No. 10-1512

In the Supreme Court of the United States

HON. JAMES DEWEESE, IN HIS OFFICIAL CAPACITY,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION
OF OHIO FOUNDATION, INC.,
Respondent.

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

BRIEF IN OPPOSITION

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July 18, 2011

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QUESTIONS PRESENTED

1. Does Respondent, ACLU, have standing under Article III to maintain an action against Petitioner under the Establishment Clause?

2. Does Bernard Davis, as a representational member of the ACLU, and an attorney who is required to appear regularly in the courtroom of Petitioner, Judge DeWeese, demonstrate sufficient injury to establish standing in this action because he is offended by the religious display which appears prominently on a courtroom wall of said courtroom?

3. Did the Sixth Circuit correctly find, based on the evidence presented, that the poster which Petitioner hung on his courtroom wall, violated the Establishment Clause?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent states as follows:

The American Civil Liberties Union of Ohio Foundation, Inc. has no parent corporations, and no publicly held corporation owns ten percent or more of the American Civil Liberties Union of Ohio Foundation, Inc.

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STATEMENT OF THE CASE

For the last ten years, Petitioner Judge DeWeese has continually tried to use his public courtroom as a pulpit, despite being repeatedly admonished by the federal courts that his conduct violated the First Amendment. Petitioner's Statement of the Case concedes some of the relevant facts and procedural history. Petition for Writ of Certiorari 3-12. (hereinafter, for convenience, cited as "Pet. for Cert."). A more complete description of the facts can be found in the Statement of Facts in the opinion of the Sixth Circuit Court of Appeals in this case, *ACLU of Ohio Found. v. DeWeese,* 633 F.3d 424 (6th Cir. 2011), Petitioner's Appendix A, 3a. et seq. (hereinafter cited as "Pet. App.")

DeWeese's initial conduct that triggered constitutional scrutiny came when he hung two posters in his courtroom, one of the Bill of Rights and one of the Ten Commandments. DeWeese claimed his purpose in doing so was twofold: (1) to illustrate "educational talks he was in the custom of giving" to visitors in his courtroom; and (2) "also as a way of fostering debate about the relative merits of a legal philosophy based on moral absolutes and one based on moral relativism." Petition for Cert. 4.

The *Sixth Circuit*, however, held that the first courtroom display violated the Establishment Clause. The Court found that DeWeese (in his own words) "chose the Ten Commandments because they were emblematic of moral absolutism and that he chose them to express the belief that law comes either from God or from man, and to express his belief that the law of God is the 'ultimate authority'." *ACLU of Ohio*

Found. v. Ashbrook, 375 F.3d 484, 491 (6th Cir. 2004), *cert. denied* 545 U.S. 1152 (2005). The District Court found that DeWeese's first display violated the First Amendment, the Sixth Circuit Court of Appeals agreed, and this Honorable Court refused to hear DeWeese's request for certiorari. *Id.*

Not to be dissuaded, DeWeese put up a second display in his courtroom, which is the subject of the present lawsuit. DeWeese claims that his intent in modifying the second display, by adding his own words of explanation, was to clarify his purpose, because the prior "court misinterpreted his purpose to be a religious one." Petition for Cert. 7-8. Both the District Court and the Sixth Circuit again found that the purpose and wording of the poster in the present case, as with the previous poster, is unconstitutional. *ACLU of Ohio Found. v. DeWeese,* 633 F.3d 424, 433 (6th Cir. 2011).

In fact, the second display is even more overtly religious than the first display, due to DeWeese's added explanation that is frought with religious commentary:

> "1. There is a conflict of legal and moral philosophies raging in the United States. That Conflict is between moral relativism and moral absolutism. We are moving toward moral relativism.
>
> 2. All law is legislated morality. The only question is whose morality. Because morality is based on faith, there is no such thing as religious neutrality in law or morality.

> 3. Ultimately there are only two views: Either God is the final authority, and we acknowledge His unchanging standards of behavior. Or man is the final authority, and standards of behavior change at the whim of individuals or societies."

DeWeese, 633 F.3d at 427. Pet. App A 3a-4a.

