CASE NO. No. 113,332

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DR. BRUCE PRESCOTT, JAMES HUFF,
DONALD CHABOT, and CHERYL FRANKLIN,

Plaintiffs/Appellants,

vs.

OKLAHOMA CAPITOL PRESERVATION COMMISSION,

Defendant/Appellee.

On appeal from the District Court of Oklahoma County
The Honorable Judge Thomas Prince
District Court No. CV-2013-1768

ANSWER BRIEF OF APPELLEE OKLAHOMA CAPITOL PRESERVATION COMMISSION

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SUBJECT INDEX AND TABLE OF AUTHORITY

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ANSWER BRIEF OF APPELLEE OKLAHOMA CAPITOL PRESERVATION COMMISSION

Appellee Oklahoma Capitol Preservation Commission ("the Commission") submits this Answer Brief to the Petition in Error and requests that this Court affirm the district court's determination that the Ten Commandments monument at issue does not violate Article II, Section 5 of the Oklahoma Constitution.

Introduction

Were this Court to rule based on the Appellants' floated theories, it would, in effect, craft a new rule: that an otherwise passive monument acknowledging religion constitutes an unconstitutional adoption of sectarian principles by the State if that monument contains text.[1] But such a rule is wholly unsupported by the text and history of Article II, Section 5 of the Oklahoma Constitution, this Court's precedent, federal precedent, and the undisputed, material

[1] That Appellants seek such a rule appears plain: "[t]hings like architectural symbols or allusions in artwork can convey exposure to religious influence in that they can contain acknowledgment of the existence of faith. Adoption of sectarian principles, on the other hand, speaks to the conveyance of specific articles of religious instruction or faith. Such specific instruction is precisely what is enshrined on the Ten Commandment's Monument." (Appellants' Br. 30-31.)

facts of this case. The Ten Commandments Monument ("the Monument") in this case is constitutionally permissible under our state provision. Indeed, it is nearly identical to a Monument found constitutional by the United State Supreme Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), and is as constitutional as the fifty-foot tall, lighted cross found constitutional in *Meyer v. City of Oklahoma City*, 1972 OK 45, 496 P.2d 789.

And the district court agreed. It examined the material facts under an "objective analysis" and held that "a reasonable observer, mindful of the context of this monument, would not conclude that the monument represents the adoption of sectarian principles, using the standard of the *Myers* decision . . . informed by the *Van Orden* analysis." (Transcript of Proceedings, ROA Ex. 15, at 11-12.) In making that determination, the district court specifically held that there was no genuine issue of material fact at play, but that the facts raised by Appellants "address[ed] the sincerity of certain individuals' belief, and [the court gave] them that . . . ." (*Id.* at 10.) Instead, the district court found that "[t]he relevant facts [were] not in dispute," those facts being

- "that the monument sits outside the Capitol on the north side near a sidewalk;"
- that the Capitol complex occupies 100 acres of land;
- that the Capitol complex contains an array of monuments, with the Parties having agreed to a total of fifty-one such monuments;
- that "House Bill 1330 . . . set out what the legislature . . . determined to be the purposes of the monument" and that those purposes were "secular, not sacred."

(*Id.* at 10-12.)

In considering these undisputed, material facts, the district court used its legal judgment to consider the Monument's context, acknowledging this Court's well-established rule that "it is not the exposure to religious influences that is to be avoided[, but] the adoption of sectarian

principles." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 7, 171 P.2d 600, 602. The district court found no such adoption. But despite the district court's thorough, well-reasoned analysis, Appellants contend that the court below got it wrong. To draw this conclusion, Appellants argue, much like they did before the district court, both that the Monument violates Oklahoma's Constitution without identifying a concrete test under which this Court should make that determination and that material facts are in dispute, without specifically identifying what those facts are. Appellee prays this Court reject Appellants' misplaced arguments and affirm the district court.

Summary of the Record

On May 18, 2009, the Governor signed into law House Bill 1330 ("HB 1330"), an Act informing the Commission that it could "permit and arrange for the placement on the State Capitol of a suitable monument displaying the Ten Commandments." (HB 1330, ROA, Doc. 8, Ex.15, p. 2.) HB 1330 required, however, that the text of any monument be in accord with the law and Supreme Court precedent as set forth in *Van Orden*. (*Id.*) Further, the Act required that the Monument "be designed, constructed, and placed on the Capitol grounds . . . at no expense to the State of Oklahoma" and that the Monument not be "construed to mean that the State of Oklahoma favors any particular religion or denomination thereof over others." (*Id.*) Finally, HB 1330 made three legislative findings: "(1) That the Ten Commandments are an important component of the foundation of the laws and legal system of the United States of America and of the State of Oklahoma; (2) That the courts of the United States of America and of various states frequently cite the Ten Commandments in published decisions; and (3) Acknowledgements of the role played by the Ten Commandments in our nation's heritage are common throughout America." (*Id.*)

On August 20, 2009, following enactment of HB 1330, the Commission's Architecture and Grounds Sub-Committee began discussing possible placement of an appropriate monument on the Capitol Grounds. (Aug. 20, 2009 Comm'n Minutes, ROA, Doc. 8, Ex. 14.) Ultimately, the Commission approved placement of the Monument on the north side of the Capitol Building on an existing sidewalk near an entrance that had been closed for years. (Transcript of Proceedings, ROA, Doc. 15, p. 10; Deposition of Duane Mass, ROA, Doc. 8, Ex. 12, at 34:13-17.) Following approval, private donors contracted with SI Memorials to construct the Monument, (SI Memorials File, ROA, Doc. 8, Ex. 6, at 1), and employees of SI Memorials traveled to Austin, Texas to make rubbings of the Ten Commandments monument found constitutional by the United States Supreme Court in *Van Orden* ("Texas monument"). (Deposition of Greg Mosier, ROA, Doc. 8, Ex. 7, p. 1.) Upon completion, the Monument was installed at private expense on the Capitol Grounds without a ceremony or other special event. (Deposition of Mike Sanford, ROA, Doc. 8, Ex. 11, p. 1.) Except for the donor plaque, the Monument is identical to the Texas monument. (Pls.' Resp. to Def.'s Mot. for Summ. J., ROA, Doc. 5, p. 2-3.)

