No. 09-531

In The
Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

v.

JAMES W. GREEN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

Nothing in respondent's misguided effort to divine a unifying theory of the Establishment Clause provides an answer to the realities that make this case a compelling candidate for this Court's plenary review. The decision below is the first (and only) post-*Van Orden* decision by a federal court of appeals to strike down a passive Ten Commandments display and is in direct conflict with decisions of several circuits. Moreover, the decision below conflicts with this Court's decision in *Van Orden* and the fundamental principle that like cases should be decided alike. This case presents an excellent vehicle for the Court to resolve these conflicts and address the confusion that has been sown in the lower courts by the decisions in *Van Orden* and *McCreary*, thus bringing coherence to this important area of Establishment Clause jurisprudence. It also provides the Court with an opportunity to address one of the causes of this confusion—relaxed standing requirements.

I. "CONTEXT" FAILS TO RECONCILE THE TENTH CIRCUIT'S CONFLICT WITH THIS COURT'S RULING IN *VAN ORDEN* AND DECISIONS OF OTHER CIRCUITS.

Green tries to reconcile the conflicts between the Tenth Circuit's decision and decisions by this Court and sister circuits with a newly fabricated test that explains all Establishment Clause jurisprudence. Unsurprisingly, this attempt at a Grand Unified Theory—which relies on the notion that all Establishment Clause legal tests are different only in name—fails.

A. There is no unified theory of Establishment Clause jurisprudence.

The unified theory of Establishment Clause jurisprudence that Green proposes exists neither in theory nor in practice. While "[i]t is always appealing to look for a single test, a Grand Unified Theory" that would resolve all cases arising under the Establishment Clause, such a test has been rejected for "do[ing] more harm than good." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring). This is because "the same constitutional principle may operate very differently in different contexts." *Id.* Thus, a single test for all Establishment Clause cases would have either been too narrow to address the wide variety of issues that exist, or "so vague as to be useless." *Id.* Context is not the test itself. It determines what test to use, and how that test might be applied.

The Tenth Circuit did not use a context test in this case. It expressly relied upon the *Lemon* test to reach its holding. App. 5a, 48a. The court found that Tenth Circuit precedent obligated it to follow *Lemon*. *Id.* at 23a. But in *Van Orden v. Perry*, this Court rejected using the *Lemon* test to determine the constitutionality of a privately initiated and donated monument of the Ten Commandments displayed with other historical monuments on government property. 545 U.S. 677, 686 (2005) (plurality opinion); *see also id.* at 703 (Breyer, J., concurring). The Eighth and Ninth Circuits have followed *Van Orden* in rejecting *Lemon* in such cases. *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008); *ACLU Nebraska Found. v. City of*

Plattsmouth, Nebraska, 419 F.3d 772, 777 (8th Cir. 2005) (*en banc*).[1]

Green tries to smooth over this conflict by saying that all courts to consider this issue have really used his context test but have just been quibbling over "the appropriate nomenclature" for that test. Resp. Brf. at 23, 13 n. 11. This would certainly be news to the *Van Orden* plurality, which found that "the *Lemon* test...[is] not useful in dealing with the sort of passive monuments" Texas had placed on its government grounds. 545 U.S. at 686. And Green's argument was rejected by the Ninth Circuit in *Card* when, as it was applying the *Van Orden* analysis to allow a passive Ten Commandments monument to remain standing, it noted that application of the *Lemon* test to such cases would likely always result in a finding of unconstitutionality. 520 F.3d at 1015-16. Thus, not only is there a significant difference in analyzing a case under *Lemon* as opposed to *Van Orden*, but that difference has been recognized as outcome-determinative. Green's attempt at jurisprudential syncretism fails outright.

