Testimony of

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Paying Your Own Way: Creating a Fair Standard for
Attorney's Fee Awards in Establishment Clause Cases

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Introduction

My name is Shannon Woodruff,1 and I would like to thank the Chairman and members of the Committee for inviting me to share the views of the American Center for Law and Justice2 in support of S. 3696, The Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006. As the Act clearly articulates, its purpose is "to prevent the use of the legal system in a manner that extorts money from State and local

governments, and the Federal Government, and inhibits such governments' constitutional actions under the first, tenth, and fourteenth amendments." To accomplish this, the Act would eliminate the award of attorney's fees in lawsuits brought under 42 U.S.C. §§ 1983 and 1988 claiming a violation of the First Amendment's Establishment Clause.

While 42 U.S.C. § 1988 ("the attorney's fees statute")3 was enacted for the laudable purpose of ensuring that those who cannot afford an attorney may still seek judicial protection of their basic civil rights, it has had the unintended effect of financing a fierce campaign against any and all expression, acknowledgement, or accommodation of religion in the public arena. This campaign, orchestrated by a few interest groups, is fueled not only by ideology but by the potential for large fee awards against government defendants, relaxed standing requirements for Establishment Clause claims, and the unsettled nature of current Establishment Clause jurisprudence. The law applying the Establishment Clause, beginning with the test announced in Lemon v. Kurtzman,4 and continuing to the present quagmire of varying tests and modes of analysis, is in a state of hopeless confusion. This confusion has produced widely inconsistent results, with judges from the district court to the Supreme Court arriving at contradictory holdings in virtually identical cases. Under such circumstances, it is both counterintuitive and counterproductive to award attorney's fees to the prevailing party.

With respect to free speech and free exercise rights, the fear of sizeable attorney's fees awards has forced government officials into a secular straightjacket where they err on the side of religious discrimination to protect their pocketbook, and accommodation of religion is the exception rather than the rule. In the face of an impending legal attack, the threat of costly litigation, coupled with the utter unpredictability of the law in this area, has led state and local governments nationwide to sever their ties to America's rich religious tradition. S. 3696 seeks to remove the financial incentive behind such attacks.

I. S. 3696 is Necessary to Prevent the Chilling Effect that Establishment Clause Litigation Is Having on the Exercise of Important First Amendment Rights.

The attorney's fee statute was intended to preserve basic civil rights; however, it has been perverted in the Establishment Clause context to instead punish government bodies that, in good faith, permit the voluntary recitation of the Pledge of Allegiance, the inclusion of a commemorative cross on a veteran's memorial, or other public references to religion. The impact of attorney's fee awards in these types of Establishment Clause cases can be felt on two levels. First, the availability of taxpayer dollars encourages lawsuits that are not very well grounded. With respect to the defendants in such cases, those dollars represent vulnerability that causes elected bodies, both large and small, to surrender to demands that are not always constitutionally based.5 Second, in the community at large, the inevitable result of large attorney's fee awards is a widespread fear among similarly situated government officials. In turn, such fear encourages government entities to take protective measures which, consciously or subconsciously, often incorporate a discriminatory posture toward the exercise of both Free Speech and Free Exercise rights.6 The dynamic at work at both levels imposes a chilling effect upon the exercise of First Amendment rights that is unacceptable. S. 3696 simply removes from the legal equation both the lure and the threat presented by those taxpayer dollars.

A. The Instability of Establishment Clause Jurisprudence Puts Governments Between a Rock and a Hard Place.

The chilling effect of awarding attorney's fees in Establishment Clause cases is exacerbated by the fact that no other area of law is more confusing or unstable. Over the past several decades, the Supreme Court has not only applied a variety of different tests to Establishment Clause claims, but the Court has done so inconsistently. In light of this confusion, municipalities and local public school boards are often placed in an untenable position when someone within the community is offended by a government acknowledgement of the religious heritage of the citizenry. Enthusiastic plaintiffs have been eager to exploit this legal uncertainty by threatening local governments with hundreds of thousands of dollars in attorney's fees if they do not end the conduct that "offends" them. Localities and school boards are often bullied into settling and giving in to plaintiffs' demands just to avoid the chance, however remote, that a judge will conclude that the government conduct violated the Establishment Clause. It is this abuse of the attorney's fees statute that S. 3696 seeks to address.

1. The Evolution of Current Establishment Clause Jurisprudence.

The Lemon test, which still nominally governs Establishment Clause cases, has been widely criticized7 since its inception 35 years ago due to its inherent malleability and lack of any basis in practical legal theory or American tradition. The three-pronged Lemon test states:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.8

As one scholar has noted:
[T]he problems with the [Lemon] test are numerous. Each part of the Lemon test is deeply ambiguous, and each--if taken literally--would produce highly unattractive results. Consequently, the lower federal courts and state courts have given the test widely different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results.9

One former Supreme Court Justice concluded that Lemon "was not required by the First Amendment and is contrary to the long-range interests of the country,"10 while another noted:
[T]he Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the Lemon test has caused this Court to fracture into unworkable plurality opinions, depending upon how each of the three factors applies to a certain state action.11

Justice Stevens has referred to "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon,"12 while Justice Thomas has noted that "the

very 'flexibility' of [the] Court's Establishment Clause precedent leaves it incapable of consistent application."13
The most colorful critique of Lemon comes from Justice Scalia's concurring opinion in Lamb's Chapel v. Center Moriches Union Free School District:
Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman, 505 U.S. 577 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.14

