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I. INTRODUCTION

In *Green v. Haskell*, the Tenth Circuit considered whether the Haskell County Board of Commissioners' decision to approve a private citizen's request to erect a monument inscribed with the Ten Commandments on the lawn of the county courthouse violated the Establishment Clause.[1] With reasoning based primarily on Justice O'Connor's "Endorsement Test,"[2] the court found that under the unique circumstances of the case, a reasonable observer would view the government's decision to allow the display of the Ten Commandments as having the "principle or primary effect of endorsing religion," and thus the display violated the Establishment Clause.[3]

This Note argues that the Tenth Circuit erred in finding that the monument in Haskell County violated the Establishment Clause. The Tenth Circuit failed to apply the controlling precedent of *Van Orden v. Perry*[4] to find that the monument in Haskell County was a constitutionally acceptable, neutral acknowledgement of the religious history of this nation. Instead, the court incorrectly distinguished *Van Orden* both by using an unrealistic "reasonable observer"[5] standard requiring a clear secular purpose for the erection of the monument, and by incorrectly attributing the divisiveness surrounding the lawsuit to the unconstitutional effect of the monument.

II. FACTS AND PROCEDURAL HISTORY

Haskell County, located in Southeastern Oklahoma, has a small population of about 15,000 people.[6] The courthouse is located in

1. 568 F.3d 784 (10th Cir. 2009).
2. Lynch v. Donnelly, 465 U.S. 668, 692 (1984).
3. *Green*, 568 F.3d at 799.
4. 545 U.S. 677 (2005).
5. *Green*, 568 F.3d at 799.
6. Green v. Bd. of County Comm'rs, 450 F. Supp. 2d 1273, 1274 (E.D. Okla. 2006),

Stigler, the county seat, and is situated in the middle of a square block of county property, which also contains a rustic cabin for the Haskell County Historic Society, a gazebo used for activities ranging from political rallies to symphonies, and a lawn where a number of public and private events take place. The lawn contains a number of marble monuments "spread willy-nilly," which were mostly paid for and erected by private citizens of Haskell County.[7]

Although no written policy exists regarding the types of monuments allowed to decorate the lawn, the theme of the monuments could arguably be construed as relating to the historical significance of Haskell County and the United States in general.[8] The largest monument, situated directly in the center of the lawn, honors Haskell County citizens who died in World War I and World War II.[9] There are also smaller monuments including one that honors those who were killed in action in Vietnam and Korea; a rose garden with a bird bath; a flag pole with the American Flag; a large monument for the Choctaw Nation; two marble benches dedicated to and inscribed by the local high school classes of 1954 and 1955; white billboards with advertisements for various churches; a section for "personal message" bricks from private sponsors; and, of course, the recently added monument displaying the Ten Commandments.[10]

The plans for the addition of the Ten Commandments monument began in 2004 when a private citizen named Mike Bush attended a regularly scheduled meeting for the Board of County Commissioners and asked for permission to erect a monument with the Ten Commandments.[11] Mr. Bush said that he would take care of all expenses for the project.[12] The Board discussed the historic aspects of the project, but it did not discuss any religious aspects of the decision to allow the monument's erection.[13] Mr. Bush was granted permission, and he proceeded to design the monument and

rev'd sub nom. Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009).

7. *Id.*

8. *Id.* at 1275 ("The lawn monuments have no apparent central theme to the amateur eye. One could argue that they all have some tenuous connection to the history of Haskell County.").

9. *Id.*

10. *Id.*

11. *Id.* at 1276.

