STATEMENT OF THE CASE

Procedural History

Americans United for Unbelief and Liberty ("AFL") filed suit against Zion County, South Carolina, seeking an injunction against a local ordinance that mandated a display of the Ten Commandments inside the Zion County courthouse located within New Salem Township. The AFL contended that a privately donated display of the Ten Commandments violated the Establishment Clause of the First Amendment because it contains an express religious message. The AFL also contended that the Lemon v. Kurtzman test established by this Court is necessary to determine the constitutionality of a governmental action under the Establishment Clause because it seeks to achieve governmental neutrality regarding religion.

The District Court of South Carolina initially granted a temporary injunction against the display. However, after a subsequent hearing, in June 2007 the District Court upheld the display and denied the AFL's requested relief of a permanent injunction, finding the display did not violate the Establishment Clause.

The AFL appealed to the Fourth Circuit Court of Appeals, which upheld the lower court's finding. In affirming the District Court's holding, the Fourth Circuit based its analysis merely on America's historical ties to religious acknowledgement and failed to resort to governing standards for Establishment Clause claims. The AFL petitioned this Court for writ of certiorari. This Court granted the writ in October 2009.

Statement of the Facts

The American Society for the Preservation of Christian Knowledge ("ASPCK") proposed that the Zion County Council and New Salem Township Municipal Board ("Zion County") mount a display of the Ten Commandments in the Zion County courthouse located within New Salem Township. The ASPCK is a Christian organization which espouses evangelical goals, as evident through its by-laws:

> Helping people to understand the Christian message, and what it can mean for them. Helping to resource Christians in their study, prayer and worship. Helping the development of Christian thought through publishing and distributing Christian information and literature. Supporting the life and growth of the world-wide Church. Reaching out to those currently outside the Church. Resourcing the training of future church members and leaders. Encouraging Christians from different traditions and cultures to learn from one another.

In March 2007 Zion County voted on an ordinance which mandated the display of the Ten Commandments to be exhibited in the courthouse entitled "Our National Heritage." Although the vote passed, it was not unanimous. Two council members voted against the display; it is unknown how many citizens of Zion County those council members represented.

The ordinance establishing the display listed several purposes, including: to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; to created a limited public forum on designated walls within the courthouse for the purpose of posting historical documents which played a significant role in the development, origins, or foundations of American or South Carolina law." Notably, during the debate prior to the

ordinance vote, chairman of the council, Jonathan Edwards, stated, among other things, "I want to give those liberal judges on the Supreme Court what they want."

The display opened approximately four months later containing only the Ten Commandments which were framed on the wall. This initial display, appearing in "a very high traffic area" was devoid of any larger educational, historical, or retrospective exhibit.

It was only after the initial lawsuit was filed that Zion County altered the display by adding other documents in an admitted attempt to comply with the First Amendment and thus protect against the lawsuit. Zion County's recorded purpose never changed. Although various documents were added, the Fourth Circuit found that the new display was significantly similar to the first display.

The amended display contains (1) an excerpt from the Declaration of Independence; (2) the Preamble of the Constitution of South Carolina; (3) the national motto of "In God We Trust;" (4) a page from the Congressional Record of Wednesday, February 2, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading "The Bible is the best gift God has ever given to man,"; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; (8) The Magna Charta; (9) the Virginia Statute for Religious Freedom drafted by Thomas Jefferson in 1779; (10) and the Mayflower Compact. Only some of the documents are displayed in their entirety while others are mere excerpts highlighting a religious reference. This later display never included a statement of purpose or signage

that explains its context or supposed purpose. Each document added to the display mentions "God," "the Creator," or both.

This display, located in a courthouse funded by county and town funds, is visible to residents wishing to conduct civic business, such as obtaining or renewing drivers' licenses/permits, registering vehicles, paying local taxes, and registering to vote. Although Zion County claims it has created a limited public forum, the evangelical group, the ASPCK, is the only group to date that has been granted permission to rent space.

SUMMARY OF THE ARGUMENT

I. This Court should reverse the Fourth Circuit's decision and find that Zion County's "Our National Heritage" display violates the Establishment Clause of the First Amendment.

First, the "Our National Heritage" display unconstitutionally promotes religion in violation of the test enunciated by this Court in Lemon v. Kurtzman, because both displays have a religious purpose, have an effect of advancing religion, and cause Zion County to be excessively entangled with religion. Secondly, even if this Court should find the Lemon test is inappropriate, Zion County's display is still unconstitutional under alternative judicial standards.

II. This Court should reverse the Fourth Circuit's decision and find that the Lemon test established by this Court is imperative to determine the constitutionality of a governmental action under the Establishment Clause.

