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No. 10-566

IN THE SUPREME COURT OF THE UNITED STATES

McCREARY COUNTY, KENTUCKY, et. al.,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

In their effort to dissuade this Court from accepting review, Respondents have aptly demonstrated why it is critical that the Petition be granted. Respondents acknowledge that the identical display has been judged to be both constitutional and unconstitutional, but argue that those divergent opinions are not inconsistent, just reflective of a "fact-intensive" Establishment Clause analysis under *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Respondents ask this Court to apply "law of the case" and *stare decisis*, concepts designed to foster consistent, principled constitutional analysis, to perpetuate the inconsistent, ad hoc determinations spawned by continuing reliance upon *Lemon.* This Court's prior statements about the confusion and conflict *Lemon* has created illustrate why it should decline Respondents' invitation.

"The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden v. Perry,* 545 U.S. 677, 697 (2005) (Thomas, J. concurring in judgment). "The outcome of constitutional cases ought to rest on firmer grounds than the

personal preferences of judges." *Id.* "It is irresponsible to make the Nation's legislators walk th[e] minefield" of Establishment Clause jurisprudence that Respondents are championing. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 756 n.3 (1995).

None of the doctrines or authorities cited by Respondents should persuade this Court to maintain the status quo that has become a trap for unsuspecting legislators and "purgatory" for lower courts. *ACLU of Ky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). This Court should grant the Petition and provide legislators and lower courts with the objective, principled analytical standard that they need to comply with the Establishment Clause.

I. THE SIXTH CIRCUIT'S DECISION PRESENTS A GENUINE CONFLICT WITH THIS COURT'S PRECEDENT THAT CANNOT BE AVOIDED BY DIVERSIONS OR REFERENCE TO "LAW OF THE CASE."

The Sixth Circuit correctly quoted this Court's statement that the "counties' past actions do not 'forever taint any effort on their part to deal with the subject matter'" of the Foundations of American Law and Government Display ("Foundations Display"). *ACLU of Ky.*

v. McCreary County, 607 F.3d 439, 449 (6th Cir. 2010) (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-874 (2005)). It does not follow, however, as Respondents claim, that the Sixth Circuit's decision comports with that directive. (Opposition Brief, pp. 14-15). The Sixth Circuit acknowledged that this Court did not adopt a "once tainted always tainted" approach, but then adopted that approach itself in its dismissive discussion of the post-2005 evidence surrounding Petitioners' Foundations Displays. *Id.* at 448.

The Sixth Circuit did not engage in the thoughtful analysis required to invalidate a passive religious display even under *Lemon*'s ill-defined purpose prong. *Id.* at 448. Instead, the panel merely concluded that the counties had not done enough to "purge the taint." *Id.* The panel provided no direction on how or why the counties' efforts fell short, nor on what would be required to avoid violating the Establishment Clause, indicating that the panel believed that nothing could be done to remove the "taint." *See id.* The panel further signaled that it believed the "taint" could not be purged when it criticized fellow panels of the same Circuit for purportedly ignoring this Court's reliance on the content of the Foundations Displays in McCreary and Pulaski counties. *Id.* at 449 n. 5. "The *Mercer* and *Grayson* panels would have us believe that the

Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham." *Id.* (referring to *Mercer County*, 432 F.3d 624 (6th Cir. 2005) and *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010), which found identical Foundations Displays constitutional). The panel clearly indicated that, regardless of whether it accurately quoted this Court's statement that the Displays are not forever tainted, it believes that the Displays are forever tainted and must be found to violate *Lemon*'s purpose prong regardless of other factors. *Id.*

Instead of directly addressing that clear conflict between the panel's decision and this Court's decision in *McCreary County v. ACLU*, 545 U.S. 844 (2005), Respondents try to create a diversion by accusing Petitioners of improperly construing the panel opinion. (Opposition Brief, pp. 14-16). Respondents erroneously claim that Petitioners quote the Sixth Circuit as holding that the contents of the Foundations Displays violate *Lemon*'s "effect" prong. (Opposition Brief, p. 16, citing Petition at 15, 18). However, no more than a cursory glance at the Petition is necessary to confirm that Petitioners correctly stated that the Sixth Circuit did not consider the effects prong. (Petition at 15, 18).

Looking beyond Respondents' diversion to what the Sixth Circuit actually did, it is apparent that the panel failed to adhere to this Court's ruling in *McCreary County*. Rather than engaging in a serious, impartial analysis of the post-2005 evidence proffered by Petitioner, the panel summarily dismissed it as insignificant and pronounced that the Foundations Displays remain "tainted" by a religious purpose. *ACLU v. McCreary County*, 607 F.3d at 448. As discussed above, the panel also made it clear that it believed the "taint" could not be purged.