The Sixth Circuit noted the significance of DeWeese's religious commentary in its Statement of Facts, wherein the court presented a lengthy quote from the courtroom display, which ends with this sentence: "I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation. Judge James DeWeese." *DeWeese*, 633 F.3d at 428. Pet. App A 6a. From these and other textual statements in the courtroom display, the Sixth Circuit was able to conclude that the textual content of the display itself reveals its religious nature. *DeWeese*, 633 F.3d at 434. ("The poster's patently religious content reveals Defendant's religious purpose, violating ... the Establishment Clause.") *Id.*

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED LONG-STANDING PRINCIPLES OF LAW TO FIND THAT THE ACLU HAD STANDING TO CHALLENGE THE PETITIONER'S COURTROOM DISPLAY UNDER THE ESTABLISHMENT CLAUSE.

A. The Lower Courts in this case correctly recognized that the ACLU of Ohio has organizational standing to sue for relief on behalf of its members who are injured by Judge DeWeese's religious display.

Respondent is a not-for-profit organization with members living in Richland County, Ohio, including Bernard Davis, an attorney who practices regularly in the Richland County Common Pleas Court. Complaint, Pet. App.D 60a and Declaration of Bernard Davis, Pet. App.E, 66a. It is well established that a membership organization has standing to assert the rights of its members so long as "any one of them are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

A voluntary organization may thus sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The courts below found that all three of these conditions were met.

Petitioner has raised no issue with respect to the second and third conditions. His sole challenge to standing is that the individual representative member, Bernard Davis, has not demonstrated sufficient injury to meet standing requirements, based principally on Petitioner's interpretation of this Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464 (1982) and also on three other decisions of this Court. Pet. For Cert. 13. As Respondent will argue in the next section, Petitioner's position is wrong.

B. The decision of the Sixth Circuit Court of Appeals in this case is not in conflict with previous decisions of the Supreme Court on standing.

Petitioner asks this Court to rewrite the basic, time-honored principle that observers who are personally and directly confronted and affected by unwelcome governmental displays of religion have standing to challenge those displays. Petitioner attempts to reject a large canon of law approving offended observer standing, primarily in Establishment Clause cases, on the basis that they conflict with this Court's readily distinguishable holding, principally, in *Valley Forge Christian Coll. v. Ams. United. for Separation of Church and State, Inc.*

454 U.S. 464 (1982) and three other cases,[1] *Steele Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

As Petitioner has pointed out, the Sixth Circuit has consistently affirmed standing in First Amendment cases over objections based on *Valley Forge*. See Pet. for Cert. 15 & n.4. See also *ACLU v. Mercer County, Ky.*, 432 F.3d 624 (6th Cir. 2005); *ACLU of Ky. v. Grayson County, Ky.*, 591 F.3d 837 (6th Cir. 2010); *ACLU of Ky. v. McCreary County,* 354 F.3d 438, aff'd. 545 U.S. 844 (2005). But the Sixth Circuit is hardly a "maverick" in this regard. It would appear that every other Circuit, with the possible exception of the Seventh Circuit,[2] that has considered the issue, has also found that *Valley Forge* did not defeat standing in establishment clause cases. Petitioner essentially agrees with this statement:

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[1] For ease of identification, we are labeling, for the purpose of this discussion, non-economic injuries relating to government infringement on the plaintiff's rights under the Establishment Clause as "offended observers," but the nature of the infringement may vary, depending on the facts. They do not all follow a pattern of (a) observing and (b) being offended.

[2] *See Freedom From Rel. Found. v. Obama*, _ F.3d _, 2011 WL 1405156 (7th Cir. Apr. 14, 2011), wherein the Court denied standing to challenge a presidential proclamation ordering a "prayer day." The Court conceded that the Seventh Circuit decisions were not consistent, and then added: "Evidently we may need to revisit the subject of the observers' standing in order to reconcile this circuit's decisions; but today is not the day." *4

> Notwithstanding *Valley Forge's* clarity on the illegitimacy of standing predicated upon mere disagreement with something one observes, numerous lower federal courts in addition to the Sixth Circuit have read *Valley Forge* to permit standing where the plaintiff alleges that he has seen and been offended by a religious display.

Pet. for Cert. 17. (citations omitted.)