The shortcomings of Lemon and its endorsement analysis are most problematic when they are applied to longstanding traditions of public recognition of the country's religious heritage. Despite confusion in the Court's Establishment Clause analysis, a few fundamental constitutional principles remain intact. It is quite clear from the Supreme Court's Establishment Clause jurisprudence that the Constitution is not to be interpreted in a manner that would purge religion or religious references from society. The Supreme Court has acknowledged for over a century that "this is a religious nation"20 and, with respect to the historical role of religion in our society, has concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."21
Recognition of the primacy of religion in the Nation's heritage is nowhere more affirmatively expressed than in Zorach v. Clauson:
We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.22

"[T]he Constitution [does not] require complete separation of church and state; it affirmatively

mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."23 Nothing in past or present Establishment Clause jurisprudence compels the redaction of all references to God just to suit atheistic preferences. Consequently, American governments have a long venerable history of public acknowledgment of the nation's religious heritage that should not be trampled upon by an improper reading of the Establishment Clause or by overly zealous interest groups.

2. Recent Decisions Involving Ten Commandments and Holiday Displays Illustrate the Extent of the Problem.

The wholesale disagreement and inconsistency regarding the appropriate legal framework to apply to Establishment Clause claims can only be described as analytical schizophrenia. Nowhere is this problem more evident than in recent decisions concerning the display of the Ten Commandments.24 Just last summer, the Supreme Court issued decisions on the same day in two cases involving public displays of the Ten Commandments. Not only did the Court arrive at opposite holdings, but it did not even apply the same Establishment Clause analysis in both cases. In McCreary County v. ACLU of Kentucky,25 the Court held that displaying a framed copy of the Ten Commandments in a courthouse hallway violated the Establishment Clause, and yet in Van Orden v. Perry,26 the Court upheld a Ten Commandments monument on State capitol grounds. The vote in each case was 5-4,27 seven Justices authored a total of ten opinions,28 and each case involved an entirely different mode of legal analysis.29

Commentators declared that these decisions had added "mud to murky water,"30 "couldn't be more confusing or convoluted,"31 "offered muddled and confusing answers,"32 and fell in line with other Establishment Clause cases "where schizophrenia is business as usual."33 As one author explained: "The Supreme Court's ruling[s] . . . promise[] no relief. Like Moses and the Hebrews forced to wander 40 years in the wilderness, we remain lost."34

The Supreme Court's confusion is only magnified when one examines lower court decisions on the same issue. For example, a few months before the Supreme Court struck down the display in McCreary County, a federal appeals court upheld a virtually identical display, noting, "[t]he Establishment Clause is not violated when government teaches about the historical role of religion."35 In another case decided six months after McCreary County, a federal appeals court upheld a display identical to the one struck down in McCreary County, noting that "[n]othing in the [McCreary County] opinion can be read to stand for the proposition that governmental displays such as the ones involved here, without more, are unconstitutional."36 The bizarre result of these decisions is that one Kentucky county and one Indiana county may maintain a particular display that includes the Ten Commandments while another Kentucky county may not.

The public display of menorahs, creches, and other symbols during the holiday season is another area where the Lemon test has wreaked havoc. In 1984, the Supreme Court upheld a publicly-owned display which included a crèche and many other things such as a Christmas tree, a "Seasons Greetings" banner, and Santa's reindeer and sleigh.37 Just five years later, the Court upheld a display outside a public office building which included a menorah and a Christmas tree, but it also struck down the display of a creche inside a courthouse next to a "Glory to God in the Highest!" banner and a plaque noting the creche's private ownership.38 One federal appellate

judge has derided these cases as creating a malleable "St. Nicholas too" test:
It may be convenient to think of this as a "St. Nicholas too" test--a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too. The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?39

Another federal appellate judge has noted how Establishment Clause challenges to holiday displays have essentially turned federal judges into interior decorators:
[The Lynch] decision, like others requiring multi-factor balances, gives judges of the inferior federal courts fits. The Court avoided creating a rule about the treatment of religious symbols and instead announced that judges should examine each symbol's context. But which items of the context matter? If different elements cut in different directions, what is to be done? It is discomfiting to think that our fundamental charter of government distinguishes between painted and white figures--a subject the parties have debated--and governs the interaction of elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary. When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.40

Unfortunately, confusion and inconsistency experienced in Ten Commandments and holiday display cases is the rule rather than the exception under the current state of Establishment Clause jurisprudence. Such legal uncertainty has allowed the attorney's fees statute to be used as a weapon against permissible government acknowledgment of America's religious heritage. The specter of attorney's fees in these cases has had an unintended chilling effect on a wide variety of government action that is not actually prohibited by the Establishment Clause. If the Justices of the Supreme Court cannot consistently discern the parameters of the Establishment Clause, other government officials deserve at least a small margin of error as they attempt to do the same. S. 3696 is necessary to ensure that the narrow exception to the general rule created by the attorney's fees statute is no longer used to blackmail government officials into stripping all religious references from the public arena.

B. The Current Fee Shifting in Establishment Clause Challenges Works to Frustrate and Often Prevent the Full and Complete Resolution of the Legal Questions at Stake.