Resting upon their (incorrect) premise that the Sixth Circuit's ruling is consistent with *McCreary County v. ACLU,* 545 U.S. at 844, Respondents claim that the panel properly applied the "law of the case" doctrine when it concluded that the Foundations Displays remain "tainted." (Opposition Brief, p. 17). However, as Respondents acknowledge, the lower court's adherence to law of the case does not foreclose this Court's review where extraordinary circumstances exist, such as where the initial decision was clearly erroneous and would work a manifest injustice. (Opposition Brief, p. 17, citing *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988). In fact, in *Christianson,* this Court held that a court has the power to revisit its own or coordinate courts' prior decisions in any

circumstance, but should, as a rule, do so only in extraordinary circumstances. *Id.* Respondents conclude that there are no such extraordinary circumstances here because the panel followed this Court's precedents. (Opposition Brief, p. 17). Respondents are incorrect both because extraordinary circumstances are not defined by whether a lower court follows precedent and because the panel did not follow this Court's precedent. In fact, the panel's failure to follow this Court's precedent creates the extraordinary circumstances of an intra-circuit conflict, inter-circuit conflicts, and a hopelessly confused analytical standard which militate in favor of this Court's review.

Furthermore, this Court explicitly said that it was not creating an established rule of law that should be applied in subsequent proceedings. *McCreary County*, 545 U.S. at 873-874. To the contrary, this Court specifically cautioned against such an approach when it said that its decision should not be read to hold that the Foundations Displays were forever "tainted" by religious purpose. *Id.* Noting that the 2005 decision addressed a preliminary injunction, this Court explicitly said that district courts could revisit the question if factual circumstances change. *Id.* Consequently, law of the case did not prevent the Sixth Circuit and does not prevent this

Court from reviewing the issue of whether the counties can hang the Foundations Displays in their courthouses without violating the Establishment Clause.

The conflict caused by the panel's failure to follow this Court's precedents is real and substantial. It cannot be erased by casting aspersions on Petitioners or other Sixth Circuit panels or by misapplying "law of the case." The conflict presented by the Sixth Circuit's ruling should be resolved by this Court.

II. THE SIXTH CIRCUIT'S DECISION CREATES REAL INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT SHOULD BE RESOLVED BY THIS COURT.

Respondents' herculean efforts to demonstrate that there is no conflict between the Sixth Circuit's decision and other circuit court decisions actually have the opposite effect, as they demonstrate that there is no principled way to reconcile decisions that reach divergent conclusions about identical passive religious displays. More importantly, they point to the larger problem of the confusing, unpredictable and unworkable standard under which legislators and lower courts must labor when trying to comply with the Establishment Clause.

Respondents assert that the obviously inconsistent decisions of the panel here finding the Foundations Displays unconstitutional and the Sixth Circuit panels in *Mercer County* and *Grayson County* finding identical displays constitutional are, in fact, consistent. (Opposition Brief, p. 18). Respondents try to justify that incredible conclusion by pointing to differences in the "sectarian heritage" of the displays. (Opposition Brief, p. 21). However, as this Court said in *McCreary County v. ACLU*, the fact that a governmental agency might have acted with an impermissible religious purpose in the past does not "forever taint" the display for the future. *McCreary County*, 545 U.S. at 874. Consequently, a purported "tainted history" of one county's display is not a distinction that can justify divergent conclusions regarding the constitutionality of identical displays. As this Court made clear in *McCreary County*, the lower courts cannot use the purported tainted history of a display to justify perpetual differential constitutional analysis. *Id.* Neither can Respondents use the purported tainted history of these Foundations Displays to conclude that the inconsistent rulings in *Mercer County*, *Grayson County* and *McCreary County* are in fact consistent. Respondents cannot escape the fact that the panel's decision in this case created an intra-circuit conflict that should be resolved by this Court.

The fact that the Sixth Circuit refused to grant rehearing en banc does not alter the conclusion that there is an intra-circuit conflict. Respondents speculate that the court's denial of rehearing en banc might be confirmation that there is no conflict, or at least not one worth the court's attention. (Opposition Brief, p. 20). However, Respondents' statement is just that – speculation – not a determination upon which this Court can base its decision. This Court's statement that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam), also does not support Respondents' conclusion that there is no intra-circuit conflict. In *Wisniewski*, this Court held that it was improper to use the Court's certification jurisdiction to resolve a panel's doubts about other panels' decisions in the first instance. *Id.* That is not the case here. The Sixth Circuit is not seeking a pre-emptive determination to avoid a conflict, but has already failed to reconcile existing conflicts. That creates the kind of conflict this Court should review and resolve under Supreme Court Rule 10(a).

Similarly, the divergence between this panel's decision and decisions by other circuits is a genuine conflict, not merely the "application of settled law to an entirely different set of facts," as Respondents contend.