Petitioner cites cases from the Fourth, Ninth, Tenth, and Eleventh Circuits, all of which approved standing after considering *Valley Forge. Id.* In addition, there are cases from the Second, Fifth, and Eighth Circuits which also have permitted standing in such cases. *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101 (2d Cir. 1992); *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274 (5th Cir. 1999); *ACLU Neb Found. v. City of Plattsmouth,* 358 F.3d 1020 (8th Cir. 2004). Thus, all of the Circuits that have considered the issue have had little difficulty reconciling *Valley Forge* with a finding of standing based on offended observer status or related harm.

Of course, the fact that the Circuit Courts are in agreement as to the boundaries of the *Valley Forge* decision, does not *necessarily* override Petitioner's contention that those decisions have consistently disregarded or distorted the holding in *Valley Forge* for the past approximately 29 years. Although, the fact remains that there has been little or no dissent among the lower courts as to the issue of standing in these offended observer cases for all these years. To support his argument, Petitioner could only come up with two dissenting opinions and one concurring opinion in which standing was questioned as being in conflict

with *Valley Forge*: *Ashbrook*, 375 F.3d at 495-500 (Batchelder J., dissenting); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 794-799 (9th Cir. 2008) (Kleinfeld, J., dissenting); *Washegesic v. Bloomindale Pub. Sch.*, 33 F.3d 679, 684-685 (6th Cir. 1994) (Guy, J., concurring). In addition, the Supreme Court has refrained from addressing this issue despite numerous opportunities when the issue has presented itself, as it did recently in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005); and before that, in *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989); and *Lynch v. Donnelly*, 465 U.S. 668 (1984).[3] It seems highly unlikely that the Supreme Court simply chose to ignore the standing issue in its eagerness to decide yet another Establishment Clause case.

Respondents would argue that the obvious reason for the approval (or lack of objection) to standing in these cases is that *Valley Forge* is readily distinguishable as to the nature of the injury which the plaintiffs suffered. In the *Valley Forge* case, the plaintiff presented an abstract, theoretical claim, which the Supreme Court did not find to be a direct injury suffered by plaintiff, sufficient to meet Article III standards. *Valley Forge*, 454 U.S. at 490. The Supreme Court, in denying the *Valley Forge* plaintiff standing, held that the plaintiff had failed to

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[3] We are mindful of Petitioner's admonition that "'when a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct 1436, 1448 (2011). Pet. For Cert. 16. Nevertheless, one cannot help but wonder as to why the Court took no action on an issue for such a long period.

demonstrate any palpable injury to itself or its members that was likely to be addressed if the requested relief were granted. *Id* at 482. Nevertheless, the Court was careful to point out that "in reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury. See, e.g. *United States v. SCRAP,* 412 U.S. 669, 686-688 (1973) *Id.* at 486.[4]

In contrast to the indirect, abstract claim of injury in *Valley Forge* and the other cases cited by Petitioner, Pet. For Cert. 14., is the injury of Bernard Davis in the case at bar. Mr. Davis, a long-time member of the bar, was required by the demands of his profession to appear frequently in the courtroom of Judge DeWeese, where, on many occasions, he observed the offending display. Declaration of Bernard Davis, ¶¶ 2,3,4, Pet. App E 67a. Mr. Davis found this display to be personally offensive and demeaning because it made him feel like a particular religion was being thrust upon him. Id at ¶4. Pet. AppE 67a. Because of his duties as a member of the bar, he had no choice but to appear in Judge DeWeese's courtroom. Id at ¶4. The injury was both personal and direct. Unlike the

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[4] The Court's reference to the *SCRAP* suit is certainly instructive on how remote the injury may be and still be the basis for standing. The *SCRAP* plaintiffs were members of an environmental group seeking to enjoin the Interstate Commerce Commission from permitting railroads from collecting a surcharge on certain freight rates. Plaintiffs claimed that allowing the extra freight rate would cause "economic, recreational and aesthetic harm" because the proposed rate increases would discourage the use of recyclable materials, thus impacting adversely on the environment. The Supreme Court found adequate injury for Article III standing. *United States v. SCRAP, Id* at 687.

plaintiffs in *Valley Forge*, who had no direct involvement with the land in question, Mr. Davis is *required* by the dictates of his practice to appear in Judge DeWeese's courtroom and to view the offensive religious display.

