

**No. 11-13457-EE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,
PLAINTIFF-APPELLEE,**

v.

**DIXIE COUNTY, FLORIDA,
DEFENDANT-APPELLANT**

**Appeal from the United States District Court for the Northern District of
Florida, Gainesville Division, Honorable Maurice M. Paul, Judge
Case No. 1:07-cv-0018-MP-GRJ**

**BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE; HADASSAH, THE WOMEN'S ZIONIST
ORGANIZATION OF AMERICA; SIKH AMERICAN LEGAL DEFENSE
AND EDUCATION FUND; AND UNITED SIKHS, ON BEHALF OF
PLAINTIFF-APPELLEE, IN SUPPORT OF AFFIRMANCE**

Ayesha N. Khan
Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
1301 K Street, N.W.
Suite 850, East Tower
Washington, DC 20005
Phone: (202) 466-3234
Fax: (202) 898-0955
khan@au.org / luchenitser@au.org

Barbara E. Etkind
Carrie Collier-Brown
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Washington, DC 20004
Phone: (202) 274-2950
Fax: (202) 274-2994
barbara.etkind@troutmansanders.com
carrie.collierbrown
@troutmansanders.com

Counsel for Amici Curiae; additional counsel listed on signature page.

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Each of the *amici curiae* is a non-profit organization that has no parent corporation. No corporation owns more than 10 percent of the stock of any of the *amici*. The following individuals and entities, in addition to those listed in the parties' briefs, have an interest in this litigation:

Americans United for Separation of Church and State, *amicus curiae*.

Collier-Brown, Carrie, counsel for *amicus curiae* Americans United for Separation of Church and State.

Etkind, Barbara E., counsel for *amicus curiae* Americans United for Separation of Church and State.

Hadassah, the Women's Zionist Organization of America, *amicus curiae*.

Khan, Ayesha N., counsel for *amicus curiae* Americans United for Separation of Church and State.

Luchenitser, Alex J., counsel for *amicus curiae* Americans United for Separation of Church and State.

Sikh American Legal Defense and Education Fund, *amicus curiae*.

Singh, Hansdeep, counsel for *amicus curiae* UNITED SIKHS.

No. 11-13457-EE, ACLU of Florida, Inc. v. Dixie County, Florida

Troutman Sanders LLP, counsel for *amicus curiae* Americans United for
Separation of Church and State.

UNITED SIKHS, *amicus curiae*.

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents approximately 120,000 members and supporters, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an *amicus curiae* in leading church-state cases before the Supreme Court of the United States, this Court, and other federal and state courts nationwide.

In particular, Americans United has served as a party or *amicus curiae* in a number of cases involving challenges to governmental displays of the Ten Commandments, including counsel for the plaintiffs in *Glassroth v. Moore*¹ and *amicus* briefs in *McCreary County v. ACLU of Kentucky*² and *Van Orden v. Perry*.³ In addition, Americans United has extensively reported in its award-winning magazine, *Church and State*, on the Religious Right's movement to use public displays of the Ten Commandments to assert religious dominance over

¹ *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

² *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 125 S. Ct. 2722 (2005).

³ *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854 (2005).

government and over those who subscribe to minority faiths or to no faith at all. We believe our legal expertise in the realm of Establishment Clause law generally and public displays of the Decalogue in particular, combined with our extensive experience with the Ten Commandments movement, will provide a unique perspective and assist this Court in evaluating whether the Dixie County Ten Commandments monument incites the religiously-based civic divisiveness that the Establishment Clause was intended to prevent, and whether the monument should, therefore, be deemed unconstitutional.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish women's Zionist membership organization in the United States, with over 300,000 Members, Associates and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education and youth institutions in Israel, Hadassah has a proud history of protecting the rights of the Jewish community and women in the United States. Hadassah is committed to supporting the fundamental principle of Separation of Church and State, which has served as a guarantee for religious freedom, and tolerance of American religious diversity. Religious symbols such as the Ten Commandments belong in houses of worship or homes, rather than in government buildings or on public or government property.

The Sikh American Legal Defense and Education Fund (“SALDEF”) is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a hospitable environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF believes that it can attain these goals by helping to protect the religious and civil liberties of people of all backgrounds, and has participated as *amicus curiae* in numerous federal court cases.