12. *Id.*

13. *Id.*

raise funds for the project.[14] As an afterthought, Mr. Bush decided, without approval from the Board, to add the text of the Mayflower Compact.[15] The monument was erected on the courthouse lawn on November 5, 2004, and an unveiling ceremony organized by Mr. Bush followed days later consisting primarily of impromptu religious speeches.[16] Two of the commissioners attended the ceremony.[17]

After the unveiling of the monument and the initial media coverage, there was a period of relative calm until James Green filed a lawsuit on October 6, 2005, claiming that he was "offended by the Monument because he believes its text is presented as a mandate and is thus an endorsement by the government of religious matters."[18] Following the initiation of the lawsuit, Mr. Bush circulated a petition and organized a rally in support of the monument, and the commissioners made statements in support of the monument.[19] The district court held that Haskell County did not violate the Establishment Clause by approving a private citizen's plan to erect a monument,[20] and Mr. Green appealed to the Tenth Circuit.[21]

III. SIGNIFICANT LEGAL BACKGROUND

A. The Secular Emphasis of the Three-Pronged Lemon *Test*

In 1971, the Supreme Court decided *Lemon v. Kurtzman*, a seminal Establishment Clause case in which the Court considered whether programs that supplemented and reimbursed parochial schools for secular teachers' salaries were unconstitutional.[22] The Court articulated the famous "*Lemon* test," which explains that to survive Establishment Clause scrutiny a government action must (1) have a secular legislative purpose, (2) neither advance nor inhibit religion as its principal or primary effect, and (3) not foster excessive government entanglement with religion.[23] Based on this test, the

14. *Id.*
15. *Id.* at 1277.
16. *Id.* at 1276.
17. *Id.*
18. *Id.* at 1279.
19. *Id.* at 1279–80.
20. *Id.* at 1296.
21. Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009).
22. 403 U.S. 602 (1971).
23. *Id.* at 612–13.

Court found that the programs in question were unconstitutional[24] because their "cumulative impact" involved "excessive entanglement between government and religion."[25] *Lemon*'s progeny seems to suggest that the purpose of government action must be exclusively secular and that any religious motivations warrant invalidation.[26]

Shortly after deciding *Lemon*, the Supreme Court began to distance itself from the rigid application of that test. For instance, just two years after *Lemon*, the Court explained that the factors identified in *Lemon* served as "no more than helpful signposts."[27] In some cases, the Court refrained from using the *Lemon* test entirely.[28] Furthermore, the Court soon began to develop alternative forms of analysis for analyzing Establishment Clause issues.

B. The Lemon *Test Refined by O'Connor's "Endorsement Patina"*[29]

In her concurring opinion in *Lynch v. Donnelly*, a case dealing with a government-purchased nativity scene on display during Christmas,[30] Justice O'Connor articulated another way of conceptualizing the *Lemon* test."[31] O'Connor explained that when the government endorses a particular religion, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[32]

To determine whether or not the government has endorsed religion, O'Connor set forth a two part analysis: first, the court must ask what the message was that the government *intended* to communicate; and second, the court must ask what message the

24. *Id*. at 607.

25. *Id*. at 614.

26. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09 (2000); Edwards v. Aguillard, 482 U.S. 578, 586–93 (1987); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985); Stone v. Graham, 449 U.S. 39, 41 (1980).

27. Hunt v. McNair, 413 U.S. 734, 741 (1973).

28. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983) (upholding the use of prayer in the context of legislative and deliberative bodies based on the "history and tradition of this country").

29. *Green*, 568 F.3d at 796.

30. 465 U.S. 668, 671 (1984) (O'Connor, J., concurring).

31. *Id*. at 687.

32. *Id*. at 688.

government actually, objectively conveyed to the community.[33] If either the government intended to endorse or actually endorsed religion, based on the specific facts of the situation, then the government activity must be invalidated.[34] O'Connor argued that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[35] Thus it is necessary to closely analyze the specific context and audience of each case to determine whether the message sent by the government had the effect of endorsing religion.