The Capitol Complex comprises approximately 100 acres, (Transcript of Proceedings, ROA, Doc. 15, p. 10.), and boasts an array of monuments, (*id.*). Appellants and Appellee agree that the Monument is one of, at least, fifty-one such monuments. (*Id.*) The Flag Plaza—the monument sitting closest to the Ten Commandments Monument—is a large collection of flags rich with Native American spiritual symbolism that encircle the Spring of Life Rock. (Monuments, ROA, Doc. 8, Ex. 1, at Item 105.) And the Flag Plaza is not the only monument reflecting spiritual symbolism. (*See e.g.* Monuments, ROA, Doc. 8, Ex. 1, at Items 38 and 68.) Named *The Guardian*, a statue sits atop the Capitol Building and is "rife with Native symbolism,"

being "a composite of material and spiritual and cultural characteristics of Oklahoma's thirty-nine tribes." (Def.'s Am. Mot. for Summ. J., ROA, Doc. 8, p. 6.)

On August 19, 2013, Appellants filed suit in Oklahoma County District Court, alleging that the Monument violated Article II, Section 5 of the Oklahoma Constitution. (Pls.' Pet., ROA, Doc. 2, p. 8.) On September 13, 2013, Appellee filed its Answer (Answer, ROA, Doc. 3), and on May 22, 2014, Appellee filed its Motion for Summary Judgment. (Motion for Summary Judgment, ROA, Doc. 4.)

But on June 27, 2014, the district court ordered both Appellants and Appellee to file supplemental briefing, asking the Parties to answer five specific questions. (Order, ROA, Doc. 7.) Those questions asked:

1. "Whether, and, if so, how Okla. Const., Art. 2, §5, should be construed in light of the history and/or expressed purpose of what generally has been referred to as the 'Blaine Amendment'";

2. "What meaning or definition should be given by the Court to the terms 'sect, church, denomination, or system of religion'";

3. "Whether any Party contends that Okla. Const., Art. 2, §5, is functionally and/or substantively equivalent to the Establishment Clause of the First Amendment";

4. "Whether the Plaintiffs are challenging the constitutionality of §4110, on its face; or, whether the Plaintiffs' claim is limited to the manner or means by which the Defendant carried out §4110"; and

5. "What relevance, if any, should be given to Plaintiffs' claim on p.1 of Appendix 1, to Plaintiff's Response to Defendant's Motion for Summary Judgment, that '[t]here remains significant factual dispute concerning whether the Ten Commandments Monument is coordinated or contextualized with other monuments.'"

(*Id.* p. 4-5.) On July 24, 2014, Appellee filed its amended motion for summary judgment, answering those specific questions posed. (Def.'s Am. Mot. for Summ. J., ROA, Doc. 8.) On September 19, 2014, the district court held a hearing at which the Parties were present and represented by counsel. Following a short argument, the Court entered its order granting

summary judgment and making specific findings with respect to the material facts and the law. (*See* Transcript of Proceedings, ROA, Doc. 15.)

Summary of the Argument

I. It now appears that Appellants lack standing, which Appellants bear the burden of alleging and proving. *Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶ 8 n. 7, 890 P.2d 906, 910 n.7. First, Appellants made no showing that they are offended by the text of the Ten Commandments, and, in fact, Appellants' counsel recently disavowed any offense. Further, even if they are offended by the text, Appellants cite no legal authority that this State even recognizes something akin to offended observer standing. Second, all Parties agree that public funds have not been expended on the Monument, defeating taxpayer standing. Absent these showings, Appellants case must be dismissed.

II. Appellants urge this Court to find that there is a dispute of material facts, but Appellants never actually identify the material facts they believe to be at issue. There is no dispute over what the monument depicts, where it is located, or how it came to be located there. Further, the record contains significantly detailed maps and descriptions of the contents of monuments in and around the Capitol, which Appellants do not contest. Appellants' argument about "facts" is actually an argument about what those facts mean under the law. That is not a dispute of material fact.

III. Appellants also ask this Court to rule, for the first time in state history, that a passive display is a violation of the Oklahoma Constitution if it has religious content. Appellants argue that the text of the Ten Commandments Monument renders it a violation of the Oklahoma Constitution. It is in this way Appellants attempt to distinguish this Court's finding a fifty-foot tall, lighted cross compatible with Article II, Section 5. *See Meyer v. City of Oklahoma City*, 1972 OK 45, 496 P.2d 789. But the text of Article II, Section 5 does not support such a ruling, and

this Court has never ruled that a passive monument with religious content violates that section. Appellants do not even identify how the State is supporting a sectarian institution by permitting a Ten Commandments monument. And if allowing ministers to place a fifty-foot tall, lighted cross on state property is not supporting a sectarian institution, it is doubtful that any passive display could qualify.

Further, Appellee was only authorized to permit placement of a Ten Commandments monument on the Capitol Grounds if such monument complied with the law. HB 1330 required that the text of the Monument—the very text upon which Appellants base their case—be the same as the text of the monument upheld as constitutional by the United States Supreme Court in *Van Orden.* HB 1330 further required that the Monument be placed on Capitol Grounds where there are numerous other monuments, and so it was. Clearly, therefore, the Monument is secular, and Appellants do not argue to the contrary.

Instead, Appellants argue that the text of the Ten Commandments precludes its placement, period. Appellants cite no case, state or federal, that holds a Ten Commandments monument or any monument with religious content unconstitutional absent proof establishing the proposed monument's religious purpose. Appellants contend that the purpose of the display is irrelevant. With that concession, even assuming Appellants have standing, which they do not, there is no legal basis for this Court to do anything other than affirm.

Standard

This Court conducts a *de novo* review of a district court's determination granting summary judgment. *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 17, 148 P.3d 842, 848. Therefore, like the district court, this Court upholds summary judgment "when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law." *EOG Resources Marketing, Inc. v. Okla. St. Bd. of Equalization*, 2008 OK 95, ¶ 13, 196 P.3d

511, 518-19. "A fact is 'material' if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action." *Buck's Sporting Goods, Inc. of Tulsa v. First Nat'l Bank & Trust Co. of Tulsa*, 1994 OK 14, ¶ 11, 868 P.2d 693, 698. Importantly, Appellants "may not rely on the allegations of [their] pleadings or the bald contention that facts exist to defeat" summary judgment. *Farmers Ins. Co., Inc. v. Smith*, 1998 OK CIV APP 28, ¶ 9, 957 P.2d 125, 128.