In that regard, Mr. Davis is like the plaintiffs in *Lee v. Weisman*, 505 U.S. 577 (1992), whose constitutional rights were infringed by a public school's inclusion of a "nonsectarian" prayer in the school graduation ceremony. The Supreme Court found that this constituted the impermissible establishment of religion under the establishment clause by coercing students to stand and remain silent during the prayer, even though attendance at the ceremony was completely voluntary, the students were not required to join in the prayer and even though the prayer and closing benediction consumed about two minutes of the whole ceremony. *Id.* at 593. Because of the "coercion" factor, i.e. legally-compelled attendance at school, this Court has always been sensitive in Establishment Clause cases to safeguard the religious rights of school children. *Id.* at 592. ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.") The same is true of courtrooms, where lawyers, criminal defendants, and parties to civil suits are *required* to attend.

As with *Valley Forge*, the other cases cited by Petitioner as being at odds with the finding of standing in this case, are readily distinguishable from the case at bar. Pet. For Cert., citing *Steel Co. v. Citizens for a Better Env't* 523 U.S. 83 (1998); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S.208 (1974);

United States v. Richardson, 418 U.S. 166 (1974). None of these cases involved any individual, particularized injury on the part of a plaintiff. In *Steel Co.*, the Supreme Court also found the "redressability" element i.e. the ability for the Court to fashion relief for the claimed injury, to be missing. *Steel Co.,* 523 U.S. at 105.

II. THE LOWER COURT PROPERLY APPLIED THE LAW AND EVIDENCE TO DETERMINE THAT JUDGE DEWEESE'S COURTROOM DISPLAY VIOLATES THE ESTABLISHMENT CLAUSE.

A. The Court of Appeals correctly applied the law to the facts of the present case in reaching its conclusion that the DeWeese display violates the Establishment Clause.

The Sixth Circuit Court of Appeals reached the only possible conclusion based on the facts before it, namely, that DeWeese's second courtroom display violates the Establishment Clause. The Sixth Circuit correctly applied this Court's precedents, including *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *McCreary County Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), in evaluating the Establishment Clause issues present. However, in this case, whatever legal test one applies, DeWeese's current display fails to pass constitutional muster.

Whether grounded in the *Lemon*, endorsement, or coercion tests, or a combination of these legal standards, this Court's opinions have repeatedly recognized that, "under the Establishment Clause, detail is key." *McCreary County v. ACLU of Ky.*, 545

U.S. 844, 867 (2005); see also, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . ."); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). The facts, context, and history in the present case compel but one conclusion.

Based on application of the law to the facts of this case, the Court of Appeals correctly concluded that DeWeese's current display fails any of the legal tests, because the facts bear out that DeWeese's purpose in erecting the current display and the language of the display itself are overtly religious in nature.

The Sixth Circuit found that the DeWeese display failed both the purpose test and the endorsement tests, and thus was in violation of the Establishment Clause. A law, practice, or policy which involves the state with religion, is constitutional only if: (1) it has a legitimate secular purpose; (2) its principal effect neither inhibits nor advances religion; and (3) it does not foster "excessive governmental entanglement with religion." *Lemon*, 403 U.S. at 612-613 (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). Governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The *DeWeese* Court, after discussing the various legal standards then went on to consider the evidence: the content of the poster itself, the Declaration of Judge DeWeese, the explanatory pamphlet relating to the poster and the evidence and findings in *Ashbrook*.

From all of this evidence – including but by no means limited to its holding in Ashbrook alone – the Court justifiably found a violation of the Establishment Clause. See *DeWeese*, 633 F.3d at 435.

B. The Sixth Circuit Court of Appeals correctly found religious purpose in this case, based on all the evidence relevant to the present display. Contrary to Petitioner's assertion, the Court of Appeals did not apply an "indelible taint" approach, ignoring this Court's admonition in *McCreary*.

The Court of Appeals reached its conclusion that DeWeese had a religious purpose in erecting the display at issue in this case based on all of the evidence – the context of the present display in relation to the prior display, DeWeese's own explanation of his purpose, and the text of the current display.