Section 1988 has generally been successful in helping to preserve basic civil rights such as the freedom of speech or the right to be free from racial discrimination, but it has also been used far too often to muzzle state and local governments seeking to acknowledge the longstanding religious traditions of their citizens in a constitutionally permissible manner. In such circumstances, attorney's fee awards in Establishment Clause cases can have a devastating impact upon small towns, counties, and school districts. Localities that honestly believe their actions are completely legal and proper, and that have a good chance of winning their case should an appellate court decide it, are often forced to settle rather than take the risk of having to

pay enormous fees should they lose the case. It is the taxpayer that must bear the costs of both the defendant's and plaintiff's attorney's fees. The specter of mammoth attorney's fee awards, coupled with the confusion rampant under the Establishment Clause, often handcuff state and local governments by forcing them to shy away from many permissible courses of action for fear of potential litigation costs.
A prime example demonstrating the need for S. 3696 was the recent high-profile case of Kitzmiller v. Dover Area School District41 out of Pennsylvania dealing with the teaching of evolutionary theory in public school classrooms. The school board sought to comply with existing Establishment Clause case law but ended up paying $1 million in attorney's fees after a court ordered it to pay over $2 million. The school board adopted a policy requiring high school science teachers to read a simple disclaimer that Darwin's theory of evolution is not the only scientific theory available to explain the origin of life.42 The disclaimer did not mandate the teaching of intelligent design theory in science classrooms, nor did it seek to prohibit the teaching of evolutionary theory; it merely sought to ensure that students are aware of the ongoing controversy within the scientific community over the origin of life and the fact that alternative theories, including intelligent design, exist.43

The school district did not act in blatant disregard of the Establishment Clause but rather sought to follow statements of the Supreme Court and the United States Senate noting that public schools can and should take a balanced, accurate approach to the origin of life controversy. In Edwards v. Aguillard,44 the Supreme Court held that a Louisiana statute which banned the teaching of evolution in science classes unless creationism was also taught violated the Lemon test because it was enacted for a religious purpose. The Court did not hold, however, that Darwinian evolution must be given an unquestionable monopoly in public science classrooms on the issue of the origin of life. Instead, the Court specifically noted that evolutionary theory can be questioned in an appropriate manner:

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.
Id. at 708-09.

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.45

The Dover Area School District did not even go so far as to require "[t]eaching a variety of scientific theories about the origins of humankind," but merely sought to ensure that students are aware that evolutionary theory is not the only theory in existence.

The school board's modest disclaimer also fully complied with the United States Senate's stated guidelines for science education. In June 2001, the Senate overwhelmingly approved Amendment 799 to S.1, the Better Education For Students and Teachers Act, by a vote of 91-8.46 Amendment 799 states:
It is the sense of the Senate that:

1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and
2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and should prepare the students to be informed participants in public discussions regarding the subject.47

The Dover Area School District's short disclaimer sought to further the laudable goals set forth in the Senate Amendment 799. By simply explaining that evolutionary theory is not the only scientific explanation for the origin of life, the disclaimer was a reasonable manner of preparing students "to distinguish . . . theories of science from philosophical or religious claims" and "to be informed participants in public discussions regarding the subject."
Opponents of the disclaimer brought a lawsuit under the Establishment Clause. After holding a trial, the federal district court concluded that the school district's disclaimer violated the Establishment Clause because it had the purpose and effect of promoting a religious view.48 The result of the decision was a district court order for the school to pay over $2 million in attorney's fees. While many of the district court's legal conclusions appear to be unsupported by the Supreme Court's Establishment cases, the decision was never appealed because the case ultimately settled for $1 million after new members joined the school board and the board agreed not to appeal to appease the ACLU and Americans United for Separation of Church and State.49 $1 million is a tremendous price for any school district to pay for simply taking action in good faith in accordance with the directions of the Supreme Court and the Senate. The application of the attorney's fees statute in the Dover case also served to further muddy the unclear Establishment Clause waters by forcing the school district to forgo appealing the questionable district court decision. Unfortunately, however, other school districts will likely face a similar fate unless S. 3696 is enacted. In the words of one local director of the ACLU, "[t]he $2 million was a very conservative number, so they got a terrific deal . . . The next school district isn't going to get the same break that Dover did."50

Cases involving public displays that include the Ten Commandments also provide a good example of the need for S. 3696. As discussed previously, Ten Commandments displays on public property are frequently challenged in court, with some being upheld and some being struck down. Small municipalities often do not believe that it is worth the financial risk of defending displays that may very well be constitutional given that a court loss could lead to a huge attorney's fee award. Several public interest law firms that frequently bring Establishment Clause claims such as the ACLU have a tremendous amount of resources available for litigation51 in comparison to many local governments and are therefore not burdened by the same financial concerns. While the attorney's fee statute was designed to help preserve the basic civil rights of the "little guy," in Establishment Clause cases, the little guy is often a cash-strapped local government facing a threat of litigation from a large, well-funded public interest

law firm.
Often times, municipalities immediately fold at the threat of an Establishment Clause lawsuit, regardless of the chances of in-court success, due to the threat of attorney's fees. For example, in Duluth, Minnesota, the city council reached a compromise with the ACLU and agreed to remove a Ten Commandments monument that had been in place for over 40 years.52 The local newspaper warned readers that standing up to the ACLU might cost the city up to $90,000.53 Consequently, the issue of whether the display was actually constitutional was never litigated by the courts, and the ACLU could then use this settlement to further pressure other municipalities.