UNITED SIKHS is a UN-affiliated NGO whose mission is to protect disadvantaged communities through international civil and human rights advocacy, humanitarian aid, and health and education initiatives. In supporting religious freedom worldwide, UNITED SIKHS has seen the danger that arises when the dominant / majority religion obtains government’s official endorsement. Often, such an endorsement, even if indirect, comes at a tremendous cost to the identity, and ultimately, the viability of minority religions within that state.

AUTHORITY TO FILE

The parties have consented to the filing of this brief.

RULE 29(C)(5) STATEMENT OF COMPLIANCE

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF ISSUES

Amici adopt the appellee's statement of issues.

SUMMARY OF ARGUMENT

By arguing for the right to erect or maintain a display of the Ten Commandments on government-owned land, Dixie County seeks to turn the Establishment Clause on its head. The goal of the First Amendment’s Religion Clauses “is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent in a pluralistic society.”⁴ As the religious diversity in the country has increased, however, the Religious Right has perceived a growing threat to — in fact, an attack on — Christianity. In response to this perceived attack, the Religious Right has appropriated the Ten Commandments as a symbol of Christian dominance in an attempt to cast religious minorities and the non-religious as outsiders.

Contemporary presentations of the Decalogue on government land thus communicate a message to non-Christians of outsider status in American political life — creating the very situation that the First Amendment was intended to avoid. This message is accentuated in the monument at issue here, both by the sectarian, distinctively Christian version of the Ten Commandments that the monument presents, and by the exhortation to “LOVE GOD AND KEEP HIS COMMANDMENTS” at the monument’s base. Dixie County’s attempt to use

⁴ *McCreary County*, 545 U.S. at 881, 125 S. Ct. at 2746 (O’Connor, J., concurring).

public-forum doctrine to hide government speech in the clothing of private speech is an oft-used tactic of the Religious Right that fails here as a matter of both law and fact. The district court's decision should be affirmed.

ARGUMENT

I. The Religious Right has Appropriated the Ten Commandments as a Symbol of Christian Dominance.

A. The Religious Right Perceives America's Increasing Religious Diversity as a War on Christianity.

In response to America's increasing religious diversity, the Religious Right in recent decades has embraced the goal to "reclaim America for Christ, *whatever the cost.*"⁵ The late Jerry Falwell, one of the movement's founders, described its mission this way:

Modern U.S. Supreme Courts have raped the Constitution and raped the Christian faith and raped the churches by misinterpreting what the founders had in mind in the First Amendment of the Constitution. * * * [W]e must fight against those radical minorities who are trying to remove God from our textbooks, Christ from our nation. We must never allow our children to forget that this is a Christian nation. We must take back what is rightfully ours.⁶

⁵ D. JAMES KENNEDY, *CHARACTER & DESTINY: A NATION IN SEARCH OF ITS SOUL* 91 (1994) (emphasis added).

⁶ *IRS Fines Falwell for Partisan Politicking As TV Preacher Plans New Moral Majority*, *CHURCH & STATE*, May 1993, at 14 (quoting sermon delivered at Thomas Road Baptist Church).

George Grant, who served as the executive director of Coral Ridge Ministries (now known as Truth in Action Ministries), an organization that is at the forefront of the Religious Right movement, declared:

Christians have an obligation, a mandate, a commission, a holy responsibility to reclaim the land for Jesus Christ — to have dominion in the civil structures, just as in every other aspect of life and godliness. But it is dominion we are after. Not just a voice. It is dominion we are after. Not just influence. It is dominion we are after. Not just equal time. It is dominion we are after. * * *

Thus, Christian politics has as its primary intent the conquest of the land — of men, families, institutions, bureaucracies, courts, and governments for the Kingdom of Christ. It is to reinstitute the authority of God’s Word as supreme over all judgments, over all legislation, over all declarations, constitutions, and confederations.⁷

The late head of Truth in Action Ministries, D. James Kennedy, made clear that it was the Religious Right’s perceived threat by religious minorities that compelled it to assume a mission of “biblical” proportions: “Christians did not start the culture war but * * * we are going to end it. That is a fact, and the Bible assures us of victory.”⁸

⁷ GEORGE GRANT, CHANGING OF THE GUARD: POLITICAL BLUEPRINTS FOR POLITICAL ACTION 50-51 (1987), *available at* http://www.garynorth.com/freebooks/docs/pdf/the_changing_of_the_guard.pdf.