The context of the present display in relation to the prior display sheds light on the constitutionality of the current poster, for, as this Court has repeatedly recognized, context matters. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005) ("under the Establishment Clause, detail is key"); see also, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . ."); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). The *Ashbrook* Court found that the prior courtroom display violated the Establishment Clause based on DeWeese's own words that he "chose the Ten

Commandments because they were emblematic of moral absolutism and that he chose them to express the belief that law comes either from God or from man, and to express his belief that the law of God is the 'ultimate authority'." *ACLU of Ohio Found. v. Ashbrook,* 375 F.3d 484, 491 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005).

The distinction between merely presenting examples of historical views on the source of law, and advocating a position that all law comes from God and that society suffers when people abandon what DeWeese terms "moral absolutism," is of course a crucial distinction in determining whether the poster in question is a religious one. But it is a distinction which seems to escape Judge DeWeese. For he goes on to say that his intent in modifying the second display (which is the subject of the present lawsuit) by adding his own words of explanation was to clarify his purpose, because "a court misinterpreted his purpose to be a religious one." Petition for Cert. 7-8. But his "explanation" exacerbated the problem by adding an expressly religious viewpoint to the display. The Sixth Circuit, in considering the poster in the present case, found that its purpose was substantially an articulation of the purpose behind the previous poster, which had been ruled unconstitutional by its previous decision in *Ashbrook*. *ACLU of Ohio Found. v. DeWeese,* 633 F.3d 424, 433 (6th Cir. 2011).

Petitioner is now urging this Court to grant certiorari because, he claims, the Sixth Circuit misapplied this Court's holding in *McCreary County Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), Pet. for Cert. 20. Ignoring the careful textual analysis which the Sixth Circuit gave to the display, and the obviously

religious content thereof, Petitioner seized on one sentence from the *DeWeese* opinion[5] to conclude that the Sixth Circuit was interpreting *McCreary* to mean that once DeWeese's purpose (in hanging the first poster) was found to be religious, he could never get over the "taint" of that action, no matter what the avowed purpose was in hanging the second poster. Pet. for Cert. 21 ("In short, the impermissible "taint' of DeWeese's prior actions was inescapable.") This, concludes Petitioner, puts the *DeWeese* decision in direct conflict with this Court's decision in *McCreary*. *Id.* Respondent emphatically disagrees.

The Sixth Circuit's opinion in *DeWeese* never cited *McCreary* for the proposition that a previous finding of religious purpose creates an irrebutable presumption of religious purpose in subsequent activity, or anything like such a holding. Nor did the *DeWeese* court itself advocate such a simplistic position. (Were it otherwise, the *DeWeese* Court would not have had to do any analysis of the poster; simply cite to its decision in *Ashbrook*, and *ipso facto* find the purpose of the second poster to be religious.) The teaching of *McCreary*, which the Sixth Circuit did correctly follow, was that the previous actions of the government may be used as relevant (but not conclusive) evidence in determining purpose in the present case. See *DeWeese*, 633 F.3d at 432 ("This Court is 'compel[led] to consider the government's past violations of the Establishment Clause when evaluating its present conduct'", (quoting

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[5] "Assuming for the sake of argument that Defendant has stated a facially secular purpose,and giving that stated purpose its due deference, the history of Defendant's actions demonstrates that any purported secular purpose is a sham." Pet. App.A, 16a.

McCreary, 354 F.3d at 457). The historical significance of the first poster, which had been ruled in violation of the Establishment Clause by the Sixth Circuit in *ACLU v. Ashbrook*, supra, was especially relevant in *DeWeese* because of the admitted similarity between the first poster and the second poster. See *DeWeese*, 633 F.3d at 433 ("Defendant's history of Establishment Clause violation casts aspersions on his purportedly secular purpose in hanging the poster in his courtroom. So too do the similarities between Defendant's stated purpose in this case, and his unconstitutional purpose in *Ashbrook*.").

Even before this Court's decision in *McCreary*, the Sixth Circuit had held in *Ashbrook* that in looking at purpose under *Lemon*, the inquiring court is not bound by the Government's bald assertion of a non-religious purpose: "Although a government's stated purposes for a challenged action are to be given some deference, it remains the task of the reviewing court to 'distinguis[h] a sham secular purpose from a sincere one. *Ashbrook,* 375 F.3d at 490-491 (quoting *McCreary County*, 354 F.3d at 446, quoting *Santa Fe Indep. Sch. Dist. v, Doe*, 530 U.S. 290, 308).