In other cases, municipalities have initially defended Ten Commandments displays but have failed to pursue an appeal after an initial adverse judgment by a district court judge. In Turner v. Habersham County,54 for example, two residents represented by the ACLU sued the county claiming that a Ten Commandments display violated the Establishment clause. The county lost at the trial court level and was ordered to pay $74,462 in attorney's fees.55 While the county originally appealed the order to remove the monument, it ultimately dropped the appeal because of concerns about the mounting costs to taxpayers.56 Although Habersham County was represented pro bono by a public interest law firm, the County Manager cited the risk of having to pay the ACLU's attorney's fees as the reason for not pursuing the appeal.57 He stated that the county's decision "was basically a financial decision" based "on the fact that if we lost then we would be picking up the fees and costs of the other attorneys. The costs would have come to us."58
52 Phyllis Schlafly, Jury Still Out on Ten Commandments, COPLEY NEWS SERVICE, Sept. 21, 2004.

There are countless other examples of the attorney's fee statute being used to punish state and local governments in Establishment Clause cases. Some of the many examples (some of which are still pending cases) include:
? Selman v. Cobb County School District, in which the school district had placed a sticker on school textbooks with the disclaimer, "Evolution is a theory, not a fact." The ACLU sued and received $135,000 in attorney's fees.59

? ACLU of Tennessee v. Hamilton County, where the ACLU was awarded a total of $35,240 when it sued the County for the removal of Ten Commandments displays on County property. After an appeal, the County ended up paying the ACLU $50,000.60

? Barnes-Wallace v. BSA, in which the ACLU sued a city for leasing land to the Boy Scouts because of the group's stance against homosexual behavior. The ACLU received $950,000 of taxpayer money.61

? Doe v. Barrow County, in which the ACLU filed a lawsuit against Barrow County to remove a copy of the Ten Commandments from the County Courthouse. The judge ordered the county to pay $150,000 in attorney's fees and expenses to the ACLU.62

? Glassroth v. Moore, where three organizations sued for the removal of a Ten Commandments

monument in a courthouse. The State of Alabama settled the case and paid out $500,000 in attorney's fees and about $49,000 in expenses.63

? Freiler v. Tangipahoa Parish Board of Education, in which the ACLU was awarded $49,444.50 in attorney's fees in a case contesting a Louisiana policy requiring a disclaimer to be read before teaching students about the theory of evolution.64

? Buono v. Norton, in which the ACLU received $62,793.69 in attorney's fees and costs after suing the federal government for the removal of a cross from the Mojave National Preserve.65

? ACLU Nebraska Foundation v. City of Plattsmouth, where the ACLU received a total of $14,036.43, including $13,764 for attorney's fees and $272.43 for expenses, when it sued the City of Plattsmouth for the removal of a Ten Commandments monument.66

? A case in Great Falls, South Carolina where the ACLU received $65,490 in legal fees after representing a Wiccan high priestess who sued the town council for beginning council meetings with a prayer. The City had to pay this massive amount, totaling more than a quarter of the town's annual administrative budget. The ACLU used the threat of further attorney's fees to try to prevent the town from pursuing an appeal to the United States Court of Appeals for the Fourth Circuit.67

? A case in London, Ohio in which a football coach engaged in voluntary prayer with the team. The school board settled to avoid rising legal costs and agreed to pay the ACLU $18,000.68

? Adland v. Russ, where Kentucky passed a law stipulating the placement of a monument containing the Ten Commandments on the capital grounds. A court held that the law violated the Establishment Clause and awarded the ACLU $121,500 in fees.69

? Powell v. Bunn, in which the Portland Public School District allowed the Boy Scouts to recruit during school hours. The ACLU sued and the taxpayers were required to pay $108,000 in ACLU attorney's fees.70

? A case in Humansville, Missouri where a mother of a student (represented by the ACLU) sued a public school because it had a small Ten Commandments plaque. The school district settled for $45,000 and the school Superintendent lost his job.71

? Staley v. Harris County, in which the County allowed a memorial to a local philanthropist to consist of an open Bible. A plaintiff was awarded $41,000 in court costs and attorney's fees and, after the County filed an Emergency Motion to Stay the Final Judgment, the amount the county was required to pay was increased to $43,961.00.72

There are countless other similar examples nationwide of the adverse effect the attorney's fees statute has had on state and local governments in Establishment Clause cases. These cases show that awarding attorney's fees in Establishment Clause cases has harmed taxpayers and also forced municipalities to give into the demands of one person rather than pursuing litigation to its fullest

extent. The frequent failure to appeal lower court losses adds to the confusion over the Establishment Clause by allowing erroneous lower court decisions to stand. Removing the threat of attorney's fee awards in Establishment Clause cases through the enactment of S. 3696 would help state and local governments to fully litigate cases if they desire to do so. S. 3696 preserves the attorney's fees statute as it was originally designed--as a tool to encourage the protection of civil rights rather as a bludgeon for those who seek "to exclude religion from every aspect of public life" 73 at taxpayer expense.

Section 1988 arose out of the recognition that fee awards were necessary to enable private citizens to assert their civil rights. The remedy of attorney's fees is appropriate in civil rights actions because the vindication of one's constitutional rights is vital to the public interest. The Supreme Court in Elrod v. Burns,76 recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." By contrast, the injury in most Establishment Clause cases is abstract, consisting of mere "offense." Just as the irreparable harm that accompanies a civil rights violation supports the notion of fee-shifting in those cases, the lack of such harm in Establishment Clause cases weighs against it. For example, one cannot, with any degree of intellectual honesty, compare the harm suffered by an individual who is denied the right to vote on account of race or sex, with the "offense" typically alleged in Establishment Clause cases. Likewise, the significance of a decision vindicating someone's right to vote far outweighs that of a declaratory judgment holding that a County's Christmas display did not have enough reindeer next to the Baby Jesus.
This fundamental distinction between the Establishment Clause and the rights-protecting provisions of the Constitution ensures that S. 3696 will not produce some kind of adverse domino effect on the protection of basic civil rights through the elimination of attorney's fees in other contexts. The bill is designed to address an unintended misuse of the attorney's fees statute in Establishment Clause cases that is simply not present in cases involving civil rights. The bill merely places Establishment Clause cases within the general rule applicable to similar restrictions on government power such as the Commerce Clause.