⁸ KENNEDY, *supra* note 5, at 76.

A key technique in fostering this “us-against-them” mentality is the portrayal of Christians as victims on every front. Vision America’s founder, Rick Scarborough, expanded on the message that Christianity is under attack and that Christians must resist by imposing religious values through government. In 2006, his organization hosted a national conference entitled, “The War on Christians And The Values Voter,” which was widely attended by members of Congress and leaders of the Religious Right.⁹ One of the speakers at the conference, Janet Folger Porter, advanced this theme in a book she wrote in 2008 entitled “The Criminalization of Christianity.” Porter is the founder of Faith2Action, whose mission is to “[t]urn[] people of faith into people of action to win the cultural war together for life, liberty, and the family.”¹⁰

Recently, the Religious Right’s strategy has been to engage in out-and-out historical revisionism to claim that the Constitution of the United States applies

⁹ Official presenters included former Sen. Tom DeLay, Sen. John Cornyn, Former Ambassador Alan Keyes, Religious Right radio-show-host Janet Parshall, Faith2Action founder and head Janet Folger Porter, and Eagle Forum head Phyllis Schlafly. *See Success Stories*, VisionAmerica.com, <http://www.visionamerica.us/success-stories/> (last visited Oct. 10, 2011).

¹⁰ *See About Us*, FAITH2ACTION.COM, http://www.f2a.org/index.php?option=com_content&view=article&id=392&Itemid=175 (last visited Oct. 10, 2011).

only to Christians. For example, Bryan Fischer of the American Family Association has asserted that

Islam has no fundamental First Amendment claims, for the simple reason that it was not written to protect the religion of Islam. Islam is entitled only to the religious liberty we extend to it out of courtesy.¹¹

Similarly, David Barton, founder of Wallbuilders, Inc., which filed an *amicus curiae* brief in support of Dixie County, claims that the United States was intended to be a “Christian nation,” that the separation of church and state is a myth, and that the nation’s laws should be based on Christian Scripture.¹²

B. The Ten Commandments Have Been Usurped as the Principal Weapon in the War Against Religious Diversity.

At the forefront of the Religious Right’s battle to co-opt America stands “a potent symbol of [the movement’s] hopes for changing the course of the nation”: the Ten Commandments.¹³ Decalogue displays thus have become “the front line of

¹¹ Bryan Fischer, *Islam and the first amendment: privileges but not rights*, RENEW AMERICA BLOG (Mar. 24, 2011), <http://www.renewamerica.com/columns/fischer/110324>.

¹² See Yoni Appelbaum, *American Scripture: How David Barton Won the Christian Right*, THE ATLANTIC.COM (May 10, 2011), available at <http://www.theatlantic.com/politics/archive/2011/05/american-scripture-how-david-barton-won-the-christian-right/238603/>.

¹³ Jane Lampman, *For Evangelicals, A Bid to ‘Reclaim America,’* CHRISTIAN SCI. MONITOR, Mar. 16, 2005, at 16, available at <http://www.csmonitor.com/2005/0316/p16s01-lire.html>. The Religious Right specifically has characterized legal challenges to Ten Commandments displays as the front in the war on Christianity.

a proxy war, standing in for the bigger issue of the place of religion in public life.”¹⁴ Accordingly, the Religious Right has waged a highly public, decade-long crusade to erect new Ten Commandments displays on public land and in public buildings across the country.¹⁵

As part of a carefully orchestrated movement, the Religious Right has launched several campaigns to encourage and facilitate displays of the Ten Commandments on public grounds. For example, Faith and Action has sponsored

See, e.g., National Briefing/South/Alabama: New Suit Over Court Monument, N.Y. TIMES, Aug. 26, 2003, available at <http://www.nytimes.com/2003/08/26/us/national-briefing-south-alabama-new-suit-over-court-monument.html> (supporters of Ten Commandments displayed by then-Alabama Supreme Court Justice Roy Moore filed complaint to block its removal, asserting that “any attempt to remove the Ten Commandments monument is * * * an attack on their Christian beliefs”).