The Lemon test sets the sturdiest foundation for Establishment Clause claims because it allows for examination of purpose, which is a core element of statutory interpretation. The Lemon test is a straightforward standard that appropriately examines context through the eyes of an objective observer. This Court's precedent demonstrates

that the Lemon test's purpose prong does not trivialize an Establishment Clause analysis. Adopting an alternative inquiry over the Lemon test's purpose prong would jeopardize the fundamental concept of governmental neutrality concerning religion. Alternative tests are unnecessary considering the Lemon test's consistency and workability.

ARGUMENT

I. ZION COUNTY VIOLATED THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BY DISPLAYING THE TEN COMMANDMENTS BECAUSE IT WAS EXPRESSING A RELIGIOUS MESSAGE IN A PUBLICLY FUNDED COURTHOUSE.

The display by New Salem Township and Zion County ("Zion County" or "County") violates the Establishment Clause of the First Amendment by promoting the Christian and Jewish religions over other religions and non-religions. On March 14, 2007, the County mandated that a display of the Ten Commandments be posted in a high traffic area of a publicly funded courthouse. The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion…" U.S. CONST. amend. I. The Establishment Clause prohibits the government from taking a particular stance regarding religion. See e.g. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (finding the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and non-religion"); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (holding "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2002) (holding "where the government favors religion, the government sends the message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members") (internal quotations omitted).

This Court has found that where there are subsequent displays or actions, the progression of the displays is important, and the earlier display's purpose must be incorporated into the analysis. The government may not avoid scrutiny by attempting to cloak the unconstitutionality

of an earlier display. See Santa Fe, 530 U.S. at 315. Thus, the Court must consider the full purpose and religious context of both displays.

The governing standard for determining whether a government action violates the Establishment Clause is the test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, courts must consider whether; 1) the government activity in question has a secular purpose; 2) the activity's primary effect advances or inhibits religion; and 3) the governmental activity fosters an excessive entanglement with religion. Zion County's display violates the Establishment Clause under all three prongs. Even if this Court should find, *arguendo*, that the Lemon test is not the appropriate standard, Zion County's display is still unconstitutional as both displays espouse religion on behalf of the government.

The County's original display of the Ten Commandments is unconstitutional, and the attempt to create a second display is nothing more than a sham to avoid litigation. The purpose of both displays is to unconstitutionally promote one religion over another in violation of the Establishment Clause of the First Amendment. Thus, the ruling of the Court of Appeals for the Fourth Circuit must be reversed and remanded.

A. Zion County's First Display Of The Ten Commandments Fails the Lemon Test Because It Expressly Promotes A Religious Message.

Zion County's display fails all three prongs of the Lemon test because the display of the Ten Commandments is religious in purpose, the display advances a specific faith and inhibits others, and the government mandate fosters an excessive entanglement with religion. As the context of the entire display cannot be ignored, the first display causes the entire display to be repugnant to the Establishment Clause.

1. The first display has a religious purpose.

The circumstances surrounding the first display all point to a religious purpose. The council chairman stated that Zion County wants to prove that a government can *endorse* "God" while still being constitutional. AUFUL v. Zion County, 666 F.3d 2, 4, n. 2. Any person within the jurisdiction of the constitution has a right to personal autonomy, and all individuals have the right to a conscience, free from legislation. Zion County is attempting to legislate the beliefs of the individuals whom enter its courthouse.

The adoption of the first display from a private organization with evangelical beliefs carries with it an evangelical purpose. The group which pushed for the display, the American Society for the Preservation of Christian Knowledge ("ASPCK"), is an evangelical Christian group. Id. at 22 (Derfner, J., dissenting) (finding "The aims of this group are avowedly Christian and evangelical."). Indeed, the purpose of the ASPCK is to "Help[] people to understand the Christian message…[and to] [s]upport the life and growth of the world-wide Church." Id. at 3, n. 1. Zion County adopted the message of the ASPCK when it allowed this specific group exclusive access to its courthouse walls. Zion County, thus, maintained the religious purpose of the ASPCK in mandating the display.

The County's council expressed a non-secular purpose behind the display, in addition to adopting the non-secular purpose of the ASPCK. Specifically, in support of the display, County council chairman Jonathan Edwards stated:

> "I want to give those liberal judges on the Supreme Court what they want. We're going to show the world that we can do this and follow the Constitution too. We can believe in God and believe in our country without violating the law of the land here."

Id. at 4, n. 2. By stating "We can believe in God," Edwards was making it clear that the purpose of the display is to promote belief in the Christian God. The instant facts illustrate that the

purpose of the first display is to recognize the Christian God. The purpose purported by Zion County now, during litigation, appear disingenuous after an examination of this statement in the current context. Thus, the display promotes a religious message in violation of the first prong of the Lemon test.