III. The Passage of S. 3696 Will Have Little or No Impact on the Prosecution of Legitimate Establishment Clause Claims.

S. 3696 would simply return the fee structure in Establishment Clause cases to the way it existed prior to the passage of § 1988. With the attorney's fee statute, Congress carved out a narrow exception to the general rule, applicable to the vast majority of all lawsuits, that each party bears its own attorney's fees. This general rule, also known as the American rule, operates in every case to prevent the recovery of attorney's fees in the absence of an applicable fee-shifting statute. Opponents of S. 3696 claim that it will close the courthouse doors on potential Establishment Clause plaintiffs who cannot afford to pay an attorney. This criticism is without merit because it ignores the reality that most Establishment Clause plaintiffs are already represented pro bono by public interest law firms; S. 3696 will not change that fact. Moreover, the effect of the potential loss of attorney's fees awards on the budgets of the major law firms that handle most Establishment Clause cases is miniscule. For example, legal awards only constitute a very small fraction of the ACLU's annual income, and only a small percentage of those awards are

attorney's fees that would be affected by S. 3696. The ACLU reported an income of $21,722,600 for the 2004 fiscal year, with $19,817,957 in expenses.77 Of the reported income, 91% came from membership dues, 6% from bequests, and 3% from grants and contributions.78 The ACLU Foundation reported an income of $48,398,241, with only $31,349,650 in expenses. Of the reported income, 78% came from grants and contributions, 10% from bequests, 9% from interest and dividends, and only 3% came from legal awards.79 Since only a slight fraction of the 3% composed of legal awards came from Establishment Clause attorney's fees, S. 3696 would have an insignificant impact on the ACLU's ability to take Establishment Clause cases.

The effect of S. 3696 on most local chapters of the ACLU, and on most other pro bono law firms, would be similar. For example, the ACLU Foundation of Florida reported a total revenue of $1,590,135 for the 2003-04 fiscal year. Of that revenue, only $16,696 (just over 1%) came from attorney's fees and cost reimbursement.80 The ACLU of Utah81 reported $367,302 in revenue between April 1, 2004 and March 31, 2005; legal awards of all kinds totaled $21,405, or just under 6%, of the total revenue.82 The ACLU of Minnesota reported $453,916 in income from January 1, 2003-March 31, 2004, and none of that money came from legal reimbursements.83 Even in the rare case where S. 3696 would actually affect an ACLU chapter's budget,84 the national chapter of the ACLU--which reported over $17,000,000 of income above and beyond what was spent in the 2004 Fiscal Year--often subsidizes local chapters.85 S. 3696 would in no way damage the ability of the ACLU and other firms to take Establishment Clause claims on a pro bono basis. Any minor inconvenience incurred by these firms would be minimal in comparison to the burden that the current attorney's fee statute has placed upon towns, cities, counties, and school boards with respect to Establishment Clause cases.

Finally, the argument in opposition to S. 3696 that removal of attorney's fees in Establishment Clause cases will somehow encourage municipalities and school boards to blatantly violate the Establishment Clause is specious at best. First and foremost, this claim ignores the fact that the vast majority of public officials take their oaths of office seriously and diligently seek to comply with all of the Constitution's requirements. Courts apply a strong presumption that any official act is constitutional precisely because it is the rare case indeed that public officials deliberately seek to break the law. The reality is that state and local governments and school boards diligently try to walk the fine, albeit blurred, line drawn by the Supreme Court with respect to the Establishment Clause. In the rare case in which public officials inadvertently overstep the bounds of the Establishment Clause, there are plenty of public interest groups ready, willing, and able to represent potential plaintiffs. Additionally, the fact that state and local governments and school boards have to pay for their own attorneys is a built-in incentive to comply with the Constitution. Moreover, this argument ignores the first part of the Lemon test which dictates that a law "must have a secular legislative purpose."86 Any policy enacted for the purpose of violating the Establishment Clause would automatically violate the first prong of Lemon.

S. 3696 provides a much-needed change in the attorney's fees statute with respect to Establishment Clause cases while leaving the statute's protection of basic civil rights untouched. Rather than encouraging public officials to violate the Establishment Clause, the bill merely acknowledges the Supreme Court's statement that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the

Constitution."87 S. 3696 should be viewed as remedial, not as some special privilege or accommodation, as it seeks to eradicate a system that encourages the use of extortion as a means to a legal end. Ultimately, S. 3696 should create an atmosphere where fewer Establishment Clause violations occur because governments will not have to banish religion just to protect their pocketbooks.
S. 3696 simply ensures that the many forms of permissible "[n]oncoercive government action within the realm of flexible accommodation" that do not "benefit[] religion in a way more direct and more substantial than practices that are accepted in our national heritage" are not unduly hampered by the attorney's fees statute.88

Conclusion

The narrow exception to the general rule carved out by 42 U.S.C. § 1988 was meant to encourage the protection of basic civil rights; it was never intended to be used as weapon to force state and local governments to remove any and all public acknowledgments of America's religious heritage. Former Supreme Court Justice Sandra Day O'Connor recently noted:
It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.89

Nevertheless, elected officials, in order to avoid financial hardship, are quite often forced to surrender to the intimidation tactics of groups such as the ACLU who demand the removal of "references to divinity in [their] symbols, songs, mottoes, and oaths." The impact that § 1988 and the virtual flood of Establishment Clause litigation has had upon towns, cities, counties, and school districts cannot be overstated. Officials are faced with the difficult choice of either draining already sparse public resources or settling and giving in to the pressure to abandon often constitutional religious activity or expression. Congress should adopt S. 3696 to protect the countless municipalities and school boards across America who have been bullied in this manner as the result of 42 U.S.C. § 1988 in Establishment Clause cases.