¹⁴ Alan Cooperman, *Christian Groups Plan More Monuments; Many Expect Confusion and Litigation on Ten Commandments to Continue*, WASH. POST, June 28, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701583.html> (“Within hours of yesterday’s Supreme Court decision [in *Van Orden*] * * * Christian groups announced a nationwide campaign to install similar displays in 100 cities and towns within a year. ‘We see this as an historic opening, and we’re going to pursue it aggressively,’ said the Rev. Patrick J. Mahoney, director of the Washington-based Christian Defense Coalition.”).

¹⁵ *See, e.g., Mathew D. Staver, The Comeback of the Ten Commandments*, NAT. LIBERTY J., Mar. 2006, at 10, 14 (“Since the ACLU is playing chicken again, we will display the Ten Commandments throughout the states covered by the Seventh Circuit (Illinois, Wisconsin and Indiana).”); *Ten Commandments replacing abortion as key Christian issue scholar says*, ASSOCIATED PRESS, Jan. 1, 2000, available at <http://www.freedomforum.org/templates/document.asp?documentID=8836> (“With its message on yard signs, book covers and on the walls of courthouses and public classrooms, a Ten Commandments movement is pushing forward in Kentucky and nationwide.”).

its “Ten Commandments Project,” which aims to “restore the moral foundations of our American culture” by placing displays of the Ten Commandments in public buildings.¹⁶ The Project involved making public presentations of Ten Commandments plaques to at least 400 government officials, who then displayed the plaques in their public offices.¹⁷ Similarly, in 1999, the Family Research Council established the “Hang Ten” campaign, with the goal of displaying the Ten Commandments in congressional offices, public schools, and other public buildings. At least 41 members of Congress vowed to post framed copies of the Ten Commandments in their offices and to encourage the public display of the Ten Commandments nationwide.¹⁸

In the twelve years since these campaigns were launched, governmental bodies across the country have considered, and some have passed, resolutions or laws supporting displays of the Ten Commandments on public land or in public facilities. For example, in Missouri, state legislators proposed a resolution

¹⁶ Sarah Posner, *FundamentalList*, THE AMERICAN PROSPECT, Sept. 24, 2008, available at http://prospect.org/cs/articles?article=the_fundamentalist_092408.

¹⁷ *See Our Program Focus*, FAITH & ACTION, <http://www.faithandaction.org/web/about-faith-action/the-how/> (last visited Oct. 10, 2011).

¹⁸ *Members of Congress ‘Hang Ten’: Family Research Council and Members of Congress Launch National Campaign To Post Ten Commandments*, PR NEWSWIRE, Oct. 21, 1999; Sean Scully, *Ten Commandments Urged for Nationwide Public Display*, WASH. TIMES, Oct. 22, 1999, at A11.

declaring that the Founding Fathers “recognized a Christian God” and that therefore voluntary school prayer and religious displays on public property are not a violation of church-state separation.¹⁹ In 2000, Indiana state legislators passed a bill to allow schools, courts and other public facilities to post the Ten Commandments.²⁰ Kentucky,²¹ South Dakota²² and Oklahoma²³ subsequently

¹⁹ Tim Townsend and Matthew Franck, *Proposed House Resolution on Religion Irks Some Here*, ST. LOUIS POST-DISPATCH, Mar. 4, 2006, available at <http://www.jewsonfirst.org/06a/sep080.html>.

²⁰ Hanna Rosin and William Claiborne, *Taking the Commandments Public: Indiana Passes Bill Allowing Display in Schools, Other Government Facilities*, WASH. POST, Feb. 8, 2000; see also H.R. 1180, 111th Gen. Assemb., 2nd Reg. Sess. (Ind. 2000); IND. CODE § 4-20.5-21-2 (2006); IND. CODE § 36-1-16 (2006).

²¹ See S. J. Res. 57, Gen. Sess. (Ky. 2000) (authorizing the posting of the Ten Commandments in “classrooms by any public school teacher and on other public property, when incorporated into an historical display along with other historic documents * * *”), available at <http://www.lrc.state.ky.us/Statrev/ACTS2000/0444.pdf>.