2. The first display has the effect of advancing religion.

The second prong of the Lemon test requires that the display not advance a specific religion, or inhibit others. The underlying purpose of the display was to propound the Christian religion over all others. Specifically, during the debate at the Zion County council meeting, the chairman of the council made clear the purpose behind the display was to exemplify that Zion County "can believe in God and believe in our country…" Zion County, 666 F.3d 4, footnote 2. The mention of "God" by the councilman is evidence that the display is meant to illustrate a belief in God. Furthermore, the display of the Ten Commandments illustrates the belief in the Christian faith, and not the purported purpose of illustrating "Our National Heritage."

This Court has recognized that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone v. Graham, 449 U.S. 39 (1980). The Ten Commandments are found in two places in the Bible: Exodus 20 and Deuteronomy 5. For most Christians and Jews in the United States, the Ten Commandments symbolize biblical law, and are "clearly religious in their origin and their substance, because a number of [the commandments] refer to 'God.'" Paul Finkelman, The Ten Commandments on the Courthouse Lawn and Elsewhere, 73 Fordham L. Rev. 1477, 1520 (2005) ("Ten Commandments")[1]. Even the *version* of the Ten Commandments one chooses to display is contentious, because "[d]ifferent textual versions reflect deep historical

[1] *Available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887777

and religious disputes among Christian religions and between Christians and Jews…[d]isplaying one version necessarily favors one religion over others." Stone, 449 U.S. at 41. In reference to the display of the Ten Commandments, the Court found in McCreary Cnty. v. ACLU of Kentucky,

> "This is not to deny that the Commandments have had *influence* on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an *unmistakably religious* statement dealing with religious obligations and with morality subject to religious sanction…[w]hen the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."

545 U.S. 844, 867 (2005) (emphasis added). It follows that it is "quite impossible to have a theologically 'neutral' version of the Ten Commandments." Finkelman, *supra* at 18.

Contrary to the Court of Appeals' opinion, the text of the Ten Commandments bears little relation to American law. As pointed out by the ACLU in their brief to this Court in McCreary:

> "The first four are religious commands; they could not be part of American law, consistent with the First Amendment. Three others – prohibiting coveting and adultery and requiring that one honor one's parents – generally are not part of American law. The remaining three – prohibiting killing, stealing and perjury – are part of American law, to be sure, but they were common to ancient religious and secular moral codes. They are hardly unique to the Ten Commandments. In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments."

Brief for Respondent at 39 McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844 (2005) (No. 03-1693). There is no textual or historical link between the Ten Commandments and Zion County's national heritage. Zion County does not provide any evidence that the Ten Commandments are so inexorably intertwined with their "Our National Heritage" that a secular purpose emerges. In contrast, Zion County adopted the display at the suggestion of an evangelical Christian organization, not a historical society. The Circuit Court did not cite any factual connection within the founding fathers reliance on the Ten Commandments in framing the United States

Constitution or any American law. Neither the County nor the displays themselves yield any evidence to support a secular purpose. Thus, Zion County's first display of the Ten Commandments has the effect of advancing religion in violation of the Establishment Clause.

3. The first display causes Zion County to be excessively entangled with religion.

The third prong of Lemon prohibits excessive government entanglement with religion. By mandating that the "Our National Heritage" display be hung in a high traffic area of the courthouse, the County is entangled with a specific religious message. Zion County's display is readily visible to any citizen who uses the courthouse "to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes and to register to vote." Zion County, 666 F.3d at 24. By requiring the display in this location, Zion County is mandating the maximum exposure of religious advancement, and the result is one of isolation of those with different religious opinions. Moreover, the County claimed that this specific doctrine is the bedrock to their national heritage. See Id.at 3. Yet any individual who does not share the beliefs of Zion County council are therefore made outsider, and burdened by the permanent presence of a governmental endorsement of religion.

Additionally, the funding for the display came from the ASPCK, but this does not insulate the government from scrutiny. By letting a private group rent space in a publicly funded courthouse, Zion County is endorsing and promoting the message of the ASPCK. The Court in Stone found that, "It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State…Government' that the Establishment Clause prohibits." Stone, 449 U.S. at 42, (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)). Zion County is promoting religion over non-religion by exhibiting *only* the religious

display suggested and paid for by the ASPCK. Consequently, the display creates an excessive entanglement of government with religion.

B. The County's Second Display Fails To Cure The Earlier Unconstitutionality Of The First Display.

1. The second display fails the first prong of the Lemon test because it is still religious in purpose.

The first prong of the Lemon test requires that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." Stone, 449 U.S. at 42. In Stone, the Court required an analysis of three factors "when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays; the physical setting in which the Ten Commandments are displayed, and; any changes…made to the displays since their inception." 449 U.S. at 42. The content, the physical setting, and changes made to the display of the Ten Commandments fail to demonstrate a secular purpose. Once Zion County was facing litigation, they immediately amended their display and added additional documents. However, the County only displayed portions of those documents that referred specifically to "God," the "Creator," or to the Bible. Zion County, 666 F.3d at 10. Every document added to the display mentions "God" or the "Creator" in some form showing an express religious purpose. Additionally, Zion County did not contextualize the second display with explanatory signage, as in Stone. See 449 U.S. at 41. Thus, the content of the display furthered the message of Christianity. In addition, the County never removed the display from the high-traffic area of the courthouse.