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2 The American Center for Law and Justice (ACLJ), is a non-profit, public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and other federal and state courts, and a Supreme Court Justice recently cited an ACLJ amicus curiae brief in an opinion in a case involving the public display of the Ten Commandments. Van Orden v. Perry, 125 S. Ct. 2854, 2877, n.9 (2005) (Stevens, J., dissenting). The ACLJ has been involved in dozens of cases nationwide relating to the recognition of America's religious heritage in public life and has vast experience dealing with the unintended chilling effect that 42 U.S.C. § 1988 has on state and local governments with regard to threatened Establishment Clause litigation.

3 42 U.S.C. § 1988(b) provides, in relevant part: "In any action or proceeding to enforce a provision of [various civil rights statutes,] . . . the court, in its discretion, may allow the

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

4 Lemon v. Kurtzman, 403 U.S. 602 (1971).

5 See Section I.B, infra, for a discussion of numerous examples of Establishment Clause cases where local governments have been forced to pay large attorney's fee awards, forgo an appeal, and/or settle out of court due to the combined effect of the attorney's fee statute and the confusing state of Establishment Clause jurisprudence.

6 The importance of the effect of the attorney's fees statute on private First Amendment activity cannot be ignored. Establishment Clause cases are not limited solely to government action, but rather, frequently involve challenges to government accommodation of private expression of religious speech. The effect of the current state of Establishment Clause litigation is that municipalities, in an effort to avoid Establishment Clause claims, often adopt policies that overly restrict religious freedom and end up violating the Establishment Clause by demonstrating hostility toward religion. In this way, litigation under the current system of fee-shifting has transformed the Establishment Clause from a limitation on government to a very real and complex obstacle to the exercise of First Amendment rights by many citizens. Many government officials have chosen to take the calculated risk that suppressing First Amendment rights, at least until they are asserted, might be safer, from a liability standpoint, than possibly allowing too much and drawing the attention of eager Establishment Clause plaintiffs.

7 See, e.g., McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722, 2750-51 (2005) (Scalia, J., concurring); Van Orden, 125 S. Ct. at 2865-68 (Thomas, J., concurring); Cutter v. Wilkinson, 125 S. Ct. 2113, 2125, n.1 (2005) (Thomas, J., concurring); Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); Lee v. Weisman, 505 U.S. 577, 586-87 (1992); id. at 644-45 (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 655-56 (1989) (Kennedy, J., dissenting in part); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346-48 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); id. at 112 (Rehnquist, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Thomas C. Marks, Jr. & Michael Bertolini, Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause, 12 BYU J. PUB. L. 1 (1997); Michael W. McConnell, Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion, 83 A.B.A.J. 46 (1997); Michael W. McConnell, Religious Participation in Religious Programs: Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell & Richard A. Posner, An Economic Approach to Issues of Religious Freedom, 56 U. CHI. L. REV. 1 (1989); Michael Stokes Paulsen, Religion and the Public Schools After Lee v. Weisman: Lemon is Dead, 43 CASE W. RES. L. REV. 795 (1993); Joseph P. Viteritti, Blaine's Wake:

School Choice, The First Amendment, and State Constitutional Law, 21 HARV. J.L. & PUB. POL'Y 657 (1998).

8 Lemon, 403 U.S. at 612-613 (citations omitted).

9 McConnell, supra note 7, 83 A.B.A.J. at 46.

10 Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

11 Wallace, 472 U.S. at 110 (Rehnquist, J., dissenting).

12 Comm. for Pub. Educ. & Religious Liberty, 444 U.S. at 671 (Stevens, J., dissenting) (quoting Lemon, 403 U.S. at 614).

13 Van Orden, 125 S. Ct. at 2867 (Thomas, J., concurring).

14 Lamb's Chapel, 508 U.S. at 398-99 (Scalia, J., concurring) (citations omitted).

Justice Scalia added that the inevitable result of applying the Lemon test is a "strange Establishment Clause geometry of crooked lines and wavering shapes."15
The introduction of the "endorsement" analysis has enhanced the Lemon test's unpredictability. In County of Allegheny v. ACLU, the Supreme Court explained that it had "refined the definition of governmental action that unconstitutionally advances religion," and added that it had "paid particularly close attention to whether the challenged governmental practice has the purpose or effect of 'endorsing' religion."16 The primary problem with this analysis is that "[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."17 While courts attempt to answer this amorphous question by considering the perspective of a fictitious "reasonable observer" who is "deemed aware of the history and context of the community and forum,"18 the reality is that one person's permissible acknowledgment of the public's religious beliefs is another's impermissible endorsement of religion. Although "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe," it has often been applied that way in practice.19
15 Id. at 399.

16 County of Allegheny, 492 U.S. at 592.

17 Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J, concurring).

