

Testimony of
Mr. Mathew Staver

Founder, Chairman
Liberty Counsel
August 2, 2006

TESTIMONY OF

Attorney Mathew D. Staver
Founder and Chairman of Liberty Counsel
Interim Dean and Professor of Law of Liberty University School of Law
Before Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
August 2, 2006

Mr. Chairman, members of the committee, thank you for inviting me. My name is Mathew Staver.¹ I am the Founder and Chairman of Liberty Counsel² and the Interim Dean of Liberty and Professor of Law of University School of Law.³ I have come today to address whether federal statutes 42 U.S.C. §§ 1983 and 1988 should be amended to exclude claims arising under the Establishment Clause of the First Amendment to the United States Constitution. Sections 1983 and 1988 are designed to encourage plaintiffs who suffer deprivation of their civil or constitutional rights to vindicate those rights in a court of law. Sections 1983 and 1988 are particularly suited for those cases in which the plaintiffs are ill-financed and where the law is relatively predictable. However, in Establishment Clause cases, many, if not most, of the plaintiffs are represented by public interest law firms which will finance the case whether or not a fee shifting statute exists.

Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There have been and remain sharp disagreements between the Justices of the United States Supreme Court and lower court judges over the meaning and application of the Establishment Clause. In an area of law where there are conflicting court decisions for every conceivable proposition, it makes little sense to award attorney's fees and costs to plaintiffs with diametrically opposed positions. While conflicting court opinions will inevitably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception to the rule. By providing a fee shifting statute in such a confused area of law, the plaintiff often uses the threat of attorney fees to force government officials to a desired result, whether or not that result is the right one. It is my considered opinion that Establishment Clause claims should be excluded from Section 1988.

To better understand the problem, let me first begin by reviewing the background of 42 U.S.C. §§ 1983 and 1988 and then addressing the current state of Establishment Clause jurisprudence.

I. BACKGROUND OF RELEVANT FEE SHIFTING STATUTES.

A. 42 U.S.C. § 1983.

Originally called the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia Section 1983 was enacted to "create a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal 4 shall be considered to be a statute of the District of Columbia.

8 deprivation of another's statutory or constitutional rights.

enforcement."5 Representative Shellabarger, the Chairman of the House Select Committee, which drafted the Ku Klux Klan Act, said that the statute was "confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights."6 The U.S. Supreme Court in *Monroe v. Pape*, held that Section 1983 served three purposes: (1) "to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate, and (3) to afford a federal remedy where the state remedy, while adequate in theory, was not available in practice."7 Section 1983 served as the vehicle of vindication for the The Members of the 96th Congress that enacted Section 1983 did not directly address the question of damages, but "the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871."9 The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available 5 H.R. Rep. No. 96-548 (1979). under that section for actions found to have been violative of constitutional rights and to have caused compensable injury.10 Section 1983 has led to the derogation of the American Rule11 for damages, by allowing the prevailing party to recover not only damages, but attorney's fees as well.

B. 42 U.S.C. § 1988.

One of the exceptions to the American Rule is 42 U.S.C. § 1988(b), which states:

In any action or proceeding to enforce a provision of sections

12

1981[],

]14[

] of 16[15], and 1986 [1985,1983 ,13], 1982[1981a

this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681e

t seq.], the Religious Freedom Restoration Act of 1993 [42

U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000

[42 U.S.C.A. § 2000cc e

t seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §

discretion, may allow the prevailing party, other than the United States, a reasonable attorney's

fee as part of the costs, except that in any action brought against a judicial officer for an act or

omission taken in such officer's judicial capacity such officer shall not be held liable for any

costs, including attorney's fees, unless such action was clearly in excess of such officer's

jurisdiction.

81

Section 1988, known as "The Civil Rights Attorney's Fees Awards Act of 1976," made fee awards an essential remedy for private citizens who had the opportunity to assert their civil rights.¹⁹ The remedy of attorney's fees is appropriate in the area of civil rights.²⁰ "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."²¹ Whether Section 1988 is appropriate in the context of Establishment Clause claims is an entirely different question. I think it is not appropriate, as I will continue to explain.