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[1] Indeed, the trend since *Van Orden* and *McCreary* has been uniformly to uphold Ten Commandments monuments and displays. Only the Tenth Circuit's decision below fails to fall in step with this case law cadence. For example, the most recent case, *ACLU of Kentucky, et al. v. Grayson County, Kentucky*, No. 08-5548, __F.3d__, 2010 WL 114361 (6th Cir. Jan. 14, 2010), upheld a display identical to the one that this Court considered in *McCreary*. *Grayson* is also notable because it wrestles with the continued confusion in the case law and it re-emphasizes the conflict between the Sixth Circuit's reasonable observer and the Tenth Circuit's.

B. Context is not a means of analysis but rather the thing being analyzed.

Context is important. It informs which test should be used to analyze a situation and then informs how the test applies in the situation. *Kiryas Joel*, 512 U.S. at 720 ("There are different categories of Establishment Clause cases, which may call for different approaches.") (O'Connor, J., concurring). Accordingly, this Court found in *Van Orden* that, in the context of a privately initiated and funded passive religious monument displayed with other historical monuments on government grounds, the proper test is not *Lemon*'s analysis of official purpose, effect or entanglement, but rather "the nature of the monument and...our Nation's history." 545 U.S. at 686. And once the test is chosen, then certain contextual matters (like *Van Orden*'s emphasis on national history) are relevant, while other ones (like *Lemon*'s questions regarding official purpose) are not.

But context is not the test itself because context cannot tell judges or government officials what and how contextual matters are relevant. Tests do that. Tests provide analytical principles to consistently evaluate the changing factual contexts that cases present. Green's "context test," then, would not provide a guide for judicial or governmental decisions.

In fact, Green's new test is not a test at all. Rather, it is a mutated resurrection of the "I know it when I see it" standard—an unworkable rule that was abandoned in the context of obscenity and should not

be used to analyze the Establishment Clause.[2] If Green's infinitely elastic "context" approach is adopted, both judges and government officials would be left to guess at which facts should be analyzed and how they should be weighed, a decidedly unreliable approach that would yield arbitrary and conflicting results—and would leave the case law "in Establishment Clause Purgatory." *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005).

C. Green fails to distinguish cases from other circuits that conflict with the Tenth Circuit's use of the reasonable observer.

Not only is there no unified theory of Establishment Clause jurisprudence, the Tenth Circuit's decision suggests that there is no unified way to apply *Lemon*. For instance, unlike *Lemon*'s "reasonable observers" employed in the Second, Sixth, Seventh, and Eighth Circuits, those in the Tenth Circuit are allowed to consider erroneous and incomplete information to determine whether a monument sends a message endorsing religion. Indeed, the Tenth Circuit's reasonable observer unreasonably thought that unofficial statements and appearances were official, even when—as a matter of unquestioned fact—they were not. App. 36a (n. 11).

Further, the Tenth Circuit's consideration of the private Monument donor's intent and the statement of a single commissioner in his concededly private

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[2] *Miller v. California*, 413 U.S. 15, 24 (1973) replaced Justice Stewart's famous definition of obscenity, stated in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

capacity conflicts with other cases' application of the reasonable observer test. This Court has held that the only relevant inquiry for the reasonable observer in searching for an impermissible endorsement of religion is in the "text, legislative history, and implementation of the statute, or comparable official act." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005) (quotation marks omitted). The Eighth Circuit further found that public officials are not required to abandon their religious beliefs upon entering public life and, for purposes of Establishment Clause analysis, the personal opinions and positions they take on religious matters cannot properly be imputed to the government. *Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989);[3] *see also McGowan v. Maryland*, 366 U.S. 420, 431 (1961). *Card* also "recognized the importance of differentiating between the [private donor's religious purpose] and the [government's] goals in accepting the gift." 520 F.3d at 1019.

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[3] Green does not deny the square conflict between the decision below and *Clayton*, but instead characterizes *Clayton* as an "outlier" because it was decided prior to cases like *McCreary* and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which "expressly reaffirmed the import of history and context in Establishment Clause cases." Resp. Brief at 27 n. 19. But this Court had considered history and context in previous cases, such as *Allegheny County v. ACLU*, 492 U.S. 573, 595 (1989), and *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987)—both of which were decided before (and cited by) *Clayton*. *Clayton*, 884 F.2d at 379. And neither *McCreary* nor *Santa Fe* even addressed facts regarding personal religious views of government officials articulated in a personal capacity, much less held that they were relevant for Establishment Clause purposes, so they do not affect *Clayton*'s analysis on that point.