²² S.D. CODIFIED LAWS § 13-24-17.1 (2011).

²³ See Marie Price, *Ten Commandments Amendment Added to Bill Approved by Oklahoma Senate*, THE J. REC., Mar. 14, 2006.

have adopted similar laws.²⁴ Twelve years later, “Hang Ten” legislation continues to be introduced in the states.²⁵

Federal legislators also have shown their support. In 2003, Rep. Robert Aderholt of Alabama introduced, for the seventh year in a row, the Ten Commandments Defense Act.²⁶ Bemoaning that “[d]isputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expressions of religious faith,” the bill reserved to the states “the power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions.”²⁷ When that effort failed, Sen. Richard Shelby of Alabama and Rep. Aderholt introduced the “Constitution Restoration Act” in 2004, and again in 2005. That bill sought to strip the Supreme Court of jurisdiction over cases concerning public officials’ “acknowledgment of

²⁴ See B. A. Robinson, *The Ten Commandments; Legal Developments: 1999*, available at http://www.religioustolerance.org/chr_10c3.htm.

²⁵ See Anna Claire Stamps, *Stupid Bills Waste Time*, AUBURN PLAINSMAN, Mar. 17, 2005; Jason Bacaj, *Sen. Gerald Dial introduces Ten Commandments amendment*, THE ANNISTON STAR, Mar. 3, 2011.

²⁶ See Mary Orndorff, *Aderholt Renews Push for Commandments Bill*, BIRMINGHAM NEWS, Sept. 5, 2003, available at <http://www.al.com/specialreport/index.ssf?commandments/tenb21.html>.

²⁷ H.R. 2045, 108th Cong. §§ 2-3 (2003).

God as the sovereign source of law, liberty, or government.”²⁸ More than 50 Representatives signed onto the bill as cosponsors,²⁹ and the bill garnered nine cosponsors in the Senate.³⁰ Several states passed resolutions urging Congress to enact the legislation.³¹

C. The Text of the Dixie County Monument Manifests a Message of Christian Dominance.

Displaying the Ten Commandments on government property not only requires choosing a religious text over a nonreligious one, it also necessitates a choice among religions.³² It comes as no surprise that the Dixie County monument contains an explicitly Christian version of the Ten Commandments, placing it in contrast to the Ten Commandments monument upheld in *Van Orden v. Perry*,

²⁸ H.R. 1070, 109th Cong. (2005).

²⁹ *Id.*

³⁰ S. 520, 109th Cong. (2005).

³¹ Meghann M. Cuniff, *Religion is Realm of State Courts, Measure Says; Panel Backs Bill that Aims to Limit Federal Role*, SPOKESMAN REV. (Idaho), Mar. 21, 2006, at B2; S. Con. Res. 23, 2d Spec. Sess. (La. 2006), 2006 LA S.C.R. 23 (NS).

³² *See Van Orden*, 545 U.S. at 717-718, 125 S. Ct. at 2879-80 (Stevens, J., dissenting).

which was the byproduct of an attempt to produce a non-denominational version of the text.³³

The most notable difference among the Jewish and Christian versions of the Ten Commandments may be the difference between “THOU SHALT NOT MURDER” and “THOU SHALT NOT KILL.”³⁴ As is shown on the depiction of Moses holding the tablets on the East Wall frieze of the Courtroom of the Supreme Court, the Hebrew word in the Sixth Commandment is “murder.” The Hebrew word for murder was translated in the King James Bible as “kill.”³⁵ Although there obviously is a significant difference between the two words, virtually (if not actually) all of the Decalogue displays that are involved in cases like this one have contained the “THOU SHALT NOT KILL” formulation.³⁶

³³ See *id.* at 701, 125 S. Ct. at 2869-70 (Breyer, J., concurring in the judgment); *but see id.* at 717, 125 S. Ct. at 2879 (Stevens, J., dissenting).

³⁴ See *id.* at 718 n.16, 125 S. Ct. at 2880 n.16 (Stevens, J., dissenting).

