mistranslation of the original Hebrew, which prohibits murder, and frequently appears in Christian versions of the Ten Commandments.”), aff’d mem., 15 F.3d 1097 (11th Cir. 1994). In addition to wording, the order and composition of the Commandments vary by denomination. See Harrelson, supra, at 47 (listing several ways of numbering the Ten Commandments according to various denominations, including Jewish, Augustine, Lutheran and Roman Catholic, Reformed Christian, and Orthodox

Christian). As Baptist scholar Derek Davis has noted, “[I]t is unlikely that biblical adherents could ever agree on a compromised version, since Catholics, Protestants and Jews are all committed, to one degree or another, to biblical inerrancy, and altering the text for them would be a desecration of God’s inspired word.” Derek H. Davis, The Ten Commandments as Public Ritual, 44 J. Church & St. 221, 224 (Spring 2002).

Justice Moore, however, has loudly proclaimed his “religion of choice” by selecting the version of the Ten Commandments that is set forth in the Book of Exodus as presented in the King James Bible. Such declaration ignores the fact that Alabama has over sixty religious denominations, including many that do not adhere to mainstream or evangelical Protestantism, such as Roman Catholics, Friends, Greek Orthodox, Latter-Day Saints (Mormons), Unitarian-Universalists, and various Jewish communities. American Religion Data Archive, State Report (Alabama): Religious Affiliations, 1990, available at: <http://www.thearda.com>. For many of these people, the government’s official display of the Ten Commandments violates the liberty of conscience by endorsing particular sectarian beliefs that they do not share. See Freethought Society v. Chester County, 191 F. Supp. 2d 589, 599 (E.D. Pa. 2002) (holding that a similar display of the King James Bible version of the Ten Commandments outside a county courthouse

violates the Establishment Clause because it expresses “denominational preference,” and “endorse[s] or advance[s] the unique importance of this predominantly religious text for mainline Protestantism” (quoting Larson v. Valente, 456 U.S. 228, 245 (1982)).

That this message of endorsement is expressed in the state’s highest court of law exacerbates its effect, as courts of all places should provide equal treatment regardless of religious persuasion. See American Civil Liberties Union v. Hamilton County, 202 F. Supp. 2d 757, 766 (E.D. Tenn. 2002) (“Courts are places where there must be equality and justice, and where persons of all religious or non-religious persuasions in this diverse nation of ours must have confidence that they are getting fair treatment. This is reason enough for the government to refrain from giving the appearance that courthouses are only for those who adhere to the Ten Commandments.”); American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook, 211 F. Supp. 2d 873 (N.D. Ohio 2002) (noting that a Ten Commandments display in a courtroom might lead “a ‘reasonable’ courtroom observer [to] conclude that the Judge would be less favorably disposed to a lawyer or litigant whose religious views or affiliation do not have Judeo-Christian roots”); see also County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 626 (1989) (O’Connor, J., concurring) (“The display of religious symbols in public areas of core government buildings runs a special risk of ‘mak[ing] religion

relevant, in reality or public perception, to status in the political community.’” (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring))). Justice Moore’s placement of the monument as the “centerpiece of the rotunda” underscores the unconstitutional endorsement of religion. Because the State Judicial Building is government property, it is “shared property, and its uses should reflect shared secular, not unshared religious aims.” Davis, supra, at 223.

B. The Ten Commandments display leads to the corruption of religion.

The Establishment Clause seeks to promote more than the freedom of conscience and respect for religious diversity. The constitutional guarantee of church-state separation also aims to preserve the purity and integrity of religion.

As Madison noted:

Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less, in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.

Memorial and Remonstrance at 70; see also Jefferson’s Act for Establishing Religious Freedom (1786), in Church and State in American History at 73 (stating that government-established religion “tends . . . to corrupt the principles of that very religion it is meant to encourage”).

The Supreme Court has recognized that the corruption of religion is a basic concern underlying the Establishment Clause. See, e.g., Lee, 505 U.S. at 608 (Blackmun, J., concurring) (“When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being ‘taint[ed] . . . with a corrosive secularism.’” (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985))); Schempp, 374 U.S. at 259 (Brennan, J., concurring) (“It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.”); Engel, 370 U.S. at 431 (“[The Establishment Clause’s] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to *degrade religion.*”) (emphasis added).

1. The Ten Commandments display degrades religion by allowing the government, rather than private individuals or faiths, to define religious practices and beliefs.