(Opposition Brief, p. 22). As this Court has stated on numerous occasions, Establishment Clause analysis under *Lemon* is far from "settled law." *See e.g., Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 45 n. 1 (2004) (Thomas, J. concurring) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Van Orden v Perry,* 545 U.S. 677, 694 (2005) (Thomas, J. concurring in judgment) (Supreme Court's decisions in this area are incoherent). In addition, the other circuit decisions do not present "entirely different sets of facts" than those presented here. *See e.g., Books v. County of Elkhart,* 401 F.3d 857, 866 (7th Cir. 2005) (finding identical Foundations Display constitutional). Therefore, this is not a case of mere factual distinctions in otherwise harmonious rulings, as was the case in *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923).

The Sixth Circuit's opinion creates a real conflict of opinion and authority within the circuit and with other circuit courts on issues of tremendous importance to the public, *e.g.,* the proper test for analyzing Establishment Clause challenges to passive religious displays. As such, it merits this Court's review.

III. STARE DECISIS SHOULD NOT BE USED TO PERPETUATE THE INCONSISTENT, UNPRINCIPLED ANALYSES SPAWNED BY THE CONTINUING USE OF *LEMON*.

Claiming that *Lemon* is a "valid, workable test by which courts can gleen [sic] governmental purpose from readily discoverable facts," Respondents ask this Court to apply *stare decisis* and maintain the status quo. (Opposition Brief, p. 22-23). This Court's repeated criticisms of *Lemon* and the "sisyphean task of trying to patch together" its "'blurred, indistinct, and variable barrier," *Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 671 (1980) (Stevens, J., dissenting), show that the test is anything but workable. Instead, as this Court's statements attest, adherence to *Lemon* has put the Court on a course that is sure error, justifying exception from the general rule of respecting the Court's precedents. *Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 911-12 (2010).

Where, as is true with *Lemon*, a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," then the Court is justified in reconsidering the decision. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 818 (2009) (citing *Payne v. Tennessee,* 501

U.S. 808, 829-830 (1991)). Certainly, *stare decisis* is the preferred course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. However, when governing decisions are unworkable or are badly reasoned, as is *Lemon,* "this Court has never felt constrained to follow precedent." *Id.* "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Id.* at 828. (citing *Helvering v. Hallock,* 309 U.S. 106, 119 (1940)). "This is particularly true in constitutional cases, because in such cases "'correction through legislative action is practically impossible.'" *Id.* (citation omitted). The *Payne* court noted that the Court applied those principles to overrule 33 cases in the 20 years leading up to 1991. *Id.*

This Court should follow the same course here. The members of this Court have called *Lemon* incoherent, unintelligible and hopelessly confusing. *See, Van Orden,* 545 U.S. at 694, 697 (Thomas, J. concurring in judgment); *McCreary County*, 545 U.S. at 901 (Scalia, J. dissenting). It is the antithesis of the objective, principled constitutional standard required to distinguish the rule of law from "a dictatorship

of a shifting Supreme Court majority." *McCreary County*, 545 U.S. at 890 (Scalia, J. dissenting). *Lemon* has defied consistent application by the lower courts as evidenced by the intra-circuit and inter-circuit conflicts discussed above. *Lemon* has left this Court's Establishment Clause jurisprudence in "hopeless disarray." *Newdow*, 542 U.S. at 45 n.1 (Thomas, J. concurring). Rather than promoting "evenhanded, predictable, and consistent development of legal principles," *Payne*, 501 U.S. at 827, applying *stare decisis* to *Lemon* would perpetuate unpredictability, inconsistency and confusion. Consequently, *stare decisis* cannot be used, as Respondents request, to keep the "somnolent, docile and useful monster" of the *Lemon* test alive. *See Lamb's Chapel v. Central Moriches Union Free School Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J. concurring in the judgment).

The Sixth Circuit's opinion finding unconstitutional the identical Foundations Displays found constitutional by other Sixth Circuit panels and other circuit courts, and divergent opinions regarding similar passive religious displays, demonstrate the urgent need to revisit the *Lemon* test as a standard for Establishment Clause analysis. This Court should undertake that review and replace *Lemon* with an objective, workable standard that will foster the kind of principled analysis

indispensable to constitutional jurisprudence based upon the rule of law.

CONCLUSION

The panel's decision conflicts with precedents from this Court, decisions from other panels in the Sixth Circuit and decisions in other circuits. The inconsistent decisions finding identical passive religious displays constitutional in one county and unconstitutional in another and similar displays constitutional in one circuit but unconstitutional in another exemplify the pervasive conflict and uncertainty caused by the *Lemon* test. Continuing to rely upon *Lemon* creates unprincipled results which detract from the integrity of the judicial process. Maintaining the status quo would only exacerbate the problem. Therefore, this Court should not rely upon *stare decisis,* but should accept review and reconsider the continuing viability of *Lemon.*

For these reasons, the Petition should be granted.

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