O'Connor's test has come under heavy criticism in recent cases. For instance, in *Capitol Square Review and Advisory Board v. Pinnette*, a case dealing with private religious expression on government property, Justice Scalia rejected O'Connor's endorsement test and argued that it supplied "no standard whatsoever."[36] Scalia argued that if the factually nuanced inquiry of endorsement was used to scrutinize every neutral acknowledgment of religion in a public forum, then officials would be forced "to weigh a host of imponderables,"[37] such as how close to the building was too close, what kind of building is being considered, what was the specific context, what symbolic messages could be drawn, etc.[38] Thus, rather than require policy makers and government officials to embark on a dizzying factual analysis of many degrees, Scalia advocated a test that focused on the neutrality of the access to the government property.[39] Though this test is not directly applicable to the context of Ten Commandment monuments post *Pleasant Grove*,[40] this test illustrates how the Court moved away from the endorsement patina, as well as the *Lemon* test, which had a strong secular emphasis, toward a standard focused much more on the neutrality of the government action.

33. *Id.* at 690.

34. *Id.*

35. *Id.* at 694.

36. 515 U.S. 753, 768 (1995).

37. *Id.*

38. *Id.*

39. *Id.* at 770.

40. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009) (finding that a permanent monument in a public area represents "a form of government speech" as opposed to the private speech in *Pinnette*).

C. Contrasting Government Involvement in Van Orden *and* McCreary

In the Court's most recent rulings discussing whether a government display of the Ten Commandments violated the Establishment Clause in the twin cases of *Van Orden v. Perry*[41] and *McCreary County v. ACLU*,[42] the Court emphasized that the "touchstone" for their analysis was "the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[43] The Court found that the *Van Orden* display constituted a constitutional, neutral acknowledgement of both the religious and historic nature of the Ten Commandments because, *inter alia*, the monument was inspired and paid for by a private organization, was erected amongst multiple other monuments with a historic message, and the government showed no particular preference to this monument.[44] In contrast, the Court found that the *McCreary* display constituted a violation of the Establishment Clause because the government issued a legislative order requiring the posting of the Ten Commandments in a high traffic area, displayed the Ten Commandments in an exclusively religiously themed display, and demonstrated a sham purpose of historic education which was dwarfed by the "clear purpose" of advancing religious ideals.[45]

Thus, while endorsement tends to focus on whether any apparent favoritism or benefit was given to religion, the neutrality test focuses on the nature of the government involvement with the display. In determining the neutrality of government action in these contrasting cases, the Court seemed to focus on whether the government was passively acknowledging the religious and historic nature of the display or actively and primarily promoting the religious ideals embodied in the display.[46] The government involvement was measured on a spectrum ranging between the unconstitutional extremes of establishment and religious hostility,

41. 545 U.S. 677 (2005).

42. 545 U.S. 844 (2005).

43. *McCreary*, 545 U.S. at 860 (citing Epperson v. Arkansas, 393 U.S. 97 (1968)).

44. *Van Orden*, 545 U.S. at 681–83.

45. *McCreary*, 545 U.S. at 852–55, 857.

46. *Van Orden*, 545 U.S. at 687 (identifying the monument as "passive" representation of the nation's religious heritage); *McCreary*, 545 U.S. at 860 (finding that the "clear purpose" of the county was to post the Commandments, not educate).

with a constitutionally neutral range of passive acknowledgment in between.[47]

IV. THE COURT'S DECISION

In *Green v. Haskell*, the Tenth Circuit determined that in this case, a "reasonable observer" would find that the Ten Commandments monument erected in Haskell County tended to strongly reflect a government endorsement of religion, and thus it violated the Establishment Clause.[48]

A. Applying the Lemon *Test Refined by O'Connor's "Endorsement Patina"*

The Tenth Circuit first had to determine which Establishment Clause test to apply in this case. The court admitted that the Supreme Court had "harshly criticized" the *Lemon* test.[49] Indeed, in *Van Orden*, the Supreme Court found that the *Lemon* test was "not useful" in dealing with the passive placement of a Ten Commandments monument. Instead, the Court focused on the neutrality of government involvement with the display.[50]