³⁵ See *id.*

³⁶ See, e.g., *Glassroth*, 355 F.3d at 1285 (quoting King James Version, Exodus 20:2-17); *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624, 624 (6th Cir. 2005) (quoting King James Version, Exodus 20:3-17); *Books v. Elkhart County, Indiana*, 401 F.3d 857, 860 (7th Cir. 2005) (quoting King James Version, Exodus 20:3-17).

Moreover, in the Jewish faith, the words “I AM THE LORD THY GOD” constitute the first of the Ten Commandments.³⁷ These words were inscribed at the top of the *Van Orden* monument,³⁸ but do not appear in the Dixie County monument. Instead, the Dixie County monument — like the King James Bible³⁹ — lists “THOU SHALT HAVE NO OTHER GODS BEFORE ME” as the First Commandment, further confirming that the monument communicates a sectarian message.

Indeed, many residents of Dixie County, in public responses to the controversy over the Ten Commandments monument, have interpreted the monument as specifically Christian. In a letter to the editor published in the *Dixie County Advocate*, a local teenager wrote of the Ten Commandments monument, “I’m just saying how happy I am to finally see something Christian besides the churches here in Dixie County.”⁴⁰ Another Dixie County resident, in a letter to the editor, positioned the monument as a stepping stone to increased Christianity in public life, writing, “The first move has been made, now its [sic] time for people to

³⁷ J. Hertz, *The Pentateuch and Haftorahs* (Exodus 22:2).

³⁸ *Van Orden*, 545 U.S. at 738-39, 125 S. Ct. at 2893 (Souter, J., dissenting).

³⁹ *See Glassroth*, 355 F.3d at 1285 (quoting King James Version, Exodus 2:02-17).

⁴⁰ Jessica Cardenas, Letter to the Editor, *DIXIE CNTY. ADVOCATE*, Dec. 7, 2006, at 2A.

stand up and have Prayer in Schools.”⁴¹ Still others have understood the monument to specifically ratify a culture in which non-Christians are unwelcome. One resident, responding to a letter critical of the monument, wrote, “if you * * * don’t like it, don’t come here.”⁴² Another, displeased with the monument, expressed his concern that the Ten Commandments on the courthouse steps “sends a message that the Dixie County government recognizes only one faith, the Holy Book. No others need apply.”⁴³

In addition, the monument exhorts citizens, in large type at its base, to “LOVE GOD AND KEEP HIS COMMANDMENTS.” The inclusion of this directive violates the Supreme Court’s instruction that encouragement to “venerate and obey” the Commandments “is not a permissible state objective under the Establishment Clause.”⁴⁴ While displaying the Ten Commandments in an attempt to encourage compliance with the Commandments is impermissible, the courts

⁴¹ Allen and Vickie Cook, Letter to the Editor, DIXIE CNTY. ADVOCATE, Dec. 7, 2006, at 2A.

⁴² Wayne Griner, Letter to the Editor, DIXIE CNTY. ADVOCATE, Dec. 7, 2006, at 8A.

⁴³ William Richard Dempsey, Letter to the Editor, DIXIE CNTY. ADVOCATE, Dec. 7, 2006, at 8A.

⁴⁴ *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 194 (1980).

have occasionally approved displays that were enacted for secular reasons.⁴⁵ For example, a “symbolic depiction” of the Ten Commandments that does not display the actual text is more likely to be “seen as alluding to a general notion of law, not a sectarian conception of faith.”⁴⁶ Thus, in *King v. Richmond County*, this Court found that a county’s use of a pictograph of the Ten Commandments, which did not include any religious text, intertwined with a sword on a court clerk’s official seal served a secular purpose of authenticating documents.⁴⁷ Similarly, Justice Breyer in *Van Orden* stated that the Ten Commandments can also “convey a historical message (about a historic relation between those standards and the law).”⁴⁸ But the inclusion of the words “LOVE GOD AND KEEP HIS COMMANDMENTS” demonstrates that the Dixie County monument cannot be defended on these grounds.

D. Dixie County’s Reliance on the Public Forum Doctrine is an Oft-Used Tactic in the Religious Right’s War Against Religious Diversity.