This Court found in Santa Fe that distinguishing a sham secular purpose from a sincere one requires "examination of the circumstances surrounding [the governmental] enactment." 530 U.S. at 315. "A government's action will be held unconstitutional when available evidence

supports a commonsense conclusion that a religious objective permeated the government's action." See Wallace v. Jaffree, 472 U.S. 38, 58 (1985) (non-secular purpose found from change of wording from earlier to later statute concerning prayer in school); Edwards v. Aguillard, 482 U.S. 578 (1987) (statute's text and detailed public comments of sponsor sufficient to find purpose); Lemon, 403 U.S. at 612 (where the government action must have a secular purpose, and although a legislature's stated reasons will generally receive deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective); McCreary, 545 U.S. 844 (finding "governmental purpose is a key element of a good deal of constitutional doctrine").

The inclusion of the Virginia Statute for Religious Freedom drafted by Thomas Jefferson in 1779 might seem as aiding the purported secular purpose of the display. However, this is one document amidst numerous documents which refer to the "dependence upon the overruling power of God." Zion County, 666 F.3d at 6-7, n. 6 (citing an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible"). In Santa Fe, the Court found that while a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts to distinguis[h] a sham secular purpose from a sincere one." 530 U.S. at 308 (quoting Wallace, 472 U.S. at 75) (internal quotations omitted). Zion County's additional documents highlight even further the religious nature of the display. See Adland v. Russ, 307 F.3d 471, 486-87 (6th Cir. 2002) (holding the combination of the Ten Commandments with symbols of American secular heritage "serves to heighten the appearance of government endorsement of religion"); Books v. City of Elkhart, 235 F.3d 292, 307 (7th Cir. 2000) ("placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of

endorsement; rather it specifically links religion...and civil government"); Stone, 449 U.S. at 42 (where the court found that "the displays were not an integrated curriculum, but a grab bag of loosely related political and patriotic items – except for the Ten Commandments, which are an explicitly religious text").

The addition of the documents to create the second display heightened the underlying religious purpose of the first display. Thus, the second display did not cure the unconstitutionality of the first display.

2. The second display fails the second prong of the Lemon test because it advances a specific religion.

In McCreary, the County erected three displays, each attempting to cure the defects of the first by amending or adding additional documents. The court in that case ruled, "In the case of each of the displays, an observer would have concluded that the government was endorsing religion." 545 U.S. 844, 869 (2005). Additionally, the Court found that after McCreary County amended their second display by "juxtaposing the Commandments to other documents with highlighted references to God as their sole common element…[t]he display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments *precisely because of their sectarian content*." Id. at 870 (emphasis added).

In almost identical circumstances, Zion County added ten additional documents which mention God, the Bible or both. As in McCreary, the documents serve only to heighten and pronounce the message of Christianity. Thus, because Zion County is advancing and promoting religion through the display, it is unconstitutional under the Establishment Clause.

3. The display fails the third prong of Lemon because it creates an entanglement with religion.

Although Zion County claims that they are creating a "limited public forum" for the purpose of "posting historical documents," the County has only displayed *certain* documents, or excerpts of certain documents, that refer explicitly to the Christian God. Moreover, the dissent in Zion County highlighted the low probability of allowing an Islamic or Hindu group equal access to the "limited public forum." See Zion County at 22.

Indeed, the Establishment Clause was designed specifically to ensure government would not use religion as a means to isolate its citizens. Justice O'Connor highlighted the importance of this in her concurrence in McCreary:

> "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish."

545 U.S. at 870. Erecting a religiously motivated display of the Ten Commandments in what should be the County's most objective and impartial establishment does exactly that. Consequently, both the first and second display of the Ten Commandments by Zion County on government property violates the Establishment Clause of the First Amendment.

C. Even If This Court Should Find That The Lemon Test Is Inappropriate, Zion County's Display Is Still Unconstitutional.

Although the Lemon test remains the governing standard for determining whether government action violates the Establishment Clause, two separate standards have emerged. One of these is the "endorsement analysis" enunciated by Justice O'Connor in her concurring opinion in Lynch v. Donnelly, 465 U.S. 668 (1984). The second is the "coercion analysis" established in Lee v. Weisman, 505 U.S. 577 (1992).