Discussion

Proposition I: Appellants' Statements to the Media Following the District Court's Decision Now Place Their Standing in Doubt.

"Standing refers to a person's legal right to seek relief in a judicial forum," *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 7, 163 P.3d 512, 519, and "may be correctly raised at any level of the judicial process or by the Court on its own motion," *Matter of Estate of Doan*, 1986 OK 15, ¶ 7, 727 P.2d 574, 576. Standing rests on the establishment of three elements: "(1) . . . an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision." *Fent*, 2007 OK 27, at ¶ 7.

Additionally, Oklahoma recognizes taxpayer standing, which provides "the right of a taxpayer to challenge illegal taxation or expenditure of public funds," *id.* at ¶ 8, and which this Court considers "a matter of public right," *id.* This Court has found that expenditure of public money "to enforce a statute that is unconstitutional" also gives rise to taxpayer standing. *Thomas v. Henry*, 2011 OK 53, ¶ ¶ 5, 6-7, 260 P.3d 1251, 1254.

In their Petition for Declaratory and Injunctive Relief, Appellants Dr. Bruce Prescott and James Huff claimed that they frequently conduct ongoing business at the Capitol Grounds; Appellants Donald Chabot ("Chabot") and Cheryl Franklin ("Franklin") did not. (Petition, ROA, Doc. 2, p. 9.) Disregarding, therefore, that Chabot and Franklin may have never actually

come in contact with the Monument, all Appellants claimed that they were directly confronted with the Monument's message, suggesting an actual, concrete injury based on the Monument's content. *Id.*

But on September 19, 2014, following the district court's granting of Appellee's amended motion for summary judgment, Appellants released a statement to the media in which Appellants contended: "The plaintiffs in this case do not seek the removal of the Ten Commandments monument from the State Capitol lawn because they find the text of the monument offensive, but rather . . . it is offensive to them that this sacred document has been hijacked by politicians."[2] Appellants' highly speculative injury, i.e. an injury based on "hijacking" of the Ten Commandments by politicians, is tantamount to an offended observer claim, but Appellee knows of no Oklahoma case supporting such a standing claim. Indeed, the federal district court dismissed plaintiffs in the federal challenge to this Monument based on the same type of speculative injury: that plaintiffs there went out of their way to be offended by the Monument. *See Am. Atheists, Inc. v. Thompson*, No. CIV-14-42-C, 2015 WL 1061137, at *1-2 (Mar. 10, 2015). This Court, like the federal district court, should find that Appellants lack standing here.

Further, in their Petition, Appellants claimed that they retain an interest in the Monument as "constituent citizens and taxpayers," suggesting taxpayer standing. (Petition, ROA, Doc. 2, p. 10.) But it is now well settled in this case that no public funds were expended to construct or place the Monument on the Capitol Grounds, nor are public funds being expended for maintenance. (*See* Def.'s Am. Mot. for Summ. J., ROA, Doc. 8, p. 4-6; Pls.' Resp. to Def.'s Am. Mot. for Summ. J., ROA, Doc. 12, p. 7-8.) Therefore, to the extent Appellants still

[2] *See* ACLU of Oklahoma's Response to District Court Ruling in Ten Commandments Litigation, ACLU of Oklahoma, September 19, 2014, http://acluok.org/2014/09/aclu-of-oklahomas-response-to-district-court-ruling-in-ten-commandments-litigation/.

claim taxpayer standing, that claim would be based solely on the fact that the Monument rests on public property. But Appellee knows of no case suggesting that taxpayer standing extends quite that far. And, indeed, extending taxpayer standing to allow anyone to challenge a law any time public property is involved would seem to make standing a requirement in name only. Therefore, based on the above, Appellants' standing appears seriously in doubt, and Appellants may, in fact, lack standing.

Proposition II: There is no Dispute of Material Facts, and the Facts Support the Constitutionality of the Monument.

First, pursuant to Oklahoma Supreme Court Rule 1.11(e),

> [t]he brief of the moving party shall contain a Summary of the Record, setting forth the material parts of the pleadings, proceedings, facts and documents upon which the party relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this Court for decision. Facts stated in the Summary of the Record must be supported by citation to the record where such facts occur.

OKLA. S. CT. R. 1.11(e).

In their Summary of the Record, Appellants recount their repeated assertions regarding the text of the Ten Commandments and location of the Monument in a "unique setting immediately adjacent to and on the level of the Capitol building." (Appellants' Br. 6.) Tellingly, however, Appellants cite to their Petition below and their own affidavits (*id.* at 6-8.), while either wholly ignoring or taking out of context[3] other evidence in the Record, including:

- the detailed, scaled map of the Capitol Grounds (the accuracy of which has not been disputed) (Monuments, ROA, Doc. 8, Ex. 1);
- the images of the, at least, fifty-one other monuments on the Capitol Grounds (the number of which the Parties agreed on) (*Id.*);
- the deposition of Duane Mass, Capitol Architect (Deposition of Duane Mass, ROA, Doc. 8, Ex. 12);

[3] *See* Part II(B) below.

- the deposition of Trait Thompson, Chair of the Commission (Deposition of Trait Thompson, ROA, Doc. 8, Ex. 13); or

- any of the agendas or minutes of the Commission (Commission Agendas and Minutes, ROA, Doc. 8, Ex. 14).

And therein lies the problem with Appellants' case: they want this Court to find the Monument unconstitutional because they say so, and not based on any evidence other than their own beliefs and feelings. But as this Court is aware, Appellants cannot rely on the allegations in their pleadings or on bald assertions regarding the Monument's constitutionality. *See Farmers Ins. Co., Inc.*, 1998 OK CIV APP, at ¶ 9. Indeed, the district court found no dispute as to the ***undisputed, material facts,*** and Appellee asks this Court to affirm that finding.

A. The Material Facts are Not in Dispute, Leaving Nothing for the District Court to Resolve on a Remand Order.

First, Appellants contend that the Parties "came into the District Court's final hearing with significant factual disputes still pressing" (Appellants' Br. 9), inviting this Court to remand this case back to the district court for further fact-finding. But Appellants cannot avoid the application of summary judgment by claiming that material facts are in dispute; they must actually identify such disputed facts. *See Farmers Ins. Co., Inc.*, 1998 OK CIV APP, at ¶ 9 (stating that a party cannot "rely on the allegations of [their] pleadings or the bald contention that facts exist" to defeat summary judgment). Nevertheless, Appellants have repeatedly failed to do so, superficially arguing before this Court, much as they did before the district court, that these alleged disputes concern "factual accuracy," "interpretation," "inferences to be drawn, and materiality of proffered facts." (Appellants' Br. 9-10.) But apart from their arguments regarding their "direct observations" addressed in detail below, Appellants conspicuously fail to identify how the facts are in dispute.

Their allegations notwithstanding, the Monument's location is firmly established. It sits where it sits, on a pre-existing sidewalk on the north side of the Capitol Building near a non-operative entrance. The text and symbols present on its face are a duplicate of the Texas monument and, likewise, will not change. And while Appellants may opine regarding ***the effect*** of the Monument's location and content, that is ***a legal question*** for this Court to determine.

Similarly, the presence of other monuments on the Capitol Grounds is an established fact: their location and content cannot be disputed. And although Appellants may intimate that the number of monuments is somehow in controversy, Appellants concede, as they must, that the Parties have agreed on a relevant monument count of fifty-one. (Appellants' Br. 12.) Further, Appellee placed into evidence a detailed, scaled map of the Capitol Grounds with pictures of all such monuments attached—the accuracy of which has not been challenged. (*See* Monuments, ROA, Doc. 8, Ex. 1.)

In short, Appellants do not, in reality, present this Court with a dispute as to the material facts. Knowing as much, Appellants argue alternatively that the vast majority of the undisputed facts are immaterial—despite the district court's findings otherwise—in a specious attempt to carve off those facts not favoring them. (*See* Appellants' Br. 11-13 (contending that the size of the Capitol Complex, the location of other monuments, and HB 1330 are all "immaterial" to contextual analysis).) But the facts that Appellants would have this Court disregard are those facts directly demonstrating context.

B. Appellants Advocate for a Context-Specific Analysis but Ignore the Undisputed Material Facts Establishing a Context That Supports the Constitutionality of the Monument.

At the time of the district court's ruling, it found that the relevant facts were not in dispute. (Transcript of Proceedings, ROA, Doc. 15, p. 10.) Those facts included: the Monument's location, the size of the Capitol Complex, the presence of an "array" of other

monuments, and HB 1330's legislative purpose statements. (*Id.*) The Court relied on these facts because they demonstrate context—the importance of which Appellants repeatedly emphasize. (Appellants' Br. 9 ("[Q]uestions of government religious endorsement or support . . . are resolved by careful and complete examination of all relevant facts, including context.").)

But despite emphasizing the importance of context, Appellants contend that the only material fact considered by the district court was the Monument's placement. (*Id.* at 10.) But were placement the only ***material*** fact, members of this Court would put blinders on, walk directly to the location of the Monument, consider only placement, and determine whether, on the basis of where the Monument sits, the Monument constitutes the adoption of sectarian principles. In other words, Appellants suggest this Court should conduct a context-specific analysis devoid of context.

But as further addressed below, the reasonable observer must do more than simply view the challenged display. *See O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005). The reasonable observer must consider its legislative history, implementation of the statute, and the history and context of the display. *See id.*; *McCreary Co. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). The reasonable observer thus examines the totality of the circumstances, prior to, at the time of, and after the Monument's placement. And on such facts, context is achieved here, which is precisely why Appellants attempt to craft such a narrow and imprecise contextual analysis.

Here, despite Appellants' repeated assertion that the district court did not address what is directly observed, the district court had in evidence, as does this Court, a detailed map with pictures, showing by exact distances how monuments are contextualized on the Capitol Grounds.[4] (Monuments, ROA, Doc. 8, Ex. 1.) That map shows that the Flag Plaza—a

[4] Based on the presence of this evidence in the record, Appellants' contention that "rather than considering the evidence actually before the Court, the District Judge instead relied upon an

monument that could be perceived as exhibiting much religious iconography—is the closest monument to the Ten Commandments Monument and otherwise stands alone on the north side of the Capitol Grounds. Further, despite Appellants' arguments regarding the proximity of the Monument to the Capitol Building, a statue "rife with Native symbolism" adorns the Capitol Dome. (Def.'s Am. Mot. for Summ. J., ROA, Doc. 8, p. 6.) But knowing the historicity of Native American culture and the Ten Commandments and its impact on the State—as the reasonable observer must—strongly supports the conclusion that these monuments reflect Oklahoma ideals from territorial times to the present. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). And the Parties agree that, in addition to these three monuments, there are at least forty-eight more all reflecting Oklahoma's history and culture. This speaks to and establishes context.

Nevertheless, in another bald attempt to defeat context, Appellants contend that consideration of HB 1330 is immaterial. On the contrary, HB 1330 is the legislative Act informing Appellee that it could consider a Ten Commandments monument, but if it did, any such monument had to contain the exact text that the United States Supreme Court upheld as constitutional and credited as non-sectarian. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). Further, HB 1330 contains legislative purpose statements that expressly disavow any state adoption of sectarian principles by virtue of the placement of a Ten Commandments monument on Capitol Grounds. (*See* HB 1330, ROA, Doc. 8, Ex. 15, p. 2.)

Regardless, Appellants attempt to diminish the relevance of HB 1330 by arguing that despite the Act's clear indications otherwise, the Commission's placement of the Monument on Capitol Grounds was, in fact, an attempt to adopt sectarian principles. (*See* Appellants' Br. 12-13.) Appellants state that "references made by the Capitol Architect to Appellee's anticipated

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assumption as to the Monument's objective effects" is truly disingenuous. (*See* Appellants' Br. 15.)

public usage of the Monument that was to be 'unique,' necessitating a 'formal setting' fit for 'reflective purpose' or 'attempting to seek solace using the monument'" suggest endorsement. (*Id.* at 13.) And Appellants contend that the Capitol Architect's references should "serve to keep the issue [(presumably, the Commission's intentions)] in dispute." (*Id.*) But that statement comes from a letter drafted by the Capitol Architect when he proposed a placement on the north side of the Capitol Building; that letter states:

> The proposed monument . . . must occupy a unique place in the setting within the Capitol lawn. In my opinion its location must be one which supports the reflective purpose for the individual in relation to the object.
>
> It should occupy a location which is tangent to a circulation route on the campus and yet on the route adjacent to the proposed location an area for individuals to stand and reflect on the monument should be considered.

(Mass Letter Dated Aug. 17, 2009, ROA, Doc. 8, Ex. 14.)

Counsel for Appellants specifically asked the Capitol Architect about these statements during his deposition on April 15, 2014. That exchange established the following:

> Q [by counsel for Appellants]: Okay. Now, the second sentence of the first paragraph, can you read that for the record, please.
> A [by Mass]: In my opinion, its location must be one which supports the reflective purpose for the individual in relation to the object.
> Q: What do you mean by that statement?
> A: All art items, object of art for me may evoke emotion, pleasure, any number of feelings, almost any object of art. I appreciate all of them greatly. So I feel that as I only have my own experience in life, you'll be the same way too.
> . . .
> Q: So to you the Ten Commandments monument, I take it, is less about communicating a text and more as an object of art in your view?
> A: Yes, sir. It is an object.

(Deposition of Duane Mass, ROA, Doc. 8, Ex. 12, at 30:8-31:21.) And the district court examined these very statements and the deposition testimony and held, "The other fact I perceive you've raised is the—draws from the testimony of the architect, Mr. Mass, that he intended that the placement of the monument be in such a place that it would allow folks to reflect. And I don't find that different than any other monument out there. He didn't say it was a

religious reflection. So I recognize your factual issues, but I find that they are not material to my ruling." (Transcript of Proceedings, ROA, Doc. 15, p. 10.) In sum, Appellants' out-of-context reliance on one opinion by the Capitol Architect cannot impute an intent by the Commission to establish religion by permitting placement of the Monument on the Capitol Grounds, especially in light of a legislative Act specifically stating that such establishment should not be perceived. And no Commission agenda or minute even remotely suggests an intention to adopt sectarian principles, and, tellingly, Appellants cite to none.

Therefore, the facts overwhelmingly demonstrate that the Monument was contextualized, despite Appellants' assertions to the contrary. Notwithstanding this, Appellants argue, as they did before the district court, that the Monument nevertheless represents the adoption of sectarian principles based on their own observations.

C. Appellants Advocate for the Application of a Reasonable Observer Standard Based on Their own Subjective Impressions Contrary to Established Law.

Finally, peppered throughout their Brief, Appellants repeatedly contend that the district court ignored "direct evidence of the impact of the Ten Commandments Monument on an observer" (Appellants' Br. 14), suggesting that they themselves are the reasonable observer. (*Id.* at 14-15 (citing to their affidavits regarding their observations).)

But Appellants' observations are irrelevant. Indeed, Appellants argue that "subjective" facts are irrelevant to the analysis (*id.* at 23-24), but nevertheless attempt to replace the objective observer with their subjective observations. As the United States Supreme Court held, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary Co.*, 545 U.S. at 862 (internal quotations omitted).

Thus, the "awareness of this reasonable observer is not limited to the information gleaned simply from viewing the challenged display." *O'Connor*, 416 F.3d at 1228 (internal quotations omitted). The reasonable observer is "informed as well as reasonable," *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996), aware, *inter alia*, of the "history and context of the forum." *O'Connor*, 416 F.3d at 1227-28; *see also Weinbaum v. Las Cruces Pub. Schs*, 465 F. Supp. 2d 1116, 1144-45 (D.N.M. 2006) (quoting same); *Alvarado*, 94 F.3d at 1232 (describing the reasonable observer as "familiar with the history of the government practice at issue"); *ACLU of Ky. v. Mercer Co.*, 432 F.3d 624, 636 (6th Cir. 2005) ("Context is crucial to this analysis. . . . including the legislative history and implementation.").

A reasonable person analysis "do[es] not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion." *Mercer Co.*, 432 F.3d at 636 (emphasis in original). The inquiry, rather, is "whether *the* reasonable person *would* conclude that [the] display has the effect of endorsing religion." *Id.* (emphasis in original). And as the United States Court of Appeals for the Sixth Circuit pointed out in a post-*McCreary County* opinion that upheld a Ten Commandments display identical to that in *McCreary County*, "the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Mercer Co.*, 432 F.3d at 626, 638.

Nevertheless, that is exactly what Appellants—members of the ACLU—ask this Court to find: that they embody the reasonable observer. For this reason, they proffer their direct observations regarding the Capitol Grounds as evidence of what is objectively observed.[5] But highlighting the fallacy of treating ***the plaintiff*** in a constitutional challenge as the reasonable

[5] And, correctly, the district court acknowledged their subjective observations; it did not, as Appellants suggest, disregard those observations. (Transcript of Proceedings, ROA, Doc. 15, p. 10 ("The facts you've raised address the sincerity of certain individuals' belief, and I give them that, okay.").)

observer, Appellants ask this Court to see only what Appellants see: that ***placement*** of the Monument on a pre-existing sidewalk near the Capitol Building is somehow extremely problematic, without regard to the size of the Capitol Complex, the presence of other monuments or even this Monument's authorizing legislation (a piece of law which Appellants claim is subjective). (*Compare* Appellants' Br. 10 (stating that "placement of the . . . Monument by the Capitol's north side is the only [fact] that is clearly material") with Appellants' Br. 11 (stating that size of the Capitol Complex is immaterial and that "[t]he same issues apply to Appellee's and the District Court's observation that other monuments are included within the Capitol Complex").) Were this Court to accept Appellants' version of the reasonable observer, no state action would ever survive constitutional scrutiny, as Appellants' test is tantamount to a heckler's veto based on the cherry-picking of facts that support that veto. Appellee knows of no case adopting such a test and would ask this Court not to be the first one to do so.

Based on the foregoing, Appellee asks this Court to affirm the district court's finding that the material facts are not in dispute and that, in considering those facts coupled with the law discussed below, this Monument passes constitutional muster.

Proposition III: Article II, Section 5 of the Oklahoma Constitution Does not Require a Ban on the Ten Commandments Monument.

Appellants ask this Court to strike down for the first time in its history a passive monument on public property because it has religious content. Appellants address several points of law but make only one fundamental argument—the Monument is prohibited from display on public property because it contains religious ***text***. (*See* Appellants' Br. 22-23, 30-32.) Further, Appellants argue for a textual analysis of Article II, Section 5, but never offer the mechanics of such analysis. To support this hypothesis, Appellants argue that Section 5 is broad, banning displays the First Amendment does not, but give no adequate basis for such a claim. *Contra ACLU of Ill. v. St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986) (Posner, J.) (citing *Meyer*, "a case

decided, by the way, under the Oklahoma constitution, which contains a more narrowly worded prohibition of establishment than the federal constitution"). Appellants also argue that displaying a passive Ten Commandments monument is an unlawful "state adoption of sectarian principles" (Appellants' Br. 31), though they provide no citation to any case in which this Court struck down a state action under Section 5 that did not involve the expenditure of money, and despite this Court's ruling in *Murrow Indian Orphans Home* that it was permissible for the State to fund a specifically-sectarian Baptist orphan home where children "are offered opportunities to attend church services and are *encouraged* to do so." 1946 OK 187, ¶ 2, 171 P.2d 600, 601 (emphasis added). In short, Appellants offer no legal support for their aggressive position.

Further, in *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir. 1973), the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") upheld as constitutional a Fraternal Order of Eagles ("FOE") Ten Commandments monument—the same monument design upon which the Texas monument and this Monument are based. There, Judge Murrah observed "we cannot say that the monument, as it stands, is more than a depiction of a historically important monument." *Id.* at 34. More recently in *Van Orden*, the United States Supreme Court upheld as constitutional the Texas monument inscribed with text that Appellants allege is "identical" to the text at issue here. (Plfs.' Pet., ROA, Doc. 2, p. 6.) After *Van Orden*, other federal courts likewise rejected challenges to the FOE monument design. *See, e.g., Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (*en banc*). Challenges under state constitutions to the very same Ten Commandments monument design, displaying the same text, also suffered similar fates. *See Card*, 520 F.3d at 1013 n.5; *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1026-27 (Colo. 1995) (*en banc*). Nevertheless, Appellants ask this Court to swim against this vast current of cases and hold, for the first time, that the

Oklahoma Constitution requires a per se ban on Ten Commandments monuments. This Court should decline the invitation and hold that the Oklahoma Constitution requires no such ban.

A. Oklahoma Law Emphatically Supports the Constitutionality of This Monument Under Article II, Section 5.

Article II, Section 5 of the Oklahoma Constitution provides:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

OKLA. CONST. art. II, § 5.

Appellants ask this Court to engage in a purely textual analysis of Article II, Section 5 but fail to articulate what such an analysis should look like. Indeed, Appellants fail even to assert, much less identify, what sect, church, denomination, system of religion, or sectarian institution the Monument supports. Moreover, while Appellants claim a textual approach is helpful, they do not engage in any textual analysis.

The crux of Appellants' argument is whether a Ten Commandments display constitutes the support of a "sect, church, denomination, or system of religion" within the meaning of the Oklahoma Constitution. It is already clear that acknowledgment of God (as is present in the Preamble to the Oklahoma Constitution) is not a violation of Article II, Section 5, as parts of a constitution must be read as a consistent whole. *See Cowart v. Piper Aircraft Corporation*, 1983 OK 66, ¶ 4, 665 P.2d 315, 317. And there is no dispute that the text found on the Monument here (save the donor acknowledgment) is identical to the text found on the Texas monument upheld in *Van Orden*. This same text has been specifically credited by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") as a non-sectarian version of the Ten Commandments. *See Card*, 520 F.3d at 1011.

As support for their contention Appellants merely declare that the language of Section 5 is "plain and broad." (Appellants' Br. 27). Beyond that, Appellants latch on to a phrase from *Murrow,* "adoption of sectarian principles," and broadly declare that display of the Ten Commandments Monument is the "adoption of sectarian principles," (*Id.* at 30) offering no guidance to the Court in defining "sectarian." It is certainly not because Appellants avoid straying from the language of Section 5. Appellants cling to the phrase "adoption of sectarian principles," which is wholly absent from the Section. Fortunately, this Court's precedent provides markers for the meaning of these terms in this context.

In *Meyer*, this Court reviewed a "50 foot high, Latin Cross" installed on the State Fair Grounds by the Oklahoma City Council of Churches and maintained by Oklahoma City. 1972 OK 45, ¶ 1. The Court held: "[n]otwithstanding the alleged sectarian conceptions of the individuals who sponsored the installation of this cross, it cannot be said to display, articulate, or portray, except in a most evanescent form, any ideas that are alleged to pertain to any of the sectarian institutions or systems named in" Article II, Section 5. *Meyer*, 1972 OK 45, ¶ 11. Appellants attempt to distinguish the cross as being permissible by alleging, despite its imposing height, form and lighting, it is somehow less offensive than what the Ninth Circuit recognized as a non-sectarian version of the Ten Commandments. This argument has no support in the law. Moreover, there is at least some authority, though disputed within the veterans memorial context,[6] that a Latin Cross like the one in *Meyer* is "an especially potent sectarian symbol." *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Moreover, this Court held that Section 5 "does not mean to compel or require separation from God" because to do so "would be directly contrary to cardinal precepts of the

[6] *See Salazar v. Buono*, 559 U.S. 700, 721 (2010).

founding and preservation of our government." *Town of Pryor v. Williamson*, 1959 OK 207, ¶ 13, 347 P.2d 204, 207. In *Town of Pryor v. Williamson*, this Court upheld construction of a chapel upon the grounds of a state-owned orphans home. 1959 OK 207, ¶¶ 1, 4, 20. The "chapel when completed was to be owned by the State, to be maintained or managed by the State Board of Public Affairs and the . . . Orphans Home." *Id.* ¶ 4. Specifically, the chapel "provide[d] a place for the voluntary worship of God by children of the Orphans Home...[where] religious services might be conducted . . ., but without requiring any child to attend any one of such services." *Id.*

And while *Meyer* controls the outcome in the present case, *Williamson* is fatal to Appellants' attempts at side-stepping *Meyer* by arguing that the Monument's text renders it unconstitutional while conceding that a fifty-foot lighted cross is constitutional. *Williamson* upheld a publicly owned chapel intended for ***state supervision of actual religious worship*** of impressionable and vulnerable children who were being parented by the State itself. While the opinion does not mention Bibles, it is not hard to imagine that the actual religious worship involved reading from the Bible, with text that may have included the Ten Commandments. *Williamson* thus addressed and upheld far more than passive display of a non-sectarian text. Appellants not only offer no explanation for how *Williamson* does not eviscerate their novel religious text argument, they tellingly fail even to cite the case. But pretending *Williamson* does not exist does not silence its precedent.[7]

[7] Appellee need not address the Monument's purpose because Appellants contend that the display's purpose is irrelevant (*see* Appellants' Br. 23-24), even though a display's purpose is often at issue in cases challenging such displays. *Compare McCreary Co.*, 545 U.S. at 881 ("predominantly religious purpose" violates the Establishment Clause); *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) ("the context suggests that the State intended the display's moral message . . . to predominate"). Appellants cite no case in which a display was found to have a secular purpose but was nevertheless struck down as unconstitutional, and Appellee is likewise unaware of any such case.

Finally, Appellants cite *Murrow* for the proposition that Section 5 prohibits the "adoption of sectarian principles" such as a display of the Ten Commandments. (Appellants' Br. 30.) *Murrow* involved state payments to a Baptist-run orphan home where children were exposed to church services. *Murrow*, 1946 OK 187, ¶ 2. The *Murrow* Court distinguished *Gurney v. Ferguson*, 1941 OK 397, 1222 P.2d 1002, where "public money was being spent to furnish a service to a parochial school for which no corresponding value was received" by the State. *Murrow*, 1946 OK 187, ¶ 5. The *Murrow* Court determined that the difference between *Gurney* and *Murrow* was that the payment of money in *Murrow* "involve[d] the element of substantial return to the State and [did] not amount to a gift, donation, or appropriation to the institution," thereby avoiding constitutional infirmity. *Id.* at ¶ 9. Regardless, if inculcating children in a particular denomination's version of Protestant Christianity is not a violation of Section 5, it is difficult to imagine that a mere display of the Ten Commandments, rather than affirmative instruction in the Ten Commandments, is a violation. Plainly, the Ten Commandments monument "does not benefit a sectarian institution." *Burkhardt v. City of Enid*, 1989 OK 45, ¶ 20, 771 P.2d 608, 613.

Further, despite Appellants' argument that *Murrow* stands for the proposition that Section 5 may be violated without the expenditure of funds by the State, *Murrow* stands for the opposite. Even though *Murrow* involved the expenditure of funds, it did not count as support for a sect under Section 5 because the State obtained value in the form of orphan care. Indeed, *Murrow* clarifies that the State may use taxpayer money to pay for the care and education of children, including religious instruction, as long as the money is not considered a gift but rather a payment for services. If there is a case in which this Court holds the State violates Section 5 without spending funds for which no corresponding value is received, Appellants do not cite it, and Appellees cannot find it. Therefore, the Court must reject Appellants' argument that *Murrow*

condemns passive displays for which no money is paid or else fashion a completely new rule from whole cloth.

In short, Appellants argue that the Court may distinguish *Meyer* because there is a "distinction between symbolism [(here, a fifty-foot lighted cross)] . . . and a 120-word message explicitly set in stone."[8] (Appellants' Br. 22.) Words, according to Appellants, render the Monument a violation of Section 5 because the monument "speaks, if not shouts." (*Id.* at 21.) Therefore, any display of the Ten Commandments would be a violation under Appellants' proposed rule. There is no precedent in Oklahoma for such a rule.

B. Federal Law and Other States' Laws Likewise Support the Constitutionality of the Monument.

Returning to the text of Article II, Section 5, more than one hundred years ago and near the very adoption of Section 5, this Court noted that Section 5's prototype was Article IV, Section 40 of the Michigan Constitution and that under that provision, "[i]n Michigan it has been held that reading of extracts from the Bible emphasizing the moral precepts of the ten commandments, as a supplemental text-book . . . was not violative of such constitutional provisions." *Connell v. Gray*, 1912 OK 607, ¶ 12, 127 P. 417, 421 (citing *Pfeiffer v. Bd. of Educ.*, 77 N.W. 250 (Mich. 1898)); *see Pfeiffer*, 77 N.W. at 251. And in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the Tenth Circuit specifically rejected "Mr. Green's contention that [it] should deem the Board's display of the Monument as presumptively unconstitutional because the Monument is inscribed with the Ten Commandments." *Id.* at 799.

[8] And, indeed, this is not a new argument. Throughout this litigation, Appellants argued that "Plaintiffs' allegations primarily concern the religious instruction contained in the Monument and its application, use or benefit to churches, sects, systems of religion, and . . . sectarian institutions as well." (Pls.' Resp. to Def.'s Am. Mot. for Summ. J., ROA, doc. 12, p. 23.; *see also id.* at p. 29 ("Article 2, Section 5, prohibits... the use of state property to purvey a particularized and exclusive religious instruction taken from the sacred texts of specific faiths."); *id.* at 29-30 ("Plaintiffs ask this Court to enjoin the state from explicitly instructing its citizens in how and how not to worship God.").)

And this rejection was in the face of an argument favoring a per se ban on Ten Commandments monuments on public property. This Court should likewise reject the same argument proffered by Appellants.

Appellants' textual approach is further flawed as the Monument is decidedly non-sectarian and merely acknowledges religion. Appellants cite *McCreary County* for support, but even there, analysis of the opinion and subsequent case law applying *McCreary County* significantly undercut Appellants' argument. *See ACLU v. Grayson Co.*, 591 F.3d 837, 848-49, 854-55 (6th Cir. 2010) (holding that without a religious purpose or endorsement, a Ten Commandments display is constitutional under *McCreary County*); *ACLU v. Mercer Co.*, 432 F.3d 624, 639 (6th Cir. 2005) ("The Constitution requires an analysis beyond the four-corners of the Ten Commandments. In short, 'proving' that the Ten Commandments themselves are religious does not prove an Establishment Clause violation.")

HB 1330, authorizing the display of the Ten Commandments on the Oklahoma Capitol Grounds, had three purpose statements Appellants urge this Court to ignore. (Appellants' Br. 12-14). One of those purpose statements reads: "[a]cknowledgements of the role played by the Ten Commandments in our nation's heritage are common throughout America." (HB 1330, ROA, Doc. 8, Ex. 15, p. 2.) This statement is actually an unattributed quote from *Van Orden*, 545 U.S. at 688. Further, there are numerous Ten Commandments monuments across the country, many of which are identical to the Monument here that display this exact text and design. Indeed, this Monument was designed based on rubbings of the Texas monument, which is one of many FOE monuments scattered on government property across the country. (Deposition of Greg Mosier, ROA, Doc. 8, Ex. 7, p.1.) For example, reviewing just such an FOE monument, the Ninth Circuit described the exact text appearing on the Texas monument and this Monument as "a non-sectarian version of the Ten Commandments." *Card*, 520 F.3d at 1011; *see*

also Van Orden, 545 U.S. at 701 (Breyer, J., concurring). The Ten Commandments thus have an undeniable secular purpose repeatedly acknowledged by courts and Congress.[9] Appellants offer nothing to refute that description.

In another case involving a nearly identical monument with an identical version of the Ten Commandments, the Colorado Supreme Court held that the Ten Commandments are "expressions of universal standards of behavior" and "ethical or moral principles." *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1024 (Colo. 1995). Appellants offer the Court no jurisprudential path around these declarations except to simply disagree with the characterization of the Ten Commandments made by the Ninth Circuit and the Supreme Court of Colorado. Appellants do not appear to argue that mere religious acknowledgment violates Section 5. Instead, Appellants argue that the Ten Commandments are something more than mere religious acknowledgement without citing any authority that supports their argument.

Additionally, Appellants contend that Appellee argued inconsistently before the district court, contending that Appellee concluded that Section 5 and the federal Establishment Clause compel the same result in this case and that Appellee then later analyzed Section 5 as a State Blaine Amendment. (Appellalnts' Br. 26.) But this was not inconsistent; it was court ordered. (Order, ROA, Doc. 7, p. 4.) The district court ordered the parties to address the relevance of the Blaine Amendment, specifically citing a law review article in the Harvard Journal of Law and Public Policy written by Professor Deforrest on the issue of State Blaine Amendments. Professor Deforrest filed an amicus with the district court and with this Court outlining that

[9] *See, e.g., Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 798 (10th Cir. 2009); Brief of the United States as Amicus Curiae Supporting Respondents at 9, *Van Orden v. Perry*, 545 U.S. 677 (2005) (citing S. Con. Res. 13, 105th Cong., 1st Sess., (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess., (1997)) ("[T]he Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization;" they "set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society;" and they "are a declaration of fundamental principles that are the cornerstone of a fair and just society.")

Section 5 is indeed a State Blaine Amendment and that it has no application to passive monument displays such as the Monument at issue in this case. Appellee agrees with Professor Deforrest but will refrain from belaboring the points raised in his brief as the brief speaks for itself quite convincingly. Nevertheless, Appellee, to be clear, stated in its amended motion for summary judgment that "in the context of a passive monument with a secular purpose, there is very little appreciable difference between an outcome based on Article 2, Section 5 and the Establishment Clause." (Def.'s Am. Mot. for Summ. J., ROA, Doc. 7, p. 24.)

Indeed, for that reason, this Court noted in *Meyer* that violations of Article II, Section 5 could also be violations of the First Amendment. 1972 OK 45, ¶ 3. And in *Williamson*, the Court upheld the building of a chapel both under Article II, Section 5 and the First Amendment. 1959 OK 207, ¶¶ 6, 7. Thus, while this Court need not rely on federal precedent in deciding this case, the great weight of federal authority reviewing similar monuments and upholding them as constitutional are relevant and serve to reinforce the analysis under the Oklahoma Constitution. And, of course, almost every other court that has analyzed a Ten Commandments monument based on the FOE design (as the monument in *Van Orden* and this Monument are) concluded it was permissible. *See, e.g., Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (*en banc*); *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir. 1973); *State v. Freedom From Religious Foundation*, 898 P.2d 1013 (Colo. 1995).

Further, in *Van Orden*, the United States Supreme Court reviewed the constitutionality of the Texas monument—a monument identical to the one here (save the donor designation) and on which the Oklahoma Monument is based—and found the Texas monument was permissible. 545 U.S. at 692. There, Justice Breyer explained that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious" because such "absolutism" is inconsistent with the Nation's traditions and would "tend to

promote the kind of social conflict the Establishment Clause seeks to avoid." 545 U.S. at 699 (Breyer, J., concurring).[10] Indeed, Justice Breyer further explained that courts "must distinguish between real threat and mere shadow. . . . Here, we have only shadow." *Id.* at 704 (internal quotation omitted).

Courts reviewing Establishment Clause challenges to passive monuments need only determine whether the display conveys a secular moral and historical message. *Id.* at 701 (Breyer, J., concurring). To do so, courts exercise their legal judgment, for which there is "no test-related substitute," and consider the physical setting of the monument, examining the overall context in which it resides. *Id.* at 700,701-02. Indeed, Justice Breyer focused extensively on the physical setting of the Texas monument—a large park with "17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." *Id.* at 702. And based on its physical setting, Justice Breyer concluded that "the State itself intended the . . . nonreligious aspects of the tablets' message to predominate." *Id.* at 701. Finally, Justice Breyer emphasized that the Texas monument had been on the Texas Capitol Grounds for forty years without incident—the only fact upon which *Van Orden* can be distinguished from this case. *Id.* Here, based upon Part II(B) above, the Monument likewise passes muster, especially when the context here is compared to the *Van Orden* context.

Conclusion

For the foregoing reasons, Appellee asks this Court to affirm the district court and hold that the undisputed material facts and the law demonstrate that Article II, Section 5 does not apply to this passive, constitutional display of the Ten Commandments.

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[10] Because he supplied the "decisive fifth vote," Justice Breyer's concurring opinion is the controlling opinion. *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May 2015, a true and correct copy of the foregoing instrument was mailed, postage prepaid to the following:

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