18 See id.

19 Id. at 779. Many of the cases described in Section I.B, infra, involve challenges to public recognition of America's religious heritage that are based upon such a "discomfort of viewing symbols [somehow affiliated with] a faith to which [the plaintiffs] do not subscribe."

20 Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892).

21 Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

22 343 U.S. 306, 313-14 (1952) (emphasis added).

23 Lynch, 465 U.S. at 673.

24 See, e.g., Jay A. Sekulow & Francis J. Manion, Symposium, The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion, 14 WM. & MARY BILL OF RTS. J. 33 (2005).

25 125 S. Ct. at 2722.

26 125 S. Ct. at 2854.

27 Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer formed the McCreary County majority which struck down that display, while Justice Breyer joined Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas in upholding the display in Van Orden.

28 Justices Souter, O'Connor, and Scalia wrote opinions in McCreary County, while Chief Justice Rehnquist and Justices Scalia, Thomas, Breyer, Stevens, O'Connor, and Souter wrote opinions in Van Orden.

29 McCreary County applied Lemon's purpose prong, while the Van Orden plurality held that the Lemon test is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." See Van Orden, 125 S. Ct. at 2861 (Rehnquist, C.J., plurality opinion).

30 Stephen Henderson, Split on Ten Commandments: High Court Only Confused the Issue, Both Sides Argue, PHILADELPHIA INQUIRER, June 28, 2005, at A1.

31 Editorial, Commandments Confusion, HARTFORD COURANT, July 11, 2005, at A6.

32 Bill Adair, Supreme Court: No Clear Rule on Religious Displays, ST. PETERSBURG TIMES, June 28, 2005, at 1A.

33 Margo Hammond, In Religious War, No Middle Ground, ST. PETERSBURG TIMES, July 3, 2005, at 7P.

34 Ruth Holladay, Commandments Issue is a Monumental Mess, INDIANAPOLIS STAR, June 30, 2005, at 1B.

35 Books v. Elkhart County, 401 F.3d 857, 868 (7th Cir. 2005).

36 ACLU of Kentucky v. Mercer County, 432 F.3d 624, 633 (6th Cir. 2005).

37 Lynch, 465 U.S. at 671.

38 County of Allegheny, 492 U.S. at 581-87.

39 ACLU v. Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

40 Am. Jewish Congress v. Chicago, 827 F.2d 120, 128-29 (7th Cir. 1987) (Easterbrook, J., dissenting).

41 Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

42 The disclaimer read as follows:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.
Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

43 Id.

44 482 U.S. 578 (1987).

45 Id. at 593-94.

46 2001 Senate Vote No. 182.

47 147 CONG. REC. S 6081, 6113 (2001).

48 Kitzmiller, 400 F. Supp. 2d at 707.

49 Paula Reed Ward, District in Evolution Debate to Pay $1 Million in Legal Fees, PITTSBURGH POST-GAZETTE, Feb. 23, 2006, at B3.

50 Id.

51 For example, the national chapter of the ACLU reported a $17,000,000 surplus of income over and beyond what was spent in the 2004 Fiscal Year. See ACLU Annual Report Fiscal Year 2004, at 41-42, available at http://www.aclu.org/FilesPDFs/ar_fy2004.pdf (last visited July 26, 2006).

53 Accept Monument Removal Without Other Conditions; ACLU Goes Too Far When it Sets Sale Conditions for Ten Commandments, DULUTH NEWS-TRIBUNE, Apr. 10, 2004, at 08A.

54 290 F. Supp. 2d 1362, 1365 (N.D. Ga. 2003).

55 ACLU of Georgia, 2003-2005 Litigation/Advocacy Docket, available at http://www.acluga.org/docket.html (last visited July 26, 2006).

56 Barrow Ten Commandments Backers Encouraged by Supreme Court Decision, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 12, 2004.

57 Plott Brice, County Gives up Fight for Commandments; Habersham Leaders Won't Risk 'Waste', ATLANTA JOURNAL-CONSTITUTION, Feb. 12, 2004, at 6D.

58 Id.

59 Selman v. Cobb County School District, 449 F.3d 1320 (11th Cir. 2006); see also Sam Kastensmidt, ACLU Sues to Stop County Commission Prayers, available at http://www.reclaimamerica.org/Pages/NEWS/ news.aspx?story=2868 (last visited July 26, 2006).

60 ACLU of Tenn. v. Hamilton County, 2002 U.S. Dist. LEXIS 26893 (D. Tenn. 2002); In Sullivan, Leaders Pick Wrong Fight, BRISTOL HERALD COURIER, Jan 21, 2004, available at http://www.sullivan-county.com/bush/10cs3.htm (last visited July 26, 2006).

61 Barnes-Wallace v. BSA, 275 F. Supp. 2d 1259 (S.D. Cal. 2003); Julia Duin, Boy Scouts Fight Back; San Diego Park Case Heads to Court in Latest Gay-Rights Battle, WASHINGTON TIMES, Mar. 7, 2004, at A1.

62 Doe v. Barrow County, 2003 U.S. Dist. LEXIS 22734 (N.D. Ga. 2003); see also Cameron McWhirter, 10 Commandments: Barrow Removes Religious Display; County Complies With U.S. Judge, ATLANTA JOURNAL-CONSTITUTION, July 20, 2005, at 1B; ACLU of Georgia, 2003-2005 Litigation/Advocacy Docket, supra note 55; Barrow County to Remove 10 Commandments Display, at www.acluga.org/press.releases/ 0507/barrow.county.html (last visited July 26, 2006).