1. Zion County's display improperly endorses religion under the endorsement analysis.

Zion County's display of the Ten Commandments explicitly endorses religion in direct violation of the Establishment Clause. The Court in Lynch found that the government can violate the Establishment Clause through excessive entanglement with religious institutions (the third prong of Lemon), or through government endorsement or disapproval of religion. Lynch, 465 U.S. at 630. The proper standard to determine what constitutes government endorsement is the "reasonable observer." See Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (finding that "[a]t least when religious symbols are involved, the question whether the State is 'appearing to take a position' is best judged from the standpoint of a 'reasonable observer'"); Allegheny, 492 U.S. 573, (finding that the "reasonable observer" determines whether the government has improperly endorsed religion). On these facts, a "reasonable observer" would find that Zion County's "Our National Heritage" display endorses religion, specifically Christianity. The purpose behind the mandate, coupled with the accompanying documents in the final display, shows that the overall result is endorsing the monotheistic "God" of Christian faith. In Justice Derfner's dissent, an Islamic group or Hindu group is unlikely to be "given the same access to government buildings" to make their case. Zion County, 666 F.3d at 22. Thus, the display unconstitutionally endorses one religion and subsequently disapproves of all other religions and non-religion.

2. The placement and context of Zion County's display has the effect of coercing citizens to support or participate in religion.

The County's display coerces the citizens of Zion County into accepting the Christian beliefs within the "Our National Heritage" display. The Court in Lee found that "…at a minimum, the Constitution guarantees that government may not coerce anyone to support or

participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." 505 U.S. 577 (internal quotations omitted). The emphasis in Lee focused on public pressure of citizens to accept the beliefs and practices of the government. Similarly, Zion County has consciously erected their display in a high-traffic area of a courthouse which is used daily for civic duties, among other tasks. They also mistakenly assert that the Ten Commandments are the bedrock of their national heritage. The citizens of Zion do not have the opportunity to choose among courthouses which do not insulate them based on their religious orthodoxy.

The deliberate maneuver of erecting the display inside a high-traffic area of a publicly funded courthouse places the "reasonable dissenter" in a dilemma. Citizens are required to accept the government's view of a specific religious orthodoxy in order to use and enjoy the government facilities. They are transformed into a "captive audience" that is unable to escape the message put forth by the government. See Hill v. Colorado, 530 U.S. 703 (2000). This is in direct contrast to the principles articulated in the Establishment Clause of the First Amendment.

For all of the aforementioned reasons, this Court must reverse the decision of the Court of Appeals for the Fourth Circuit and find Zion County's display of the Ten Commandments unconstitutional.

II. THE TEST ESTABLISHED IN LEMON V. KURTZMAN IS IMPERATIVE TO DETERMINE THE CONSTITUTIONALITY OF A GOVERNMENTAL ACTION UNDER THE ESTABLISHMENT CLAUSE BECAUSE IT IS THE BEST POSSIBLE MEANS OF ACHIEVING GOVERNMENTAL NEUTRALITY REGARDING RELIGION.

This Court has long recognized three familiar factors as the basic analysis for evaluating Establishment Clause claims. These factors, collectively known as the Lemon test, requires courts to consider whether the governmental activity in question has a secular purpose, whether

the activity's primary effect advances or prohibits religion, and whether the governmental activity fosters an excessive entanglement with religion. Lemon, 403 U.S. at 612-13. This test remains the most appropriate inquiry today. See McCreary, 545 U.S. at 861-64 (refusing to discard Lemon's purpose test or to shorten any inquiry into purpose for Establishment Clause analyses). The underlying purpose of Lemon is to preserve governmental neutrality and prevent governments from promoting particular religious views. See Epperson, 393 U.S. at 104 (concluding that "the touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); see also Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947) (concluding that the Establishment Clause protects against "laws which aid one religion, aid all religions, or prefer one religion over another.").

Zion County's "Our National Heritage" display violates the Establishment Clause under the Lemon test because it has a non-secular purpose and has the effect of advancing one religion over all others. See generally Stone, 449 U.S. at 41 (*per curiam*) (concluding that Kentucky's statute requiring the posting of the Ten Commandments in public schools had no secular purpose and found them to be an "instrument of religion"); Corp. of Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) ("When governmental actions have a predominant purpose of advancing religion, it violates the Establishment Clause value of religious neutrality"). Although Zion County attacks Lemon's purpose prong, this Court has consistently recognized the importance of examining purpose in numerous constitutional inquiries. See McCreary, 545 U.S. at 859 (examining whether governmental action has a secular purpose has been a common thread in this Court's Establishment Clause cases); see also Lemon,

403 U.S. at 612. Therefore, the Lemon test contains sound analytical principles that this Court has consistently relied upon for decades.