However, since the Supreme Court had never explicitly overruled the *Lemon* test, the Tenth Circuit concluded that the test still "cl[u]ng[] to life," and remained the touchstone for Establishment Clause analysis.[51] Accordingly, the Tenth Circuit rejected the Supreme Court's approach in *Van Orden* and chose instead to apply the *Lemon* test "refined by Justice O'Connor's endorsement test."[52] The critical issue under this analysis became whether, as determined by a reasonable observer, the monument had the principle effect of endorsing religion.[53]

B. Viewing the Monument's Effect through the Eyes of a Reasonable Observer

The Tenth Circuit explained that determining the principal effect

47. *Van Orden*, 545 U.S. at 683–84.
48. Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784, 788 (10th Cir. 2009).
49. *Id.* at 797 n.8.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 788.

of the monument is "predominantly" a "fact driven" inquiry.[54] This prong of analysis looks through the eyes of a reasonable observer who, though not omniscient, would have access to more information regarding the monument than most members of the actual community.[55] From the reasonable observer standpoint, the court argued that many facts particular to this case resulted in the Board violating the Establishment Clause. For example, in addition to attributing the ordinary knowledge of a member of the small Haskell County community to the reasonable observer, the court explained that the reasonable observer would be aware that Mr. Bush revealed to the Board his religious motivation for erecting the monument, and the Board shortly thereafter granted permission for Mr. Bush to erect it.[56] The court also assumed that a reasonable observer would also know the exact location of the monument and its special relationship to other monuments.[57] Additionally, the reasonable observer was assumed to know of the legal advice given to board members regarding the constitutionality of the monument.[58] Moreover, the reasonable observer was assumed to understand the significance of the contrast in the timing of the initiation of the lawsuits resulting in *Van Orden* and *Green*.[59] Finally, the reasonable, but not omniscient, observer was assumed to know that the Mayflower Compact was added to the monument after Mr. Bush received official authorization and without additional approval of the Board.[60]

The court admitted that some facts weighed against the Board's approval of the monument violating the Establishment Clause. First, "the Monument was one of numerous other monuments" and displays.[61] Additionally, the Ten Commandments were accompanied by the Mayflower Compact, a document with clear historic significance to our country.[62] The court reasoned, however, that the monument being one of multiple monuments would likely mean less

54. *Id*. at 798 (citing Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1022 (10th Cir. 2008)).

55. *Id*. at 799–800.

56. *Id*. at 801 n.10.

57. *Id*. at 800.

58. *Id*. at 800 n.10.

59. *Id*. at 807.

60. *Id*. at 801, 807.

61. *Id*. at 804.

62. *Id*. at 807.

to the reasonable observer since the Haskell County display had a less cohesive and unifying secular theme than the display in *Van Orden*,[63] and the inclusion of the Mayflower Compact would mean less to the reasonable observer since he or she would be aware that it was added without the Board's knowledge or approval.[64] Thus, these facts did not mitigate in favor of finding that the monument was a constitutionally permissible display in the eyes of the reasonable observer.

C. Divisive Reactions and a Lack of Clear Secular Purpose are Deemed to Create the Effect of Government Endorsement

In its final determination that the monument's primary effect was the appearance of government endorsement of religion, the court placed special emphasis on two particular issues: the divisive nature of the timing and reaction to the lawsuit, and the lack of a clear secular purpose for the erection of the monument.

The court emphasized the divisive nature of the lawsuit and related reactions. The court pointed to the fact that, in *Green*, the lawsuit was filed fairly quickly—almost a year after the erection of the monument—when compared to the lawsuit filed forty years after the erection of the monument in *Van Orden*.[65] In relying on Justice Breyer's lone concurring opinion in *Van Orden*, the *Green* court reasoned that the "years of tranquility" suggest that reasonable observers would not view the monument as favoring or promoting religion.[66] The court also emphasized the fact that Mr. Bush organized a rally and petition to support the monument after the lawsuit began and that one commissioner defended it at the rally, saying that he would stand in front of the monument and people would "have to push [him] down with it."[67] The court concluded that these activities weighed heavily toward creating an appearance of government endorsement.[68]