63 Glassroth v. Moore, 335 F.3d 1282, 1303 (11th Cir. 2003); Kyle Wingfield, Legal Battle Over Ten Commandments Monument Will Cost Alabama Taxpayers more than $500,000, THE ASSOCIATED PRESS, Apr. 14, 2004.

64 Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 348-49 (5th Cir. 1999).

65 Buono v. Norton, 371 F.3d 543 (9th Cir. 2004); see also Sept. 21, 2004 order to pay plaintiffs.

66 ACLU Neb. Found. v. City of Plattsmouth, 199 F. Supp. 2d 964, 965 (D. Neb. 2002).

67 Tim Smith, ACLU Targets Council Prayers, THE GREENVILLE NEWS (South Carolina), Sept. 20, 2005, at 13B; Bill Rankin, Prayer Provokes Lawsuits, ATLANTA J. CONST., Aug. 21, 2005, available at http://www.ajc.com/ sunday/content/epaper/editions/sunday/metro_3480f11e2126114a0079.html (last visited July 26, 2006).

68 Donna Glenn, School-Prayer Case Costs District $18,000 to Settle, COLUMBUS

DISPATCH, Oct. 20, 1999, at 1C; see also Bennett v. London City Sch. Dist. Bd. of Educ., Case No. C2-99-601 (S.D. Ohio 1999).

69 Adland v. Russ, 307 F.3d 471 (6th Cir. 2002); see also State Pays ACLU $121,500 in Ten Commandments Fight, ASSOCIATED PRESS, July 9, 2003, available at http://www.enquirer.com/editions/2003/ 07/09/loc_kytencommandments09.html (last visited July 26, 2006).

70 Powell v. Bunn, 108 P.3d 37 (Or. Ct. App. 2005); cert. granted, 108 P.3d 37 (Or. 2005); Oregon, Schools Must Pay Lawyers in Boy Scout Case, SEATTLE TIMES, July 14, 2002, at B3; Paige Parker, Judges Uphold Ruling Barring Scout Recruiting; The Appeals Court Concurs that Portland Schools Discriminated Against Atheist Students, available at http://www.scoutingforall.org/articles/2005030701.shtml (last visited July 26, 2006).

71 James Goodwin & Linda Lecht, Missouri Capital Monument Safe for Now, SPRINGFIELD NEWS-LEADER, June 28, 2005, available at http://www.news-leader.com/apps/pbcs.dll/article?AID=/20050628/ NEWS01/506280351/1095 (last visited July 26, 2006).

72 Staley v. Harris County, 332 F. Supp. 2d 1030 (S.D. Tex. 2004); Staley v. Harris County, 332 F. Supp. 2d 1041, 1044 (S.D. Tex. 2004).

II. S. 3696 is Based on the Inherent Difference Between Establishment Clause Challenges and Traditional Civil Rights Cases.

S. 3696 is both logical and reasonable to the extent that it distinguishes between Establishment Clause claims and the various civil rights protected by 42 U.S.C. § 1983 and the other statutes covered by 42 U.S.C. § 1988. Establishment Clause claims differ both in application and definition. The civil rights identified under these sections deal largely with concrete, individualized harms, while the Establishment Clause is primarily "a specific prohibition on forms of state intervention in religious affairs."74 Civil rights claims seek to remedy specific violations of individual rights, whereas Establishment Clause claims seek to define or clarify often abstract structural limitations on government. In this respect, the Establishment Clause is much more like the Commerce Clause75 and other generalized limitations on government power than it is like a specific protection of individual civil rights. This largely explains why there is a more relaxed standing requirement for Establishment Clause cases than there is for many other cases involving actual harm to an individual right.
73 See Lee, 505 U.S. at 598.

74 Id. at 591.

75 U.S. CONST. art. 1, § 8.

76 427 U.S. 347, 373 (1976).

77 ACLU Annual Report Fiscal Year 2004, at 41-42, available at http://www.aclu.org/FilesPDFs/ar_fy2004.pdf (last visited July 26, 2006).

78 Id.

79 Id.

80 ACLU of Florida Financial Report for the Fiscal Year Ending March 2004, at 8, available at http://www.aclufl.org/about/ACLU%20annual%20report2.pdf (last visited July 26, 2006).

81 Combined ACLU of Utah Union and ACLU of Utah Foundation.

82 ACLU of Utah Annual Report April 2004 to March 2005, at 7, available at http://www.acluutah.org/ 05report.pdf (last visited July 26, 2006).

83 ACLU of Minnesota Annual Report January 1, 2003-March 31, 2004, at 8, available at http://www.aclu-mn.org/sites/ed4a3989-49fd-4f1f-8dff-1b9a8d23cf25/uploads/2003_Annual_Report.pdf (last visited July 26, 2006).

84 See, e.g., ACLU of Georgia 2004 Annual Report, at 12, available at http://www.acluga.org/docs/ 2004annualreport.pdf (last visited July 26, 2006) (ACLU Foundation of Georgia received 40% of its income from litigation in 2003-2004).

85 Wikipedia, American Civil Liberties Union, available at http://en.wikipedia.org/wiki/ACLU#Funding (last visited July 26, 2006).

86 Lemon, 403 U.S. at 612.

87 Lee, 505 U.S. at 598; see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995) ("a pervasive bias or hostility to religion . . . could undermine the very neutrality the Establishment Clause requires").

88 County of Allegheny, 492 U.S. at 662-63 (Kennedy, J., concurring in part, dissenting in part).

89 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).