Dixie County argues that the Decalogue display does not violate the Establishment Clause because the display is merely the expression of a private

⁴⁵ *King v. Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 615, 109 S. Ct. 3086, 3112 (1989)).

⁴⁶ *McCreary County*, 545 U.S. at 868, 125 S. Ct. at 2726.

⁴⁷ *King*, 331 F.3d at 1278.

⁴⁸ *Van Orden*, 545 U.S. at 689, 125 S. Ct. at 2870 (Breyer, J., concurring).

party's views in a public forum. As we show below, however, Dixie County was engaging in its own expressive conduct by accepting and displaying the Ten Commandments monument, and then sought to cover up that fact with a transparently disingenuous resort to public forum jurisprudence.

After the Supreme Court's decision in *Stone v. Graham*, which held that a Kentucky law requiring the posting of the Ten Commandments in public schools violated the Establishment Clause,⁴⁹ governmental bodies seized on various strategies to circumvent that holding. One such strategy was to create a purported limited public forum and portray a display of the Ten Commandments as private speech. The notion that the constraints imposed by the Establishment Clause could be avoided through the public forum doctrine quickly gained momentum within the Religious Right movement:

Ten Commandments monuments that have been donated to government by private parties may survive an Establishment Clause challenge if they can be characterized as private religious speech in the public square.

* * *

[T]he increasingly visible doctrine of forum analysis may provide an opportunity for Ten Commandments proponents to finally go on the offensive and assert their

⁴⁹ *Stone*, 449 U.S. at 41, 101 S. Ct. at 193.

Free Speech and Free Exercise rights in the public square.⁵⁰

This tactic has been used repeatedly throughout the country. For example, in Haskell County, Oklahoma, the Board of Commissioners permitted a private citizen to erect a large, stone Ten Commandments monument on the courthouse lawn.⁵¹ Despite the Board's contention that this permanent fixture on public property was private speech, the Tenth Circuit declined to analyze the case under the limited public forum doctrine.⁵² In Johnson County, Tennessee, after the county commission received complaints about a government-sponsored Ten Commandments display in the county courthouse, the commission created a "public forum" in the courthouse lobby for displays relating to the development of American law and then accepted a Ten Commandments display as the first and only display within the alleged forum.⁵³ This tactic also was used by the city council of Bloomfield, New Mexico, which adopted a policy allowing for the

⁵⁰ Bradley M. Cowan, *The Decalogue in the Public Forum: Do Public Displays of the Ten Commandments Violate the Establishment Clause?*, 2 AVE MARIA L. REV. 183, 203 (2004).

⁵¹ *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 789-91 (10th Cir. 2009).

⁵² *Id.* at 797 n.8.

⁵³ *See Stewart v. Johnson County, Tenn.*, No. 2-11-cv-00012 (E.D. Tenn., filed Jan. 13, 2011).

donation of a monument that relates to the “development of the law and government of the city, state or United States” *after* the council had already passed a resolution approving the display of a Ten Commandments monument.⁵⁴

Likewise, here, in a half-hearted attempt to stave off allegations of unconstitutionality, the Dixie County Board of Commissioners approved a set of “Monument Placement Guidelines,” which purported to create a limited public forum on the courthouse steps.⁵⁵ The Board’s approval of the Guidelines and posting of a disclaimer came nearly three years after its approval of the Ten Commandments monument and two years after the monument’s installation.⁵⁶ The timing of the Board’s action, which coincided with the district court’s denial of Dixie County’s motion for summary judgment on standing in this litigation, suggests that the County was grasping for a legal strategy rather than earnestly attempting to create a limited public forum for citizen self-expression. Indeed, the Board’s Guidelines require that all monuments meet a set of aesthetic criteria, which, not surprisingly, require conforming to the specifications of the already-

⁵⁴ See Jenny Kane, *Bloomfield To Get 10 Commandments*, ALBUQUERQUE JOURNAL ONLINE EDITION, Jun. 15, 2011; Journal Staff, *Bloomfield Inches Toward 10 Commandments Display*, ALBUQUERQUE JOURNAL ONLINE EDITION, Jul. 11, 2007.

⁵⁵ Dkt. 150 at 3-4; Dkt. 116-2 at 31, § 1.1.