The same can be said of the language which DeWeese added to the second poster, in which he proclaims his philosophical purpose in posting the display. Under the guise of making clear his purpose, which DeWeese claims the *Ashbrook* court misunderstood (with respect to the first display), the *DeWeese* court found that Judge DeWeese's claimed purpose was:

> "...unconvincing. As borne out by this Court's decision in *Ashbrook* , Defendant's 'views about

> warring legal philosophies' and his concern over society's 'abandoning a moral absolutist legal philosophy,'...are based on his belief that 'our legal system is based on his [DeWeese's] belief that 'our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.'"

DeWeese, 633 F.3d at 433. Thus, the *DeWeese* Court concluded, the second poster had a religious purpose in violation of *Lemon's* first prong. *Id.* at 434.

The *DeWeese* opinion also relied on *McCreary* for the proposition that in considering the religious purpose issue, the text of the display itself may be illuminating. *McCreary*, 545 U.S. at 868. The *DeWeese* Court observed that "in addition to a redacted text of the Ten Commandments, the poster include[d] editorial comments by [Judge DeWeese] ...includ[ing] religious statements such as 'God is the final authority and we acknowledge His unchanging standards of behavior,' and 'I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation.'" *DeWeese,* 633 F.3d at 433.Additionally, the Court looked to the supplementary pamphlet which the poster itself announces is available to viewers of the display from the court receptionist, to further explain the message of the display, which expresses that Defendant's definition of moral absolutes "bases its distinction between right and wrong on the God of

the Bible."[6] *Id.* Thus, the display's message is not only religious but sectarian.

Based on the evidence - not as a knee-jerk reaction to its earlier finding in *Ashbrook* - the *DeWeese* Court found, as had the Supreme Court analogously, in *McCreary*, that :

> "{A}lthough Defendant attempts to veil his religious purpose by casting his religious advocacy in philosophical terms, '[a] finding of religious purpose is militated by the blatantly religious content of the display.' *McCreary I*, 354 F.3d at 455."

DeWeese, 633 F.3d at 434.

The Sixth Circuit in *DeWeese* was clearly justified in considering its previous holding in *Ashbrook* as relevant in assessing DeWeese's purpose. However, the Sixth Circuit ultimately based its conclusion that the current display violates the Establishment Clause on a variety of factors – the history of the DeWeese displays, the text of the current display and the text of the supplementary pamphlet which accompanies the current display. Considering all of these factors together, the Sixth Circuit was clearly justified in reaching its decision.

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[6] The conclusion that the "God of the poster is the 'God of the Bible' is also easily inferred from the display of the Ten Commandments itself as an expressed example of 'Moral Absolutism.'"

C. The Court of Appeals' decision that the poster violates the endorsement test is consistent with Supreme Court decisions

Petitioner's final point challenges the *DeWeese* holding that the offending poster violated the endorsement test under *Lemon v. Kurzman*. Pet. for Cert. 25-30. Citing to various Supreme Court cases, Petitioner argues that "religion has always been identified with our history and government." *Id.* at 26-27 (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 212 (1963)). In quoting this and other similar statements, Petitioner seems to be saying that his courtroom poster and purpose in displaying it are equivalent to this Court's neutral description of history. Petitioner fails to notice that the Court's acknowledgment of religion's role in our Nation's history is later tempered by the Court's statement that "[t]his is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life." *Schempp*, 374 U.S. at 214.

Petitioner treats us to almost nostalgic quotes from John Adams, the Declaration of Independence, the Northwest Ordinance, George Washington's farewell address and the Ohio Constitution, each, according to DeWeese, "recognizing the divine as a source of rights and morality," leading him to "join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation." Pet. for Cert. 26-27.

Perhaps the most persuasive rebuttal to DeWeese's comments, can be found in footnote three of the

DeWeese opinion, wherein the Court responds to DeWeese's attempts to justify his display by reaching back into history:

> " [T]he Supreme Court has stated that '[t]here have been breaches of this command [separating church and state] throughout this Nation's history, but they cannot diminish in any way the force of the command.", *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 604-605 (1989), "[h]istorical evidence shows that 'there was no common understanding about the limits of the establishment prohibition....What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined.' *McCreary*, 545 U.S. at 879-81."

DeWeese, 633 F.3d at 430 n.3.

Respondents will resist the temptation of being drawn into an academic discussion about moral and religious precepts, and their historical[7] influence on the development of American law, which are of academic interest but of little relevance to the question at hand. Suffice it to say that under modern

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[7] For a concise historical essay on the development of the Establishment Clause, see The *Oxford Companion* to *SUPREME COURT OF THE UNITED STATES* (Oxford Press, Copyright, 1992) p. 718, which traces the societal shift from Protestantism in the 19th Century to Secularism in the 20th Century and the resultant impact on the religious freedom sections of First Amendment law.

constitutional law, as exemplified in *Lemon v. Kurtzman* and its progeny, secular standards have been established which prohibit governmental involvement in and endorsement of religion, such as is clearly exhibited in the DeWeese poster.

Petitioner's view that the poster display is practically no different than the references he cites from historical documents is unconvincing. The strong iconic display of the Ten Commandments, coupled with DeWeese's own observations about looking to the Commandments as a source of law and his view that the God of the Bible is the ultimate authority from whom all law comes, leave the "reasonable viewer" with the impression that the poster is an endorsement of religion, forbidden under the Establishment Clause.

D. In the final analysis the issue of whether the Sixth Circuit's holding, that the courtroom poster violates the establishment clause is correct, is not suitable or appropriate for review under a writ of certiorari.

It is axiomatic that review under a writ of certiorari is a not a matter of right but of judicial discretion – not lightly granted. Supreme Court Rule 10 ("a petition for a writ of certiorari will be granted only for compelling reasons."). The Rule then goes on to enumerate the type (not necessarily exhaustive) of cases which the Court would consider for cert. The only pertinent one stated is one where "a United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10 closes with the caveat that "...certiorari is rarely granted when the asserted error

consists of ...the misapplication of a properly stated rule of law." *Id.*

First, as already discussed, *supra*, a careful reading of the *DeWeese* opinion does not support the position that this Court's decision in *McCreary* was misapplied, much less misunderstood by the Sixth Circuit. The evidence, which was meticulously analyzed by the *DeWeese* Court, clearly supports a finding of religious purpose.

Secondly, there is nothing to suggest that the Sixth Circuit misunderstood or deliberately ignored the pertinent holding in *McCreary*. In fact, in subsequent proceedings in *McCreary*, *after* this Court's decision, the Sixth Circuit made it clear that the Supreme Court's holdings were coming through loud and clear. Specifically, the Government argued that it had significantly changed the display in question after the Supreme Court's decision, and had, in effect, "cured" the religious purpose problem. The Sixth Circuit rejected the government's argument, stating: "Although the Supreme Court made clear that the counties' past actions do not 'forever taint any effort on their part to deal with the subject matter,' Defendants offered no new facts on remand that show that their purpose had changed from the one that the Supreme Court found to violate the Establishment Clause." *ACLU of Ky. v. McCreary Cnty.*, 607 F.3d 439, 448 (6th Cir. 2010) (internal citations omitted). The author of the opinion in *McCreary* was Judge Clay, who also authored the opinion in *DeWeese*. Judge Gibbons wrote a concurring opinion in *McCreary,* in which she opined that she thought that the court should not have decided the issue of the display's religious purpose, "[i]n light of the Supreme Court's cautioning that the

counties' past actions need not 'forever taint any effort on their part to deal with the subject matter.' " *Id.* at 451-452. Judge Gibbons also sat on the panel that decided *DeWeese*. So at least two of the three judges on the *DeWeese* panel were clearly aware of the meaning of the Supreme Court's opinion in *McCreary*. Thus, this case hardly presents a clear opportunity for this Court to educate an obviously confused lower court on an issue in conflict with the holdings of this Court.

Finally, apart from *Lemon* or whatever other legal tests one applies, the poster in this case is so clearly religious on its face that a reading of the poster alone would justify a finding of a violation of the Establishment Clause.

Given all of these considerations, a grant of certiorari in this case would seem hardly prudent.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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