A. Examining Purpose Is A Core Component Of Statutory Interpretation.

This Court has continually recognized that investigating purpose is an important element of statutory interpretation. An inquiry into a statute's purpose is a "staple . . . that makes up the daily fare of every appellate court in this country." McCreary, 545 U.S. at 861; see e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (interpreting a statute according to its "text, structure, purpose, and history" are key elements of statutory interpretation); Washington v. Davis, 426 U.S. 229, 240 (1976) (discriminatory purpose considered for finding of violation of Equal Protection Clause); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352-53 (1977) (discriminatory purpose finding integral to Dormant Commerce Clause violation). Likewise, the Lemon test's inquiry into whether a governmental action contains a secular purpose follows not only the core of constitutional analysis, but basic principles of statutory interpretation. Zion County's argument that purpose inquiries are unworkable goes against the very grain of the mode of analysis established by this Court. McCreary, 545 U.S. at 861-62 ("if [inquiries into purpose] were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose . . . would have dropped into disrepute long ago."). Thus, the Lemon test's first prong is essential and coincides with the most basic principles of judicial analysis.

B. The Lemon Test's Purpose Inquiry Is Straightforward And In Keeping With Common Sense.

This Court has found that the Lemon test's purpose prong is straightforward. See McCreary, 545 U.S. at 862; see also Edwards, 482 U.S. at 594-95 (inquiry examines "plain

meaning of the statute's words, enlightened by their context and the contemporaneous legislative history. . . and the specific sequence of events leading to [its] passage"). Moreover, this Court has also found that examining purpose is practical and often apparent from "from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart or hearts." Wallace, 472 U.S. at 74 (O'Connor, J., concurring in judgment). Purpose can be readily found by considering the basic context in which the statute was passed and does not require delving into a legislator's inner thoughts. Similarly, Zion County's religious purpose in displaying the Ten Commandments is a readily discoverable fact. One need only consider the prior actions of presenting them as a stand-alone religious testament, and then later attempting to make the display constitutionally-friendly once litigation began. See Santa Fe, 530 U.S. at 309 (concluding school's history of student-led prayer at athletic events led to a reasonable inference that the specific purpose of the later policy was to preserve a popular "state-sponsored religious practice."); see also Stone 449 U.S. at 42 (holding that posting the Ten Commandments served no educational function and any effect it might have would be to induce children to react to them in a religious manner). Therefore, the Lemon test is practical and workable because it holds governmental actions unconstitutional when easily accessible information supports a conclusion of a governmental religious objective. See McCreary, 545 U.S. at 863.

1. Lemon's purpose inquiry appropriately examines context through the eyes of an objective observer to discern whether the governmental activity in question has a secular purpose.

This Court repeatedly looks to the context and circumstances in which the governmental actions took place. See McCreary, 545 U.S. at 863-64 ("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"). Consequently, this Court asks whether an objective

observer would find that the governmental activity has a secular purpose. See Santa Fe, 540 U.S. at 308 (concluding that an objective observer is "one who takes account of traditional external signs that show up in text, legislative history, or implementation of the statute."). An objective observer to the present case would easily see that the external signs and implementation of the ordinance and display show Zion County's religious intent in erecting the display. The idea to display the Ten Commandments came from and was sponsored by an evangelical Christian group, the ASPCK. Zion County, 666 F.3d at 22 (Derfner, J., dissenting). Also, the initial display only contained the Ten Commandments, with no attempt at contextualization. Zion County's addition of other documents was a mere response to litigation. This Court has not overlooked similar circumstances in the past, and should not ignore these surrounding circumstances now. See McCreary, 545 U.S. at 866 (concluding that purpose could be evaluated by considering the evolution of the Ten Commandments displays, stating "the world is not made brand new every morning, and the counties are simply asking us to ignore perfectly probative evidence . . . reasonable observers have reasonable memories."); see also Santa Fe, 530 U.S. at 315 ("[w]e refuse to turn a blind eye to the context in which this policy [concerning school prayer at football games] arose."). Zion County would have this Court ignore abundant, essential evidence by doing away with Lemon's purpose inquiry.

Zion County argues that this straightforward purpose analysis may allow savvy government officials to hide their religious intent from an objective observer. However, this Court has soundly dismissed such criticism. See McCreary, 545 U.S. at 863 ("secret motive. . . does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have . . the illegitimate effect of advancing religion."). Therefore, any religious purpose masked so well as to trick an objective observer is doubtful to alienate

others due to religion, and any residual advancement of religion can be properly identified when examining whether the government action has the effect of advancing religion. Examining the context and circumstances in which the governmental action took place is an integral part of Lemon's purpose inquiry and the whole of the Lemon test is not diluted by any fears of official, hidden religious objectives. Accepting Zion County's argument would have broader implications on constitutional jurisprudence. Specifically, it would require this Court to forgo examination of governmental actions in constitutional inquiries, for fear that legislators are too adept at hiding their true purpose.

Furthermore, any argument regarding the Ten Commandments' historical prominence falls flat in light of the present case's context and circumstances. Unlike the Ten Commandments monument upheld on the Texas capitol in Van Orden v. Perry, the Zion County display is the result of a continuous process responsive to litigation regarding its constitutionality. 545 U.S. 677, 702-03 (2005) (concluding that the determinative factor in allowing the Ten Commandments monument to stand was its forty years of unchallenged existence, suggesting that individuals understood a moral and historical message rather than an establishment of religion) (Breyer, J., concurring in judgment). Therefore, the Court has consistently looked to the context and circumstances in which the governmental action took place when deciding Establishment Clause issues under the Lemon test.

2. This Court's precedent illustrates that the Lemon test's purpose prong does not trivialize an Establishment Clause analysis.

The Court has declined to trivialize the Lemon test's purpose inquiry. The Court has repeatedly deferred to lawmakers for economic matters, but remains steadfast in striking down any trivial purpose in Establishment Clause claims. See McCreary, 545 U.S. at 864-65 (rejecting

the Counties' argument that the purpose inquiry is "so naïve that any transparent claim to secularity would satisfy it). In fact, this Court has held that the secular purpose must be authentic and not merely a sham meant to disguise some religious objective. See Id. at 864; see e.g., Santa Fe, 530 U.S. at 308 (concluding that courts have a duty to distinguish between sincere and sham purposes); Edwards, 482 U.S. at 586-87 (concluding that a government's stated secular purpose must not be a sham). In an analysis which beholds the inexorable rights of individuals, the Court must ensure the government has not proffered sham reasons for encroaching upon such rights.

Moreover, the Court has shown that it does not accept just any secular claim when scrutinizing purpose. The Court has stated recently that "we have not made the purpose test a pushover for any secular claim." McCreary, 545 U.S. at 864. Several cases illustrate that this Court has used Lemon's purpose prong to legitimately differentiate between a genuine and sham secular purpose. See Santa Fe, 530 U.S. at 309 (finding regulation a continuation of a previous policy to preserve prayer at football games); see also, Edwards, 482 U.S. at 586 (finding the act's stated purpose to protect academic freedom was not created to achieve its purported goal by curbing the teaching of evolution or requiring the teaching of creation science); Wallace, 472 U.S. at 56 (holding that an Alabama statute allowing a daily period of silence in public schools lacked any secular purpose when legislative statements indicated a religious purpose and a prior statute authorizing such meditation was already in effect); Stone, 449 U.S. 39-41 (1980) (finding a Kentucky statute's claimed secular purpose was not achieved by provision including a notation stating "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.").

Comparatively, Zion County's later attempt at contextualization through an exhibit entitled "Our National Heritage" is a thinly veiled attempt to disguise the true religious purpose behind the municipality's display of the Ten Commandments. Therefore, the Lemon test's purpose prong is far from trivial, but rather a thoughtful examination that this Court has applied consistently in Establishment Clause and numerous other forms of constitutional jurisprudence.

C. Adopting An Alternative Inquiry Over Lemon's Purpose Prong Would Endanger The Concept Of Governmental Neutrality Concerning Religion.

The Lemon test is still the law and has not been overruled. This Court has utilized the Lemon test as the definitive test in Establishment Clause jurisprudence:

> [The Lemon test] identifies standards that have proved useful in analyzing case after case . . . It is the only coherent test a majority of the Court has ever adopted . . . continued criticism of it could encourage other courts to . . . decide Establishment Clause cases on an ad hoc basis.

Wallace, 472 U.S. at 63 (Powell, J., concurring). Adopting an alternative test would weaken this Court's persistent adherence to the concept of governmental neutrality regarding religion. See McCreary, 545 U.S. at 883 ("Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs") (O'Connor, J., concurring). The Ten Commandments display in the present case ultimately turns Zion County into a mouthpiece for only one version of this religious document. Thus the ordinance mandating the display is repugnant to the core of Establishment Clause jurisprudence favoring governmental neutrality regarding religion.

1. The Constitution's founders firmly espoused the concept of the separation of church and state through the Establishment Clause.

Our nation's founders supported the separation of church and state and the idea that government should refrain from interfering with the sacred realm of religion. James Madison, the leading architect of the First Amendment's Establishment Clause, made clear his feelings that

religion is exempt from governmental authority. In his landmark and successful fight against Virginia's tax for the support of an established church, Madison voiced a fear of mixing religion and government which permeated an early American society well aware of Europe's tumultuous experiences with establishments of religion:

> During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been the 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 . . . [t]orrents 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.

James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), reprinted in Everson v. Bd. of Educ., 330 U.S. at 65–66. Likewise, Thomas Jefferson believed that religion did not belong in the legal sphere. See Letter from Thomas Jefferson, to the Danbury, Connecticut Baptist Association (Jan. 1, 1802) (on file with the Library of Congress) available at http://www.loc.gov/loc/lcib/9806/danpre.html (writing that American people "declared that their legislature should 'make no law respecting an establishment of religion' . . . thus building a wall of separation between Church & State."). This Court has adopted these founding ideals since its first modern attempt to set out standards governing the Establishment Clause. See Everson, 330 U.S. at 18 (concluding that the First Amendment's "wall between church and state . . . must be kept high and impregnable.").