C. Equal Access to Justice Act

Before continuing further, I need to point out another exception to the American Rule is the Equal Access to Justice Act (EAJA).²² Under the EAJA, "courts may award reasonable attorney's fees to parties that have successfully litigated against the federal government in an action in which the government's position was not substantially justified."²³ Even if Section 1988 was amended to eliminate the award of attorney's fees, which I believe it should be, the EAJA remains a viable loophole to such a revision. Thus, I would urge this Committee to also consider similarly amending the EAJA to exclude from its purview Establishment Clause claims.

II. THE ESTABLISHMENT CLAUSE EXCEPTION TO STANDING RULES.

Section 1983's focus on civil rights claims has been expanded to cover constitutional claims, including Establishment Clause cases under the First Amendment. These claims are typically brought by public interest organizations, already financed by public, charitable support. These public

²² The Equal Access to Justice Act provides: Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees ...incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

²⁸ U.S.C. § 2412(d)(1)(A) (1994).

²³ John W. Finley, III, Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade, Associations, 53 J. URB. & CONTEMP. L. 243, 245 (1998).

interest organizations will continue to take Establishment Clause cases without regard to such fee-shifting provisions. In fact, a good argument can be made that some frivolous claims will be eliminated by removing the threat of attorney's fees.

Plaintiffs bringing claims pursuant to the Establishment Clause or other Constitutional provisions must meet all three prongs of the "standing" test in *Lujan v. Defenders of Wildlife*.²⁴ "First, the plaintiff must have suffered an injury in fact- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.

Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."²⁵ Simply put,

the plaintiff must suffer a (1) direct and concrete injury, (2) which injury can be traced to the complained of action, and (3) which injury will be redressed by the litigation. This three-prong test

24 *Ganulin v. United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999). 25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

8

helps to protect Article III courts, by ensuring that they are not giving advisory opinions, but rather are hearing only cases and controversies.²⁶

Despite the *Lujan* test, lower federal courts have relaxed the standing requirements in Establishment Clause cases and have carved out exceptions to the normal standing rules that apply in every other area of litigation. In ruling on standing, the Supreme Court has held that "it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."²⁷ In *McGowan v. Maryland*, the Court held that the standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.²⁸

The Sixth Circuit Court of Appeals has noted that First Amendment Establishment Clause plaintiffs do not bear a heavy burden, and the standing inquiry in such cases can be tailored to reflect the type of injury Establishment Clause plaintiffs are likely to suffer.²⁹ In *Briggs*, the court 26 *Flast v. Cohen*, 392 U.S. 82, 96 (1968). The Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. ²⁷ *Id.* at 102.

²⁸ *McGowan v. State of Maryland*, 366 U.S. 420, 429- 30 (1961).

²⁹ *Briggs v. Ohio Elections Com'n*, 61 F.3d 487, 492 (6th Cir. 1995).

held that there is not a heavy burden to demonstrate "a claim of specific present objective harm or a threat of specific future harm."³⁰ "While it is clear that abstract injury is not enough to establish standing, it is equally clear that mere offense to individual values of an abstract or esoteric nature can provide the basis for standing."³¹ In cases involving the Establishment Clause, the courts have lessened the standing requirements laid out in *Lujan* to seemingly fictitious injuries. In most lower federal courts, a plaintiff can bring an Establishment Clause challenge simply because the litigant claims that he or she is offended by the religious imagery or alleged religious action.³² This exception to the general rules of standing has opened the floodgates of litigation. In no other area of law may a plaintiff bring a lawsuit based on mere offense.

III. CONFUSING AND CHANGING INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE.

In addition to the exception to the standing rules for Establishment Clause cases, there are confusing and changing interpretations of the Establishment Clause itself. The Supreme Court currently uses several tests, some of which actually conflict with one another, and sometimes the High

³⁰ *Id.* at 492.

³¹ *Id.*

³² See Laveta Casdorff, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST.

MARY'S L.J. 471, 491-92 (1999) (noting that the "standing doctrine shifted" to allow plaintiffs much broader access to challenge governmental acts under the Establishment Clause). Court forgoes using any test at all. Thus, litigants, government officials and judges are left to guess at the meaning of the Establishment Clause. If the Justices of the Supreme Court are conflicted over the meaning of the Establishment Clause, then it is particularly inappropriate to punish government officials with the threat of attorney's fees and costs for a mere misstep in this constitutional mine field.

A. Overview of the Supreme Court's Various Tests.

1. The Lemon Test.

The Court in *Lemon v. Kurtzman* applied a three-part test for deciding Establishment Clause cases.³³ "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."³⁴

In *Lynch v. Donnelly*³⁵ and *County of Allegheny v. ACLU*,³⁶ the Lemon test was refined into an "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the

³³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). ³⁴ *Id.* at 612-13. ³⁵ 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

³⁶ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

statement to a reasonable observer.³⁷ The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement

or disapproval" of religion.³⁸

2. The Marsh Test.

In *Marsh v. Chambers*,³⁹ the Supreme Court did not use a specific test, but rather examined the Establishment Clause from an historical perspective. After chronicling history back to the debates on the Constitution and Bill of Rights, the Court held that legislative prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer.⁴⁰ Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent. ⁴¹ "Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise ³⁷ *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). ³⁸ *Id.* The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). See *Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000) (plurality).

³⁹ *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁴⁰ *Id.* at 786-91.

⁴¹ *Id.* at 790.

broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."⁴² In many cases the outcome of the litigation will be entirely different depending on whether the Court applies the Marsh test instead of the Lemon test. There is almost no guidance when one is applicable and the other is not.

3. The Lee or Coercion Test.

The Court in *Lee v. Weisman* used yet another approach for Establishment Clause cases - a coercion test.⁴³ The Court held that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so. The Court found that public school officials compelled young students to participate in "an overt religious exercise."⁴⁴ Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment

⁴² *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part, dissenting in part).

⁴³ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁴⁴ *Id.* at 587-88.

13

74

Clause, or have stated that coercion alone is insufficient.⁴⁵ Even within one test, the United States Supreme Court is conflicted and confused as to its application.

4. A New Test and No Test.

Justice O'Connor proposed a new test for Establishment Clause cases in *Elk Grove Unified School District v. Newdow*.⁴⁶ Justice Thomas has written that the Establishment Clause does not apply to the states, and thus restricts only the federal, not state, government.

The final option for analysis of Establishment Clause cases is to use no test at all.

This classic case was presented in 2005 with the two decisions by the High Court on the Ten Commandments. In the Kentucky case, the Supreme Court used a modified Lemon test, but in the Texas case, argued and decided the same day, the Court used no test at all.

⁴⁵ Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963) (apparently rejecting coercion but then discussing "indirect coercion"); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (same); Discussing coercion: *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2320 (2004) (Rehnquist, C.J., concurring) (distinguishing between compulsion in *West Virginia Bd. of Ed v. Barnette*, 319 U.S. 624 (1943) and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 870-71 (2000) (Souter, J., dissenting); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring in part); *Bd. of Ed. of Westside of Cmty. Sch. v. Mergens by & through her next Friend, Mergens, et al.*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part).

⁴⁶ *Newdow*, 124 S. Ct. at 2322 (2004) (O'Connor, J., concurring).

⁴⁷ *Id.* at 2328. (Thomas, J., concurring) ("The Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

IV. EXAMPLES OF CONFUSING AND CONFLICTING ESTABLISHMENT CLAUSE JURISPRUDENCE.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of the Supreme Court have voiced opposition to its continued use. 48 *Lemon* is not solely to blame for the infamous three-part test because it merely stated what the Court had previously done.⁴⁹ Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order..."⁵⁰ The Supreme Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."⁵¹ Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. *Lemon* has fractured the Court and caused scholars and litigators to wonder

48 See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphian task" to apply the test).

49 The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

50 *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

51 *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them.

For almost every federal district court opinion stating one proposition, one can find another federal district court holding exactly the opposite. Many of these cases have not been appealed through the appellate level, and most have not made their way to the United States Supreme Court. Consequently, many of the federal district court cases still remain and have never been clarified. Because the Supreme Court has developed such an unworkable test, it has opened the floodgates to Establishment Clause litigation. Courts have gone in all directions applying the *Lemon* test, and litigants have often been frustrated when they first enter the federal district court and are unable to take the case any higher to have it clarified or possibly overturned. To illustrate this point, I will overview a number of conflicting decisions considering the same issue. In most cases only the federal district court cases have been cited simply to illustrate the confusion among those courts. While the propositions stated below may not be the final ruling of the court, as the case may have been appealed to a higher judicial body, the cases are cited to illustrate the

religious liberty quagmire.⁵²

⁵² The cases cited between footnotes 52 and 113 are mostly citations to the federal district courts. These cases are not shepardized and may have been overruled by either a circuit court of appeals or the United States Supreme Court. The cases are listed only as examples of the confusion caused by the Lemon test and therefore may not represent the final holding or established law.

In the area of release time, courts have allowed students to go off school premises for religious instruction⁵³ so long as the instruction did not take place near the school building.⁵⁴ Some courts have ruled it is unconstitutional for students to hand carry attendance slips from the parochial instruction back to the public school.⁵⁵ Other courts have ruled that elective credit cannot be given for the parochial course.⁵⁶ Some courts have ruled that public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.⁵⁷ Schools have been forced to defend the recognition of religious observances⁵⁸ and the prohibition of school dances. ⁵⁹

A parochial school child can participate in a public school band course,⁶⁰ but cannot participate in an all-county band.⁶¹ If a parochial school

⁵³ Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981); Smith v. Smith, 523 F.2d 121 (4th Cir. 1975); State v. Thompson, 225 N.W.2d 678 (Wis. 1975).

, 737 F. Supp. 913 (W.D. Va. 1990). Doe v. Shenandoah County School Board 4 5 , 225 N.W.2d at 678. Thompson , 662 F.2d at 1349; Lanner 5 5 , 740F. Supp. 694 (D. Minn. 1990).

See Minnesota Federation of Teachers v. Nelson , 662 F.2d 1349; Lanner 6 5 .Id 7 5

⁵⁸ See Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir. 1980). See also Student Members of Playcrafters v. Board of Education, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

, 884 F.2d 376 (8th Cir. 1989). See Clayton v. Place 9 5 , 365 N.W.2d 151 (1985). Snyder v.

Charlotte Public School District 0 6 , 51 Md. App. 312, 443 A.2d 622 (1982). Thomas v.

Allegheny County Board of Education 1 6

child needs remedial services, the district may be allowed to fund services at the student's school, ⁶² but such provision may be void on its face,⁶³ or funds may be allowed only if services are performed at "neutral sites."⁶⁴

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.⁶⁵ Public schools may ⁶⁶ or may not⁶⁷ lease classroom space in parochial schools. Private school students or religious

organizations may⁶⁸ or may not⁶⁹ be permitted to utilize public school facilities. Financial

⁶² See Walker v. San Francisco Unified School District, 741 F. Supp. 1386 (N.D. Cal. 1990), reh'g denied, 62 F.3d 300 (9th Cir. 1995); Thomas v. Schmidt, 397 F. Supp. 203 (D.R.I. 1975).

, 345 F. Supp. 1349 (E.D. Pa. 1972). Viss v. Pittenger , 598 F. Supp. 1356 (W.D. Mo. 1984);

Wamble v. Bell 3

6

⁶⁴ Felton v. Secretary, 739 F.2d 48 (2d Cir. 1984); Pulido v. Cavasos, 728 F. Supp. 574 (W.D.

Mo. 1989); Filler v. Port Washington University Free School District, 436 F. Supp. 1231

(E.D.N.Y. 1977); Wolman v. Essex, 417 F. Supp. 1113 (S.D. Ohio 1976).

, 397 F. Supp. 203 (D.R.I. 1975). Thomas v. Schmidt 5

6

⁶⁶ Spacco v. Bridgewater School Department, 722 F. Supp. 834 (D. Mass. 1989); Americans

United for Separation of Church & State v. Paire, 359 F. Supp. 505 (D.N.H. 1973); Americans United for Separation of Church & State v. Paire, 348 F. Supp. 506 (D.N.H. 1972); Citizens to Advance Public Education v. Porter, 237 N.W.2d 232 (Mich. 1976) (shared time secular education program).

67 See Americans United for Separation of Church & State v. School District of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich 1982); Americans United for Separation of Church & State v. Porter, 485 F. Supp. 432

(W.D. Mich. 1980); Americans United for Separation of Church & State v. Board of Education, 369 F. Supp. 1059 (E.D. Ky. 1974).

68 Gregoire v. Centennial School District, 907 F.2d 1366 (3d Cir. 1990); Parents Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986); Country Hills Christian Church v. Unified School District, 560 F. Supp. 1207 (D. Kan. 1983); Resnick v. East Brunswick Township Board of Education, 389 A.2d 944 (N.J. 1978); cf. Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

69 Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982); Lamb's Chapel v. Center Moriches School District, 736 F. Supp. 1247 (E.D.N.Y. 1990); Resnick v. East Brunswick Township Board of Education, 343 A.2d 127 (N.J. 1975); cf. Wallace v. Washoe County School Board, 701 F. Supp. 187 (D. Nev. 1988); Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985).

assistance programs for needy students attending private schools have failed the Lemon test.⁷⁰ Some courts have disqualified private college students from receiving government tuition grants,⁷¹ while other courts have allowed such grants.⁷² Some plans have been upheld only when the use of the funds is restricted.⁷³ Students may receive grants to study philosophy or religion in public schools, but not theology in pervasively sectarian schools failing a 36-prong test.⁷⁴ However, Veteran's Administration, and some handicap tuition assistance programs, have generally been held valid for recipients attending sectarian schools.⁷⁵

70 Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972); People v. Howlett, 305 N.E.2d 129 (Ill. 1973); Weiss

v. Bruno, 509 P.2d 973 (1973), contra Barrera v. Wheeler, 475 F.2d 1338 (8th Cir. 1973).

71 See d'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983); Smith v. Board of Governors, 429 F. Supp. 871

(D.N.C. 1977); Americans United for Separation of Church & State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974); Americans United for Separation of Church & State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974); Opinion of the Justices, 280 So. 2d 547 (Ala. 1973); State v. Swanson, 219 N.W.2d 727 (Neb. 1974). But cf. Durham

v. McLeod, 192 S.E.2d 202 (S.C. 1972) (loans constitutional).

72 See Americans United for Separation of Church & State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977); Lendall v. Cook, 432 F. Supp. 971 (D. Ark. 1977); Americans United for Separation of Church & State v. Rogers, 538 S.W.2d 711 (Mo. 1976); Ceclre v. Illinois Educational Facilities Authority, 288 N.E.2d 399 (Ill. 1972).

73 See Walker, 741 F. Supp. at 1386; Lendall, 432 F. Supp. at 971; Smith v. Board of Governors, 429 F. Supp. 871 (D.N.C. 1977); Americans United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982).

74 See *Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990); But cf. *In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (testamentary scholarships for ministry students at public institute constitutional).

75 *Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974).

Some courts have ruled that the state may provide bus transportation to private school children,⁷⁶ but in Rhode Island, the enabling statute was stricken three times.⁷⁷ Public funds cannot be used to provide textbooks to private school students in some states,⁷⁸ but in others, it is acceptable for the state to reimburse parochial schools for textbook expenditures.⁷⁹ Decisions have limited the provision of educational materials to sectarian schools.⁸⁰ In some cases states may not reimburse a sectarian school for costs incurred performing state-mandated tasks, such as testing and record-keeping,⁸¹ but in other cases it is permissible.⁸²

76 *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); cf. *Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975) (no cross-district transport).

77 *Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

78 *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); contra *Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 437 N.W.2d 806 (Neb. 1989).

79 *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

80 *Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); but see *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

82 *Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas*

v. Schmidt, 397 F. Supp. 203 (D.R.I. 1975).

, 342 F. Supp. 439 (S.D.N.Y. 1972). *Committee for Public Education & Religious Liberty v. Levitt* 1

8

State regulation of private schools regarding compulsory attendance,⁸³ teacher certification,⁸⁴ and curriculum⁸⁵ have been upheld. State employees may not teach or provide remedial services in private schools,⁸⁶ but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.⁸⁷ However, student teachers may not receive credit for teaching at parochial schools.⁸⁸

State inquiry into a religious organization's operating costs violates the Establishment Clause,⁸⁹ unless requested by the Internal Revenue Service.⁹⁰ The state may enforce compliance with minimum wage laws,⁹¹ the

83 Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987); Attorney General v. Bailey, 436 N.E.2d 139 (Mass. 1982); State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

84 Fellowship Baptist Church, 815 F.2d at 486; but cf. Bangor Baptist Church v. State, 549 F. Supp. 1208 (D. Me. 1982); Johnson v. Charles City Community Schools Board of Education, 368 N.W.2d 74 (1985); Sheridan Road Baptist Church v. Department of Education, 348 N.W.2d 263 (Mich. 1984); State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981). cf. State v. Anderson, 427 N.W.2d 316 (N.D. 1988) (home schooling parents violated teacher certification requirements).

85 New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 952 (1st Cir. 1989); Sheridan Road Baptist Church v. Department of Education, 348 N.W. 2d 263 (Mich. 1984); State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981); cf. New Jersey State Board of Higher Education v. Board of Directors, 448 A.2d 988 (N.J. 1982) (prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

86 Pulido v. Cavazos, 728 F. Supp. 574 (W.D. Mo. 1989); Wamble, 598 F. Supp 1356; Americans United for Separation of Church & State v. Porter, 485 F. Supp. 432 (W.D. Mich. 1980); Americans United for Separation of Church & State v. Board of Education, 369 F. Supp 1059 (E.D. Ky. 1974); but see Walker, 741 F. Supp. at 1386.

89 Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979); Fernandez v. Lima, 465 F. Supp. 493 (N.D. Tex. 1979). See also Heritage Village Church & Missionary Fellowship v. State, 263 A.2d 726 (N.C. 1980) (act requiring only certain religious groups to file information is unconstitutional).

90 United States v. Freedom Church, 613 F.2d 1316 (1st Cir. 1979); Lutheran Social Service v. United States, 583 F. Supp. 1298 (D. Minn. 1984); cf. Hernandez v. Commissioner, 819 F.2d 1212 (1st Cir. 1987); St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1989) (state inquiry into church

, 885 F.2d 952 (1st Cir. 1989). New Life Baptist Church Academy v. East Longmeadow 7

8

, 802 F.2d 1046 (8th Cir. 1986). Stark v. St. Cloud State University 8

8

Fair Labor Standards Act,⁹² and force participation in FICA and FUTA, ⁹³ despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,⁹⁴ but a state labor board may have jurisdiction.⁹⁵ Sectarian schools are prohibited from utilizing CETA workers.⁹⁶ Civil rights statutes have not been enforced against religious organizations,⁹⁷ but courts have split as to whether the records does not violate entanglement prong).

91 Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola, 628 F. Supp. 1173 (D.P.R. 1985); Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983).

92 Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); E.E.O.C. v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); Ninth & O St. Baptist Church v. E.E.O.C., 616 F. Supp. 1231 (W.D. Ky. 1985); Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982).

93 South Ridge Baptist Church v. Industrial Commission, 911 F.2d 1203 (6th Cir. 1990) (church included within workers' compensation system); Bethel Baptist Church v. United States, 822 F. 2d 1334 (3d Cir. 1987); Young Life v. