No. 06-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES GREEN, and AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA,

Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF HASKELL, and KENNY SHORT, in his official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Oklahoma, NO. 05-CIV-406-RAW
Honorable Ronald A. White, U.S. District Judge

PETITION FOR REHEARING *EN BANC*

Kevin H. Theriot
Joel L. Oster
Alliance Defense Fund
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000
(913) 685-8001 facsimile
ktheriot@telladf.org

Brentley C. Olsson
1215 Classen Drive
P.O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648
(405) 235-1533 facsimile
olsson@huckabyfleming.com

Counsel for Defendants-Appellees

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INTRODUCTION

Come now the Defendants/Appellees in this matter, Board of County Commissioners of the County of Haskell and Kenny Short, and petition the Court for Rehearing *En Banc* pursuant to Fed. R. App. P. 35. The Panel's decision on June 8, 2009 reversing the District Court's ruling for Defendants/Appellees, *Green v. Haskell County Board of Commissioners*, No. 06-7098 (June 8, 2009) ("Panel Op."), fails to consider the recent Supreme Court precedent limiting standing in Establishment Clause cases and presents a question of exceptional importance on the continued viability of "offended observer" standing that needs to be addressed *en banc* by this Court.

The Panel Opinion also conflicts with the United States Supreme Court decision in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), which upheld the display of a Ten Commandments monument on virtually identical facts. In fact, this is the first and only circuit since *Van Orden* to strike down a Ten Commandments monument. The Sixth, Eighth, and Ninth Circuits have all upheld such monuments.[1]

The Panel Opinion presents an additional conflict with the Eighth Circuit Court of Appeals decision in *Clayton v. Place,* 884 F.2d 376 (8th Cir. 1989), which found that expression of board of education officials' personal religious

[1] *ACLU v. Mercer*, 432 F.3d 624 (6th Cir. 2005); *ACLU v. Plattsmouth*, 419 F.3d 772 (8th Cir. 2005); *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008).

convictions regarding their votes on an issue did not violate the Establishment Clause – even when made at an official meeting in a small town. The Panel Opinion sets a perilous precedent for the constitutionality of future legislative acts in the Tenth Circuit. For example, legislators who tell reporters that their vote to ban the death penalty is based on their personal religious convictions would make the new law subject to an Establishment Clause challenge.

Finally, the Panel Opinion fails to properly apply the Supreme Court's recent decision in *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (2009), which specifically held that governments like Haskell County can open up forums for private speech through the display of monuments. That is exactly what occurred in this case, as evidenced by over twenty years of allowing private entities to donate monuments, and statements of the commissioners that took place prior to this lawsuit indicating the forum is open for historical monuments. Application of *Pleasant Grove* is a question of exceptional importance since this Court has a well developed line of cases dealing with monuments on government property and this is the first case addressing how *Pleasant Grove* affects these precedents.

I. PLAINTIFFS DO NOT HAVE STANDING.

One of the irreducible constitutional minimums to establish standing to sue in federal court is that the plaintiff suffer an "injury in fact." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992). The "personal injury [must be] fairly traceable to the defendant's allegedly unlawful conduct and ***likely to be redressed by the requested relief***." *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (emphasis added).

Plaintiff/Appellant Green testified at trial that he is not primarily opposed to the Monument itself, *but rather the Commissioners' comments about the Monument*. Appellants' Appendix 978-79 ("App."). This Court cannot grant the relief that would address the harm Plaintiff Green is requesting. He has not asked for damages, nor has he asked for an injunction restricting the speech of the Commissioners. App. 26. Since *past* comments cannot be enjoined, Green lacks standing.

Green's claim that he was treated differently because of his opposition to the Monument must fail because he is not seeking relief for this alleged harm. The "redress" for such "injury" is to be treated on the same terms as others citizens. But, he has not made such a request. The harm alleged is not redressable by the relief sought, resulting in no standing.[2]

More importantly, being "offended" by something with which one disagrees should not be sufficient to confer standing on the Plaintiff. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464,

[2] The ACLU was denied standing as a plaintiff by the District Court, and Plaintiffs/Appellants did not appeal that issue. Panel Op. at 14, n.5. So if Mr. Green is denied standing, the case must be dismissed.

485-86 (1982); *ASARCO*, *Inc. v. Kadish*, 490 U.S. 605, 616 (1989). Haskell County recognizes that the panel opinion in *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005), held to the contrary. But this Court has never considered this issue *en banc* and that precedent should be overturned.

In no other area of the law are plaintiffs allowed this much latitude in proving standing. The general rule is that when plaintiffs allege as injury something with which they disagree, the courts refuse to allow standing precisely because it turns the courts into a super-legislature to review generalized grievances with the executive and legislative branches of government where there is no case or controversy involved. *See, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (no standing to challenge reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution), *and United States v. Richardson,* 418 U.S. 166 (1974) (no standing to challenge reporting rules governing CIA as violation of requirement under Art. I, § 9, cl. 7 of the Constitution for regular statement of account of public funds).

Narrowing offended observer standing is supported by the concurring opinion of Justices Scalia and Thomas in *Hein v. Freedom From Religion*, 127 S.Ct. 2553, 2582 (2007), where they observe that "taxpayer's purely psychological displeasure" is not sufficient to confer standing. That the reign of offended

observer standing is ripe for overthrow is also evidenced by the Supreme Court's recent grant of *certiorari* in the Establishment Clause case of *Salazar v. Buono*, Case No. 08-472, on the following issue: "Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols." *Salzar v. Buono,* No. 08-472, Questions Presented (2-23-2009), http://www.supremecourtus.gov/qp/08-00472qp.pdf.

Defendants respectfully submit that Mr. Green does not have standing because he only sought to prove a generalized grievance with the government, and offended observer standing should be rejected, as it is an unworkable doctrine. Alternatively, on the issue of standing, this petition should be held until the Supreme Court issues an opinion in *Salazar*, and then this case dispose of in accordance with that forthcoming ruling.

II. IF THE TEN COMMANDMENTS MONUMENT IN *VAN ORDEN V. PERRY* WAS UPHELD, HASKELL COUNTY'S SHOULD BE ALSO.

The similarities between this case and *Van Orden* are numerous. In both cases:

1. The idea for a Ten Commandments display was initiated by a private entity (125 S.Ct. at 2870 (Breyer, J., concurring); App. 885);

2. The monument was paid for with private funds (125 S.Ct. at 2870; App. 885, 55);

3. The content of the monument was determined by the private donor (125 S.Ct.

at 2870; App. 889);

4. The monument was displayed along with other historical monuments on the lawn of a government building (125 S.Ct. at 2870; App. 882-83; 1269-72);

5. There is a statement on the monument indicating it was donated by private citizens (125 S.Ct. at 2870; App. 887; 1085 &1100);

6. The display area does not lend itself to meditation (125 S.Ct. at 2870; App. 882);

7. The monument donors allegedly had a religious purpose (125 S.Ct. at 2878 (Stevens, J., dissenting); *Id.* at 2892 (Souter J. dissenting); *Id.* at 2870 (Breyer, J., concurring); App. 1009);

8. The site for the monument was selected by government officials (125 S.Ct. at 2858 (plurality); App. 410).

The only significant differences between *Van Orden* and this case also weigh in favor of finding no Establishment Clause violation. The monument in *Van Orden* contained symbols representing Christ and the Star of David, 125 S.Ct. at 2858, and the text emphasized "I am the Lord thy God." 125 S.Ct. at 2893 (Souter, J., concurring). The only thing on the monument besides the Ten Commandments in this case is the text of a non-religious document – the Mayflower Compact. App. 886; 56. And in *Van Orden*, a legislative resolution was passed commending the Fraternal Order of Eagles – the donor of the monument that required members to believe in a Supreme Being. 125 S.Ct. at 2893 (Souter, J., dissenting). No such resolution was passed supporting the donor in this case. Finally, the dedication of the monument in *Van Orden* was actually "presided over" by two legislators, 125

S.Ct. at 2858, but in this case, the private donor, Mike Bush, presided over the dedication. App. 866; 911.

The plurality opinion in *Van Orden* held that in cases like these, the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is not helpful.

> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

125 S.Ct. at 2861. Chief Justice Rehnquist emphasized the historical significance of the Ten Commandments rather than whether the government officials had a secular purpose in allowing the monument to be displayed. He concluded that the Ten Commandments display in that case did not violate the Establishment Clause without even considering whether the government officials had an improper motive or purpose.

Justice Breyer, whose concurrence supplied the fifth vote for determining there was no Establishment Clause violation in *Van Orden*, also refused to strictly apply the *Lemon* test. "I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." 125 S.Ct. at 2871 (Breyer, J., concurring). Justice Breyer emphasized the historical significance of the monument rather than whether the government officials had a religious purpose or motive in allowing it to be erected.

He noted that the Ten Commandments

> convey a historical message (about a historic relation between those standards and the law) . . . . [And] [t]he setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed.

Id. at 2870 (Breyer, J., concurring).

The Panel Opinion distinguishes *Van Orden* because it says the monuments in front of the Haskell County courthouse do not have a "unifying, cohesive, secular theme." Panel Op. at 41, n.16. But they are remarkably similar to those on the Texas State Capitol grounds in *Van Orden*. The displays there memorialized Heroes of the Alamo, Volunteer Fireman, Texas Cowboy, Spanish-American War, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. 125 S.Ct. at 2858 n.1. Haskell County's display includes monuments to veterans of World Wars I and II and the Korean War, pioneers, the graduating classes of 1954 and 1955, Native Americans, and memorializes on paving bricks in a sidewalk hundreds of other people who lived and died in the State of Oklahoma. App. 883. If the Ten Commandments display along with the other monuments in *Van Orden* was a coherent display that "communicates to visitors that the State

sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed," 125 S.Ct. at 2870, so do the monuments in the case at bar. The only difference between the setting in *Van Orden* and the one in Haskell County weighs in favor of upholding the monument. The monuments in Texas are spread over 22 acres, while the area the monuments in Haskell County occupy is small and all monuments are within sight of each other. App. 1266-72. Justice Souter thought the Texas monuments were spread so far apart, each would be taken "on its own terms," instead of part of one display. 125 S.Ct. at 2895 (Souter, J. dissenting).

The Panel Opinion also distinguishes *Van Orden* based on Justice Breyer's observation that the Ten Commandments monument in that case had been in place for 40 years before any complaints were made. Panel Op. at 43; *Van Orden*, 125 S. Ct. at 2857 (Breyer, J., concurring). But there is no indication that a majority of the Supreme Court would ever consider this to be a determinative factor. As Justice Souter notes, "I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause." 125 S.Ct. at 2897 (Souter, J., dissenting). Moreover, the Supreme Court has invalidated older practices as violating the Establishment Clause. *See, e.g., School Dist. of Abington Township v. Schemp*, 374 U.S. 203, 270 (1963) (50 year old practice of reading the Bible in Pennsylvania public schools violated Establishment

Clause). And it has upheld newer ones. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (voucher program established in 2000 did not violate Establishment Clause). The Panel's decision to make this the "determinative" factor also conflicts with this Court's opinion in *O'Connor v. Washburn University*, 416 F.3d 1216, 1220 (10th Cir. 2005), where a display was upheld even though the defendant started receiving complaints about the display "within days of installation." The Panel's decision likewise conflicts with the Sixth Circuit's opinion in *ACLU v. Mercer*, 432 F.3d 624, 626-27 (6th Cir. 2005), which upheld a Ten Commandments display that was challenged in court the very next month after it was erected. Both cases were decided after *Van Orden* was handed down.

The Panel Opinion goes even further, and determines that the very act of filing a lawsuit challenging the display demonstrates that there is an endorsement problem. Pane Op. at 44. As the District Court wisely observed: "It feels somewhat discordant to file a federal case, bask smugly in the resulting frenzy, and then claim that same frenzy is an effect of the government's establishment of religion." App. 890, 911-12. *See Lynch v. Donnelly*, 465 U.S. 668, 684-85 (1984) ("A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement.").

Displaying the Ten Commandments on a courthouse lawn with other historical monuments does not violate the Establishment Clause in this case, just as it did not in *Van Orden*.

III. EXPRESSION OF THE PERSONAL RELIGIOUS CONVICTIONS OF INDIVIDUAL GOVERNMENT OFFICIALS DOES NOT AFFECT THE CONSTITUTIONALITY OF THEIR VOTES.

The Panel Opinion concluded that the statements of individual Commissioners reported in the media create a perception that the County endorses religion. Panel Op. at 32-34. This leaves Establishment Clause jurisprudence to the whim of reporters and editors who decide what statements should be reported and how.

Moreover, the personal beliefs of the Commissioners are irrelevant. For instance, the Supreme Court held in *Lynch* that the display of a crèche on the courthouse lawn was constitutional, even though it was part of the mayor's "crusade to keep Christ in Christmas . . . ." 465 U.S. at 726 (Blackmun, J., dissenting) (quotation marks omitted).

The Panel Opinion's ruling to the contrary conflicts with the Eighth Circuit's holding in *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), where school board members made numerous statements regarding their personal religious convictions regarding allowing dancing at the school. Prior to and after a meeting where a vote was to be taken on this issue, several school employees indicated that their

religious views prohibited them from allowing dancing. For instance, a board member "stated that he opposed changing the rule because his church preached that it was wrong and immoral to dance," while another said that "he had voted to permit dances in the past but caught so much 'flak' from the ministers that he would vote against it this time," and still another "declared that his church was opposed to dancing." 889 F.2d 192, 192-94 (dissent from denial of rehearing *en banc*). When asked about the separation of church and state, the school board president responded during the meeting, "you'd better hope there's never separation of God and school." *Id.*

Despite these plain statements indicating the board members' religious views had influenced their vote, the Eighth Circuit found that there was no endorsement in violation of the second prong of the *Lemon* test.

> To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, we find nothing in the rule to suggest the District has taken a position on questions of religious belief or made adherence to a religion relevant in any way to a person's standing in the political community.

884 F.2d at 379 (citations, quotation and editing marks omitted). The court explained its rationale as follows.

> We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. *Cf. Washington v. Davis*, 426 U.S. 229, 253, 96 S.Ct. 2040, 2054, 48 L.Ed.2d 597

> (1976) (Stevens, J., concurring) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process."). To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral . . . . We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards.

884 F.2d at 380. Unlike the board members in *Clayton*, none of the statements made by the Commissioners in this case regarding the Monument indicate that they voted to allow it because of their religious beliefs, and no religious statements were made by the Commissioners at commissioners' meetings or in their official capacities. App. 892; 911-12; 915-17. So reliance on the religious perspectives of the Commissioners to strike down the display here conflicts with *Clayton*.

The Panel Opinion makes much of the fact that Haskell County is rural and Stigler, Oklahoma is a small town. Panel Op. at 35. But *Clayton* arose out of Purdy, Missouri, "a small, primarily rural community in southwestern Missouri." 884 F.2d at 378. The Panel fails to cite a single case holding that Establishment Clause concerns are heightened in small towns. This sets a hazardous precedent that imperils the acts of small town officials throughout the Tenth Circuit.

Furthermore, it is ludicrous to suggest that Commissioners lose their free speech rights by being elected (even if they do live in a small town). As Justice Stevens recognized in *Van Orden*:

> Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.

125 S.Ct. at 2883 (Stevens, J., dissenting) (emphasis in original).

IV. THE PANEL DID NOT PROPERLY APPLY THE SUPREME COURT'S RECENT DECISION IN *PLEASANT GROVE CITY, UTAH V. SUMMUM* TO THESE FACTS.

The Supreme Court did not hold in *Summum* that all donated monuments displayed on government land are government speech. While they "typically represent government speech," the court recognized that "a government entity *may* create a forum that is …dedicated solely to the discussion of certain subjects." 129 S.Ct. at 1132 (emphasis added). And that's exactly what we have in this case. Unlike Pleasant Grove, Haskell County has intentionally opened a limited forum for monuments on its courthouse lawn and does not discriminate based on viewpoint. App. 1191-94; 1202; 1263-64. The Supreme Court specifically acknowledged this is acceptable. "[T]here are limited circumstances in which the forum doctrine might properly be applied to a permanent monument – for example, if a town created a monument on which all of its residents . . . . could place the name of a person to be honored or some other private message." 129 S.Ct. at 1138. The Panel Opinion fails to consider that one of the monuments on the Haskell County courthouse meets this description exactly. Paving bricks

containing at least 140 personalized messages are displayed just feet from the Ten Commandments monument. App. 1270-71.

The presence of the brick monument indicates that the courthouse lawn was a limited public forum for private historical speech well before this litigation commenced. Pre-litigation comments of the Commissioners reported by the newspapers also reflect the forum was opened for historical monuments on a viewpoint neutral basis. Commissioner Few was reported as saying he would allow monuments reflecting documents from other religious faiths on November 9, 2004 (App. 1210), and on November 11, 2004. App. 544. On June 29, 2005 Commissioner Cole was reported as saying that he did "not have a problem" if other religious faiths wanted to have a monument. App. 1419. And Commissioner Short referred to Ten Commandments as part of "history" on June 28, 2005. App. 547. Commissioner Few expressed similar sentiments on June 29, 2005. App. 655. *En banc* review is needed to properly apply *Pleasant Grove* to this case.

CONCLUSION

The Panel Opinion directly conflicts with the Supreme Court opinion in *Van Orden v. Perry* and the Eighth Circuit's holding in *Clayton v. Place*. It also presents questions of exceptional importance on the continued viability of offended observer standing and this Circuit's first application *Pleasant Grove City v. Summum.* Rehearing *en banc* should be granted.

Respectfully submitted this 19th day of June, 2009

/s Kevin H. Theriot
Joel L. Oster
Alliance Defense Fund
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000
(913) 685-8001 facsimile
ktheriot@telladf.org
joster@telladf.org

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman type.

/s Kevin H. Theriot
Kevin H. Theriot
Attorney for Defendants-Appellees

Dated: June 19, 2009

PROOF OF SERVICE

I certify that on June 19, 2009, I electronically filed the foregoing Petition Rehearing *En Banc* using the ECF system, which sent notification of such filing to the following:

Michael Salem
SALEM LAW OFFICES
111 North Peters, Suite 100
Norman, OK 73069
msalem@msalemlaw.com

Daniel Mach
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
dmach@aclu.org

Counsel for Plaintiffs-Appellants

I further certify that, as required by the General Order dated March 18, 2009, on the same day an electronic copy of Petition for Rehearing *En Banc* was transmitted to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, via ECF system in Portable Document Format (PDF) generated from an original word processing file, (1) that all required privacy redactions have been made, (2) that every document submitted in digital form is an exact copy of the written document filed with the Clerk, and (3) that the digital submission have been scanned for viruses with McAfee Virus Scan Enterprise 8.5, updated June 19, 2009, and found free from viruses.

/s Kevin H. Theriot
Kevin H. Theriot
Attorney for Defendants-Appellees

Dated: June 19, 2009