Notably, the text of the Establishment Clause signifies a broad meaning. Although the original draft of the clause stated in part "nor shall any national religion be established," the final amended version deleted "national." See generally, Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1994) (advocating an expansive interpretation of the Establishment Clause). The textual change from specifically "national religion" to the broader "religion" illustrates the framers' intent to guard against more than just the establishment of a

single national religion or favoritism of one religion over another. Rather, the broader resulting text conveys the framers' intent to separate religion in general from government. Congress considered various drafts and rejected text that implies a narrower reading.

Just as the founders worked to separate religion from government, the Lemon test advances the concept of governmental neutrality, which is an established Constitutional principle that cannot be lightly tossed aside by the mere citing of random historical connections with religion. See Abington, 374 U.S. at 240 (reasoning that some historical messages can be indefinite and out-of-sync with modern society). Even though some the framers of the Constitution may have had documented religious leanings, these leanings do not diminish the fact that the framers equally viewed the concept of governmental neutrality regarding religion important enough to include the Establishment Clause within the First Amendment. See McCreary, 545 U.S. at 883 ("we enforce these restrictions . . . for the same reason that guided the Framers . . . Our Founders . . . provided for the possibility of judicial intervention when government action threatens or impedes such expression) (O'Connor, J., concurring). This Court's unwavering emphasis on governmental neutrality regarding religion is so embedded in the Lemon test's analytical framework that deviating from this inquiry would jeopardize these very notions of neutrality.

2. Alternative tests proposed by a minority of this Court's Justices are unnecessary replacements for the Lemon test, which sets workable judicial standards.

Although a small minority of Justices have proposed alternatives or modifications to the Lemon test, this test is a workable standard that the Court has refused to discard. Justice O'Connor's concurrence in Lynch proposed merely a modification of the Lemon test. See Lynch 465 U.S. at 687-94 (suggesting the purpose prong should focus on the intended message and

what message was actually conveyed). Justice O'Connor's endorsement test is really not a new test at all because it is not distinguishable enough from the Lemon test to stand alone as its own test. See Mike Schaps, Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right, 94 Calif. L. Rev. 1243, 1246 (2006) (arguing that Justice O'Connor's endorsement test is not really a separate test). Notably, Justice O'Connor's application of the endorsement test has yielded similar results as the Lemon test. Lynch, 465 U.S. at 687 ("The suggested approach leads to the same result in this case…") (O'Connor, J., concurring). In addition, Justice Kennedy proposed the adoption of a coercion-based inquiry over the Lemon test. See Lee, 505 U.S. at 587-89 (proposing a test that asks if the governmental action forces acceptance of or lacks appropriate alternatives to it); see also Van Orden, 545 U.S. at 697 (stating that a coercion inquiry separating acknowledgment of religion from a coercive effect would be a more consistent touchstone for Establishment Clause analysis) (Thomas, J., concurring).

However, there is sound logic behind the Lemon test and it can and has been applied consistently despite criticism from a minority of dissenting Justices. The consistency of the Lemon test relies in its dedicated adherence to examining the factual situations surrounding a governmental entity's purpose. Although a minority of case outcomes do not fall on the same side of the dividing line, this is largely due to the different facts which must dictate the outcome of an analysis that takes context and circumstances into account. For example, the instances where this Court has found a lack of connection to religion involve factual circumstances where questionably religious material has been on display for a long period of time, long enough for an objective observer to see that any religious purpose is either absent altogether or so insignificant that it does not affect such an observer. See Marsh v. Chambers, 463 U.S. 783, (1983) (noting

that the majority's reasoning emphasized the long-standing practice of legislative prayer and its "limited rationale should pose little threat to the overall fate of the Establishment Clause.") (Brennan, J., dissenting). Those instances involving long periods of time and well-established, non-religious purposes or secular groups distinguish such cases from the Zion County display, which does not share the same heritage as the display in Van Orden, or the tradition of legislative prayer in Marsh. See Van Orden, 545 U.S. at 702-03 (Breyer, J., concurring in judgment); see also McCreary, 545 U.S. at 860 (distinguishing the facts in McCreary, involving a recently created display of the Ten Commandments in a courthouse from a long-held tradition of legislative prayer in Marsh); Marsh, 463 U.S. at 795 (Brennen, J., dissenting).

Therefore, the Lemon test established by this Court should not be overruled as the standard for determining the Constitutionality of a governmental action under the Establishment Clause because this test seeks to achieve governmental neutrality regarding religion.

CONCLUSION

This Court should reverse the Fourth Circuit Court of Appeal's holding and remand to the District Court to permanently enjoin Zion County and New Salem Township from exhibiting the Ten Commandments "Our National Heritage" display.