⁵⁶ Dkt. 150 at 4; Dkt. 116-2 at 32, § 1.4; Dkt. 120-4 at 20.

existing Ten Commandments monument.⁵⁷ And the County failed to actually apply the financial requirements of the Guidelines to the Ten Commandments monument. The Guidelines purport to require those who erect displays to post bonds of \$10,000 to \$50,000, and to obtain general liability insurance coverage of \$5 million per occurrence, naming the County and the Board as insureds.⁵⁸ The Board, however, has not applied these burdens to the Ten Commandments display, requiring neither the posting of a bond nor the purchase of insurance.⁵⁹ Such “selective access does not transform government property into a public forum.”⁶⁰

Instead, the government’s actions make it abundantly clear that the Ten Commandments monument on the steps of the Dixie County courthouse is the

⁵⁷ Dkt. 116-2 at 32, § 1.3(b).

⁵⁸ Dkt. 116-2 at 31, § 1.1.

⁵⁹ Dkt. 150 at 4; Dkt. 116-2 at 4, Anderson Depo. 38:25-39:5; Dkt. 116-2 at 10, Bellot Depo. 51:9-11.

⁶⁰ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303, 120 S. Ct. 2266, 2276 (2000) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47, 103 S. Ct. 948, 956 (1983)). Although in *Santa Fe* the Court addressed the question of whether a policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause, its discussion of what constitutes a public or private forum for First Amendment purposes is relevant for purposes of any analysis involving the balancing of First Amendment rights.

government’s own speech.⁶¹ This point is driven home by the monument’s unattended, permanent nature. When the government displays a six-ton granite Ten Commandments monument on the steps of the county courthouse, a reasonable observer likely will assume that the government agrees with the content of the monument:

[B]ecause property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely — and reasonably — interpret them as conveying some message on the property owner’s behalf.⁶²

Dixie County was engaging in its own expressive conduct by accepting and displaying the Ten Commandments monument. Consequently, the public forum doctrine has no application to this case.⁶³ “[A]s a general matter, forum analysis

⁶¹ *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 470, 129 S. Ct. 1125, 1132 (2009) (“Permanent monuments displayed on public property typically represent government speech” even if the monument is privately financed).

⁶² *Id.* at 471, 129 S. Ct. at 1133.

⁶³ *Id.* at 464, 129 S. Ct. at 1129 (“We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”).

simply does not apply to the installation of permanent monuments on public property.”⁶⁴

CONCLUSION

The District Court correctly concluded that Dixie County’s acceptance and display of a Ten Commandments monument on the steps of the Dixie County courthouse constitutes impermissible government speech. For these reasons and those set forth in the appellee’s brief, *amici* respectfully ask the Court to affirm the District Court’s judgment.

Respectfully submitted,

By: _____
Alex J. Luchenitser

Ayesha N. Khan, Legal Director
Alex J. Luchenitser, Senior Litigation
Counsel
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
1301 K Street, N.W.
Suite 850, East Tower
Washington, DC 20005
Phone: (202) 466-3234
Fax: (202) 898-0955
khan@au.org / luchenitser@au.org

⁶⁴ *Id.* at 480, 129 S. Ct. at 1138.

Barbara E. Etkind
Carrie Collier-Brown
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Washington, DC 20004
Phone: (202) 274-2950
Fax: (202) 274-2994
barbara.etkind@troutmansanders.com
carrie.collierbrown@troutmansanders.com

Hansdeep Singh
UNITED SIKHS
JAF POB 7203
New York, NY 10116
Phone: (646) 315-3909
law-usa@unitedsikhs.org

Counsel for amici curiae

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: _____
Alex J. Luchenitser
Counsel for amici curiae

CERTIFICATE OF SERVICE

I certify that on this the 9th day of November 2011, I caused seven copies of the foregoing brief to be dispatched by first-class U.S. mail to the clerk of the U.S. Court of Appeals for the Eleventh Circuit and one copy of the brief to be served by first-class U.S. mail on counsel for each party:

Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
Counsel for Plaintiff-Appellee

Mary E. McAlister
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, Virginia 24506
Counsel for Defendant-Appellant

By: _____
Carrie Collier-Brown
Counsel for amici curiae