By displaying the Ten Commandments in the State Judicial Building, Justice Moore has usurped the role of private individuals and faith communities in shaping their own religious practices and views. Governmental efforts to promote religion drain religious practices and beliefs of their spiritual significance, thereby

depreciating, rather than revitalizing, religion. “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” Engel, 370 U.S. at 431-32; see also Schempp, 374 U.S. at 284 n.60 (Brennan, J., concurring) (noting that a state-sponsored religious prayer “‘is likely to deteriorate quickly into an empty formality with little, if any spiritual significance. Prescribed forms of this sort, as many colleges have concluded after years of compulsory chapel attendance, can actually work against the inculcation of vital religion.’” (quoting Prayers in Public Schools Opposed, 69 Christian Century 35, Jan. 9, 1952)). In this case, Justice Moore sought to fulfill a campaign promise by erecting a monument to the Judeo-Christian God. See Glassroth, 220 F. Supp. 2d at 1294, 1317. He controlled all aspects of the monument’s design, content, and placement. Id. These actions provide an extreme example of a civil magistrate usurping the role of individuals and faith communities in shaping their own religious views.

Furthermore, a religion that depends on the government to promote its tenets may be perceived as weak and self-doubting. Madison cautioned that state-sponsored religion would “weaken in those who profess this Religion, a pious confidence in its innate excellence, and the patronage of its author; and . . . foster in those who still reject it, a suspicion that its friends are too conscious of its

fallacies to trust it to its own merits.” Memorial and Remonstrance at 70. As the Supreme Court has noted, “[h]istory showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.” Engel, 370 U.S. at 431. The government’s display of the Ten Commandments in this case wrongly assumes that religion needs the assistance of government to flourish.

2. The Ten Commandments display leaves religion vulnerable to the changing political whims of public officials and invites the misuse of religion for political purposes.

Allowing the government to speak for religion through the display of the Ten Commandments enables the state to thwart religion according to the inclination of each political regime. As the Supreme Court stated in Engel v. Vitale, “The First Amendment was added to the Constitution to stand as a guarantee . . . that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.” 370 U.S. at 429-30. The majority religion today may not be the majority religion in the future. Thus, a religion or denomination that is favored may similarly be denigrated according to the whims of a future administration. As James Madison put it, “Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the

same ease any particular sect of Christians, in exclusion of all other sects?”

Memorial and Remonstrance at 69.

Moreover, when public officials appropriate religion for their own causes, they degrade religion in the process. “The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.” Lee, 505 U.S. at 608 (Blackmun, J., concurring). Indeed, Justice Moore used the controversy surrounding the Ten Commandments for his own political gain in the race for Chief Justice of the Alabama Supreme Court, by assuming the title of the “Ten Commandments Judge” in his campaign materials. See Glassroth, 229 F. Supp. 2d at 1294. Other public officials in Alabama, including recent gubernatorial candidates, have appropriated this case for their own political purposes as well. See Phillip Rawls, Religion Weighty in Ala. Gov. Race, AP Online, June 2, 2002, (noting that Lt. Gov. Steve Windom’s first campaign ad requested donations to assist Justice Moore in defending the challenge to the Ten Commandments display and that ads for Rep. Bob Riley’s campaign feature the candidate in church). When government officials appropriate religion in this way, they assume an undue, false authority. In Madison’s words, such appropriation “implies . . . that the Civil Magistrate is a competent judge of religious truth, . . . [which] is an arrogant

pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world.” Memorial and Remonstrance at 70.

C. The Ten Commandments display creates social conflict and religious strife.

In addition to protecting the liberty of conscience and avoiding the corruption of religion, another objective underlying the Establishment Clause is deterring social conflict and religious strife. Fear of such conflict motivated James Madison’s condemnation of government-sponsored religion. Madison wrote:

Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord, by proscribing all difference in religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried it has been found to assuage the disease. The American theatre has exhibited proofs that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State.

Memorial and Remonstrance at 71. Throughout its Establishment Clause jurisprudence, the Supreme Court has consistently cited the risk of social discord in enforcing church-state separation. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) (“[E]ncourag[ing] divisiveness along religious lines in a public school setting [is] a result at odds with the Establishment Clause.”); Lemon, 403 U.S. at 622 (“[P]olitical division along religious lines was one of the principal

evils against which the First Amendment was intended to protect.”); Engel, 370 U.S. at 432 (“Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.”); Everson, 330 U.S. at 11 (noting that experience with religious conflict engendered feelings of “abhorrence” and “indignation” among the founders and that “[i]t was these feelings which found expression in the First Amendment”); see also Zelman, 122 S. Ct. at 2502 (Breyer, J., dissenting) (“The Clauses reflect the Framers’ vision of an American Nation free of the religious strife that had long plagued the nations of Europe. . . . [T]he Framers . . . undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective.”).

1. The Ten Commandments display will lead to antagonism and competition for governmental support among religious and non-religious groups.

The display of the Ten Commandments in the State Judicial Building engenders religious divisiveness and competition for governmental approval of various religious views. The framers of the Establishment Clause “knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government’s stamp of approval.” Engel, 370 U.S. at 429. Indeed, the Supreme Court has recognized that Establishment

Clause violations increase the potential for religious divisiveness. See, e.g., Santa Fe Indep. Sch. Dist., 530 U.S. at 310 (noting that student elections regarding public school graduation prayers “encourage[] divisiveness along religious lines”); Lee, 505 U.S. at 587 (“[T]he potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.”); Lemon, 403 U.S. at 623 (“Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.”).

Likewise, because the Ten Commandments display endorses particular sectarian beliefs not shared by all members of the community, it is likely to provoke religious antagonism. In response to the Ten Commandments monument in the State Judicial Building, some already have sought to display symbols of their own in the State Judicial Building, including an atheist group and an African American legislator; but Justice Moore denied their requests. See Glassroth, 229 F. Supp. 2d at 1297. Moreover, religious groups have clashed in other arenas over particular versions of the Ten Commandments. See Lubet, supra, at 475-76 (citing instances of religious hostility over different versions of the Ten Commandments and stating that such examples “manifestly demonstrate how textual differences can be used to fan the fires of religious contempt”); see also E.J. Dionne Jr., The Third Stage: New Frontiers of Religious Liberty, in What’s God Got to Do with

the American Experiment 117 (E.J. Dionne Jr. & John J. DiIulio Jr., eds. 2000) (noting that “in 1844, . . . six people were killed in a riot in Philadelphia over what version of the Ten Commandments should be posted in the public schools”); Freethought Society, 191 F. Supp. 2d at 596 (“In 2002, it is easy to forget that people were once executed for championing the wrong text of the Bible.”).

Indeed, Justice Moore himself has added to this potential for strife. In reference to what he perceives to be an effort to remove God from public life, Justice Moore declared, “It is time for Christians to stand up.” Howard Libit, Judge Urges Greater Role for God in Government; Ten Commandments are on Wall in Courtroom, Balt. Sun, June 28, 1998, at 6B. He has further stated that “[t]he Christian majority has been coerced into silence, simply because the minority might have to hear them.” See Moore, Religion in the Public Square, at 362. These statements appear intended to incite a sectarian movement in support of his religious displays.

In addition, these statements ignore the countermajoritarian spirit behind the Establishment Clause, see Lee, 505 U.S. at 596 (“While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us.”), not to mention the entire Bill of Rights. See West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to

withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

2. The Ten Commandments display will lead to volatile, unpredictable circumstances at a time when religious hostility is already high.

The current display risks intensifying religious tension, which is already elevated in Alabama due to the controversy surrounding Justice Moore's previous display of the Ten Commandments in the Etowah County Circuit Court. See Glassroth, 229 F. Supp. 2d at 1293-94. (recounting history of defendant's controversial actions leading to constitutional challenges). When Justice Moore was sued in the Etowah County case, former Alabama Governor Fob James threatened to call out the national guard, stating: “I will use all legal means at my disposal, including the National Guard and the state troopers, to prevent the removal of the Ten Commandments from Justice Moore's courtroom.” Rick Bragg, Judge Allows God's Law to Mix with Alabama's, N.Y. Times, Feb. 13, 1997, at A14.

Controversies in other parts of the country surrounding public displays of the Ten Commandments demonstrate the inherent potential for increased religious

antagonism when the government injects itself into religious matters. For example, during a South Carolina Board of Education meeting regarding whether to display the Ten Commandments in public schools, board member Henry Jordan reportedly said, “screw the Buddhists and kill the Muslims.” Lyn Riddle, Ten Commandments: S.C. Council Enters Display Fray, Atlanta J. & Atlanta Const., June 5, 1997, at A13. At a Kentucky Senate debate on whether to post the Ten Commandments in public schools, state Senator Albert Robinson argued that the legislation should refer to “Christian” rather than “Judeo-Christian” influence, commenting that “the inclusion of Judaism was a ‘terrible injustice’ to the ‘Christian history’ of the U.S.” Marilyn Henry, Kentucky Senate Wants Ten Commandments in Schools, Jerusalem Post, Feb. 20, 2000, at 4. Senator Robinson said, “When the boat came to these great shores, it did not have an atheist, a Buddhist, a Hindu, a Moslem, a Christian, and a Jew. Ninety-Eight percent plus of these people were Christians.” Id. And during a debate on the Kentucky House floor over the same issue, a legislator asked the sole Jewish member of the state legislature, Rep. Kathy Stein, “whether she believed in Jesus and whether he ‘rose from the dead.’” Larry Copeland, States Move to Allow Public Display of the Ten Commandments, USA Today, Mar. 30, 2000, at 1A. Such antagonism is at the heart of the dangers that the Establishment Clause is designed to prevent.

II. RELIGION PROSPERS BEST WHEN THE SEPARATION OF CHURCH AND STATE IS MAINTAINED.

To call for the separation of church and state is not to express hostility toward religion. As the Supreme Court noted in Engel, “It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.” 370 U.S. at 435. To the contrary, the undersigned Alabama clergy and members of the national religious community vigorously support separation of church and state precisely because the principle has enabled religion to *flourish* in the United States. See Lee, 505 U.S. at 609 (Blackmun, J., concurring) (“We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular.”); Engel, 370 U.S. at 443 (Douglas, J., concurring) (“The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.”).

Recognizing Justice Moore’s Ten Commandments monument for what it is—a clear violation of the Establishment Clause—will not harm religion or the Ten Commandments. His effort to restore the moral foundation of law by displaying a sacred text as the centerpiece of the State Judicial Building is

misguided. Other federal courts have recently recognized this point in similar contexts. As the court stated in Harvey:

[T]he Ten Commandments are not in peril. They may be displayed in every church, synagogue, temple, mosque, home, and storefront. They may be displayed on lawns and in corporate boardrooms. Where this precious gift cannot, and should not, be displayed as a religious text is on government property. For any erosion of the Bill of Rights—restraints voluntarily imposed by the majority to protect the rights of the minority—will inevitably produce prejudice and persecution.

Harvey, 811 F. Supp. at 671; see also, American Civil Liberties Union v. Hamilton County, 202 F. Supp. 2d at 766 (“We may, if we wish, read and heed the precepts of the Ten Commandments. However, we do not need the aid of the government to do so.”).

America is one of the most religious nations in the world precisely because it has adhered to the Framers’ vision of maintaining separation between church and state. In Schempp, the Supreme Court stated, “It can be truly said . . . that today, as in the beginning, our national life reflects a religious people.” Schempp, 374 U.S. at 213. At the time the Court wrote this in 1963, it noted an official survey indicating that 64 percent of Americans were members of a church. See id., citing U.S. Census Bureau, Statistical Abstract of the United States (1962). The Court’s observation is no less true today. In fact, the percentage of Americans who are members of a church or synagogue has increased to 70 percent, U.S. Census Bureau, Statistical Abstract of the United States: 2000, at 62, and “[a]bout 95

percent of Americans say they believe in God or a universal spirit.” Jeffery L. Sheler, Spiritual America, U.S. News & World Report, Apr. 4, 1994; see also id. (noting that “about 60 percent say they attend religious services regularly—figures that have not changed much since the 1950s”). Justice Moore’s monument prominently displayed in the State Judicial Building is patently at odds with the constitutional arrangement that has long served religion well.

CONCLUSION

For all these reasons, the decision below should be affirmed. The display of the Ten Commandments in the State Judicial Building—like all governmental endorsements of religion—offends the basic purposes underlying the Establishment Clause. Rather than strengthening religion, the display undermines religious interests: it shows disrespect for the freedom of conscience, tends to degrade and corrupt religion, and engenders social conflict and religious discord. Religion has thrived in the United States precisely because it has been left to the private sphere. Only by preserving this healthy separation between church and state will religion continue to prosper.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)C), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(A)(7)(B)(ii).

Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Eleventh Cir. R. 28-1, this brief contains 5, 292 words.

Signed by:

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CERTIFICATE OF SERVICE

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