The court also put significant emphasis on the lack of a clear secular purpose for erecting the monument. Interestingly, the court

63. *Id.* at 805–06.
64. *Id.* at 807–08.
65. *Id.* at 807.
66. *Id.* at 806–07.
67. *Id.* at 792, 801.
68. *Id.* at 801–02.

did not examine the secular purpose as a separate prong of the *Lemon* analysis, but rather considered it under the umbrella of the effect prong. For instance, the court explained that if the commissioners would have voiced "a secular purpose for the installation of the monument," it would have made it easier for the reasonable observer to see that religion was not being endorsed.[69] Statements by the commissioners recognizing the religious nature of the monument were also deemed to increase the appearance of endorsement.[70]

V. ANALYSIS

The Tenth Circuit incorrectly held that the Board of Commissioners violated the Establishment Clause when the Board authorized a private citizen to erect the Ten Commandments monument in Haskell County. Specifically, the Tenth Circuit erred by using an unrealistic reasonable observer standard, strictly requiring a clear secular purpose for the erection of the monument, and attributing the divisiveness surrounding the lawsuit to an unconstitutional effect of the monument. If the Tenth Circuit would have adhered to the precedent of *Van Orden*, rather than incorrectly distinguishing the facts of this case, the court would have found that the government authorization for the erection of the monument in Haskell County was a constitutionally acceptable, neutral acknowledgement of the religious history of this nation.

A. The "Objective Reasonable Observer" Supplanted by the Court's Own Judgment

In analyzing the facts of *Green*, the Tenth Circuit used a heightened and unrealistic "reasonable" observer standard whose knowledge and observations became indistinguishable from the knowledge and personal observations of the court. This standard is not only unrealistic—it is unfaithful to the original standard set forth by Justice O'Connor. The purpose of the endorsement test, according to Justice O'Connor, is to prohibit government from endorsing religion by "making adherence to a religion relevant in any way to a person's standing in the political community."[71]

69. *Id.* at 801 n.10.

70. *Id.* at 801–02.

71. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

This analysis clearly considers real people in a real community who would actually feel the effect of government endorsement. Although a reasonable observer in a small community would be aware of many of the external activities relating to the monument, such as the unveiling ceremony, many of the more nuanced facts of *Green* that the Tenth Circuit used to distinguish the case from *Van Orden* are irrelevant because they are not something that a typical member of the community would reasonably be aware of.

The Tenth Circuit attributes an excessive amount of unrealistic information to the reasonable observer, such as the cohesiveness of the theme of the monuments, or the fact that the Mayflower Compact was added to the monument after Mr. Bush received authorization for the monument and without the specific approval of the Board.[72] The court even admitted that it was not contemplating an actual member of the community when it stated that "[i]n this inquiry, '[u]ndoubtedly, the "objective observer" is presumed to know far more than most actual members of a given community.'"[73] Although the court argues that this observer is not omniscient,[74] the court fails to identify any knowledge that would *not* be available to this omnipresent observer. The reasonable observer in this case has apparently degenerated into little more than the reasonable observations or personal bias of the court. Conversely, to uphold the original conception of the reasonable observer as articulated by Justice O'Connor, facts outside the realm of an ordinary community member's knowledge must be deemed as irrelevant when determining the effect of the monument.

B. Political Divisiveness: A Product of Litigation, Not Establishment Violation

In a misguided effort to distinguish *Green* from *Van Orden*, the Tenth Circuit emphasized two issues. First, the court examined divisive activities and statements that took place after the initiation of the lawsuit in *Green*, but not in *Van Orden*. Second, the court compared the relatively long period of time between the erection of the monument and the initiation of the lawsuit in *Van Orden* with

72. *Green*, 568 F.3d at 808 n.18.

73. *Id.* at 800 (quoting Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1031 n.16 (10th Cir. 2008)).

74. *Id.*

the comparatively short period of time between the erection of the monument and the initiation of the lawsuit in *Green*.

First, the Tenth Circuit improperly suggested the divisive activities that took place after the initiation of the lawsuit in *Green* showed that the monument's primary effect indicated an improper government endorsement of religion. However, in *Lynch*, the Supreme Court rejected the appellant's argument that the divisiveness that ensued after the commencement of the lawsuit was evidence of a violation of the Establishment Clause. The Court explained, "A litigant cannot, by the very act of commencing a lawsuit, . . . create the appearance of divisiveness and then exploit it as evidence of entanglement."[75] Additionally, Justice O'Connor stated in her concurring opinion that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."[76]

Therefore, it was inappropriate for the Tenth Circuit to place such weight on the comments and activities that took place after the lawsuit began. The district court judge correctly recognized these activities for nothing more than products of the litigation. "The Monument did not begat the Rally. This lawsuit begat the Rally."[77] Intuitively, it makes sense that activities created by a lawsuit should not determine the constitutionality of the monument because many community members would likely have been just as defensive if someone had attempted to take down their World War II monument or the monument honoring the Choctaw Nation. Such defensiveness is merely a result of the offensive lawsuit, not necessarily a particular endorsement of any one monument, and thus it should not be used to distinguish the case.

Second, the Tenth Circuit improperly relied on the difference in time between the erection of the monuments and the initiation of the lawsuits to distinguish *Green* from *Van Orden*. Courts should be wary of placing weight on the timing of the lawsuit as an indication

75. *Lynch*, 465 U.S. at 684–85.

76. *Id.* at 689 (O'Connor, J., concurring); *see also* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1670 (2006) (arguing that observations or predictions of "political division along religious lines" should not shape the constitutional content allowed by the First Amendment's Establishment Clause, because political division over religion is an unavoidable, and arguably beneficial, aspect of the political life in a diverse and free society).

77. Green v. Bd. of County Comm'rs, 450 F. Supp. 2d 1273, 1280 (E.D. Okla. 2006), *rev'd sub nom.* Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009).

of constitutionality. Though an immediate reaction to a symbol may be an indication of the symbol's unconstitutional character, such a reaction also may be merely the response of an overly sensitive individual. Likewise, a slow reaction to a religious symbol may be merely an indication of a less observant populace, or a populace that agrees with the religion being endorsed. Thus, while timing may be indicative of constitutionality, it is certainly not determinative of whether government approval of a religious symbol violates the Establishment Clause.

C. Resurrecting the Secular Requirements of O'Connor's Refined Lemon *Test*

In *Van Orden*, the Chief Justice, joined by a plurality of the Court, stated, "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."[78] Despite this clear statement from the Supreme Court, the Tenth Circuit determined that it was still "obliged here to apply the *Lemon* test, with Justice O'Connor's endorsement patina," which resulted in the court placing excessive emphasis on the requirement of a secular purpose.[79]

The Tenth Circuit seemed to suggest that the only appropriate acknowledgement of a religious symbol like the Ten Commandments was secular acknowledgement.[80] Despite the commissioners' sincere acknowledgment of the historic nature of the monument,[81] the court found that the commissioners' recognition of the religious nature of the monument signaled an endorsement of religion.[82] This perception was clearly negated by the Court in *Van Orden*, which stressed the importance of the dual nature of religious symbols.

> Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the

78. Van Orden v. Perry, 545 U.S. 677, 687 (2005).

79. *Green*, 568 F.3d at 796.

80. *Id.* at 798 ("The Ten Commandments have a secular significance that government may acknowledge.").

81. *Id.* at 790.

82. *Id.* at 801–02.

> Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning . . . . Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.[83]

Thus, in this context, the Court distanced itself from the *Lemon* test's requirement that a government action have a wholly secular purpose. As long as the government's recognition of the Ten Commandments' religious significance does not dwarf the acknowledgment of historic significance, as in *McCreary*,[84] the government does not violate the Establishment Clause by recognizing the dual nature of a religious symbol. To hold otherwise would be to relegate all sacred symbols recognized by the government to nothing more than purely secular displays.[85]

In *Green*, the commissioners clearly had a dual acknowledgement of both the religious and secular nature of the Ten Commandments, and the religious awareness never dwarfed the historic appreciation of the monument. For instance, when granting approval for the monument, the Commissioners exclusively discussed its historic nature.[86] Furthermore, the district court found that, whatever the commissioners' views were on the religious nature of the monument, certainly "the Commissioners' belief in the texts' historical significance is sincere as well."[87] Thus, the commissioners' neutral recognition of the religious nature of the monument should not have been a factor that weighed towards a violation the Establishment Clause.

83. *Van Orden*, 545 U.S. at 690.

84. McCreary County v. ACLU, 545 U.S. 844, 857 (2005). The Court in this case even held that a secretive religious motive is constitutionally permissible, because such a motive, without more, does not make outsiders out of nonadherents. *Id.* at 863.

85. Lynch v. Donnelly, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) ("The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed. . . . Surely, this is a misuse of a sacred symbol.").

86. *Green*, 568 F.3d at 790.

87. Green v. Bd. of County Comm'rs, 450 F. Supp. 2d 1273, 1283 (E.D. Okla. 2006).

D. The Appropriate Outcome: Allowing Neutral Acknowledgement of Our Nation's Religious Heritage

The Tenth Circuit should have found that the Board's approval of the Ten Commandments monument was a neutral government action upheld by the First Amendment. This conclusion naturally follows from the fact that the government's actions in *Green* reflect a passive acknowledgement of the religious and historic nature of the monument, as in *Van Orden*, as opposed to an active promotion of religious ideals, as in *McCreary*.

In reality, the facts of *Van Orden* are incredibly similar to those of *Green*. In both cases, a private citizen or group approached the local government seeking approval to fund and erect a monument prominently displaying the text of the Ten Commandments (unlike *McCreary* where the government itself initiated a legislative order requiring the display of the Ten Commandments).[88] In both *Green* and *Van Orden*, the government gave approval for the monument, chose the location for the monument on government property near a government building, and sent two government officials to attend the dedication ceremony of the monument.[89] Although these government actions acknowledged the religious nature of the monument, none of these actions gave special attention or favoritism to the monument. Moreover, unlike *McCreary*, there was simply no showing that any religious motivation on the part of the commissioners dwarfed their appreciation of the historic significance of the monument.[90] Rather, the monument was given neutral government attention. Thus, the holding of *Green* should have been controlled by the precedent of *Van Orden*, and the Tenth Circuit should have held the government authorization of the Ten Commandments monument in Haskell County did not violate the Establishment Clause.

VI. CONCLUSION

Based on the specific facts of this case, the Tenth Circuit found that a reasonable observer would find the Ten Commandments monument in Haskell County had the unconstitutional effect of

88. *Green*, 568 F.3d at 790; *Van Orden*, 545 U.S. at 681; *McCreary*, 545 U.S. at 850.

89. *Green*, 568 F.3d at 790–91; *Van Orden*, 545 U.S. at 681.

90. *McCreary*, 545 U.S. at 852–55, 858.

endorsing religion, thus violating the Establishment Clause. The court came to this conclusion by applying an unrealistic and virtually omniscient reasonable observer standard and by requiring that government motivations in acknowledging a religious symbol be clearly secular in purpose. The court further erred in over-emphasizing the timing of and divisiveness surrounding the litigation. Had the court followed the precedent set forth in *Van Orden*, it would have concluded the monument was given neutral treatment, rather than endorsement, through the government's passive acknowledgement of the religious and historic nature of the Ten Commandments in connection with our nation's religious heritage.

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