Additionally, every case Green cites for the proposition that private statements by public officials can be evaluated under *Lemon* involves statements made by public officials while performing their duties. Resp. Brf. at 27 n. 19. The Judge-Executive in *McCreary* was acting in his official capacity at the dedication ceremony that he "presided over." 545 U.S. at 851. The official speech of the chief judge at the unveiling ceremony was evidence regarding secular purpose (and primary effect) in *Glassroth v. Moore*, 335 F.3d 1282, 1296-97 (11th Cir. 2003). In *Edwards v. Aguillard*, 482 U.S. 578, 591-92 n. 13 (1987), this Court considered legislators' statements that were in the "official legislative history" when assessing whether a state statute regarding creationism had a secular purpose. And *Epperson v. Arkansas*, 393 U.S. 97 (1968), did not even address statements made by legislators.[4]

Thus, there are significant case law conflicts between the Tenth Circuit's decision and the decisions of this Court and sister circuits. Given the substantial similarity between *Van Orden* and the facts of this case, discussed in more detail below, resolution of these conflicts by determining that *Van Orden* governs religious monument displays would result in a finding for the Commissioners.

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[4] *Epperson*, decided three years before *Lemon*, determined that an anti-evolution statute adopted by Arkansas 40 years earlier had a religious purpose based on advertisements and letters to the editor, *id.* at 108 n.16—neither of which were relied upon by the Tenth Circuit in this case as evidence of endorsement.

II. LIKE CASES SHOULD BE DECIDED ALIKE, AND THIS CASE IS LIKE *VAN ORDEN*.

Save the age of the monument, all the relevant facts weighed in *Van Orden* are similar in the case at bar. Pet. at 13-14.[5] And while Green tries to create factual grounds for distinguishing *Van Orden*, he ultimately admits that he does not "take[] issue with any of the district court's factual findings." Resp. Brf. at 25 n. 17.[6] With that concession in mind, here are the relevant findings of the district court:

- Green failed to prove that any of the quotations he attributes to the Commissioners were official statements or a part of the official history of the Monument. App. 62a, 71a, 93a.[7]

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[5] Green effectively concedes that *McCreary* is distinguishable from this case by entirely failing to address the Commissioners' argument on that point. Pet. at 17.

[6] Green fails to address the circuit split over whether the correct standard of review for factual matters in Establishment Clause cases where there has been a trial is *de novo* or clear error. Pet. 28-29.

[7] The district court also found that the accounts offered by Green's witnesses of certain statements by the Commissioners lacked credibility. App. 77a (finding Nichols' inflammatory allegations against Commissioner Cole, Resp. Brf. at 10, "are likely apocryphal," and the account of Commissioner Few's rally statements, Resp. Brf. at 8, too questionable to be accorded "much weight"). And despite Green's attacks on the Commissioners' truthfulness on appeal, *see, e.g.*, Resp. Brf. at 6 n. 7, the district court found them to be "highly credible witnesses." App. 75a.

- None of the Commissioners ever made religiously-themed comments or even attended Monument-related events in their official capacity. App. 71a, 91a, 93a, 99a.

- The "Board never approved, or even reviewed, Bush's design of the Monument or the version of the Commandments that appears on it. Indeed...none of the Commissioners knew that different versions of the Ten Commandments might exist at the time they voted to approve the Monument." App. 67a.

- The County did not endorse the message of any of the monuments erected on the courthouse grounds, including the Ten Commandments Monument. App. 101a.

- The Commissioners did not make any comments regarding the religious value of the Monument when Mr. Bush requested to erect it, though they did discuss its historical significance. App. 62a, 78a.

- "[O]ne of the purposes of the Commissioners in approving Bush's request was to protect the public from potential liability should his request have been denied." App. 79a.

- The Monument was entirely non-controversial, attracted no real public attention until Green filed suit, and it was Green's suit—not the Monument—which incited discord. App. 68a, 70a-71a, 94a-95a.

- "[A] reasonable observer would see an aesthetic flow" in the courthouse monuments because they "clearly represent what Haskell County citizens consider the noteworthy events and sentiments of their country, their state, and their nation." App. 104a.

Green's attempts to distinguish *Van Orden* are simply inaccurate. First, he argues that, unlike the instant case, there was no religious purpose for the *Van Orden* monument's erection. Resp. Brf. at 18 and 26. But the *Van Orden* monument was explicitly donated with a goal to "inspire all who pause to view [it], with a renewed respect for the law of God." 545 U.S. at 707 (Stevens, J., dissenting) (citation and quotation marks removed).[8] Similarly, the Ninth Circuit's *Card* decision specifically acknowledged the religious purpose of the private donating organization, but did not believe that changed the *Van Orden* analysis. 520 F.3d at 1020.

Green further tries to distinguish *Van Orden* by saying that it dealt with a monument that was incorporated into a unified theme, whereas Haskell County had no theme. But not all the justices who viewed the *Van Orden* display were convinced of a common theme, 545 U.S. at 743 (stating "there is no common denominator" to unify the *Van Orden* display) (Souter, J., dissenting), and many of the judges—including the district court—who viewed the

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[8] Curiously, Green tries to deflect this point by arguing that there was no evidence that Texas officially adopted the donor's religious purpose. Resp. Brf. at 27 n. 18. But there is no evidence that Haskell County officially adopted Mr. Bush's religious purpose, either.

Haskell County display saw a sufficiently unified theme. App. 104a (district court), App. 118a (Judge Kelly's dissenting opinion, joined by Judges Tacha and Tymkovich), 139a (Judge Gorsuch's dissenting opinion, joined by Judges Kelly, Tacha, and Tymkovich).

Haskell County's Monument is no more an endorsement of religion than the one upheld in *Van Orden*, and razing it[9] would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." 545 U.S. at 704. Government entities like Haskell County and the states that joined in the Indiana Attorney General's amicus brief cannot function under a jurisprudence where cases like *Van Orden* are decided unlike *Van Orden*. The end result will have government entities banning religiously-tinged displays to avoid lengthy and costly litigation. While this may be acceptable or even desirable to those who oppose monuments that acknowledge religion's historical significance, it is certainly not required by the Establishment Clause and this Court should take this opportunity to say so.

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[9] While the district court's order to remove the sizeable Monument did not give a deadline, the Commissioners have taken steps to comply by asking Mr. Bush to remove the Monument and by soliciting bids to have it removed if he fails to do so. They have also filed a Fed. R. Civ. P. 60(b) motion with the district court to allow delay of removal until after this Court completes its review of this case.

III. LOWER STANDING REQUIREMENTS IN ESTABLISHMENT CLAUSE CASES HAVE CONTRIBUTED TO THE CURRENT CONFUSION.

While Green calls offended-observer standing a "time-honored principle," Resp. Brf. at 32, he is unable to cite a single case where this Court has directly ruled on the issue because none exist. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *Domino's Pizza Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (citations omitted).

This case provides an excellent opportunity to directly address offended observer standing because it exemplifies the confusion in the case law that has resulted from relaxed lower court standing requirements in this area. Offended observer standing is too easily met since all that is required is mere exposure to a display that is deemed offensive. *See O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005).

This problem can be solved now by simply requiring Establishment Clause standing to be treated like all other standing.

CONCLUSION

This Court should review the Tenth Circuit's decision because it is in conflict with both this Court's cases and those of other Circuits. It should also review

this case to determine whether courts should continue to be inundated with Establishment Clause cases based solely on observation of putatively offensive displays.

Respectfully submitted,

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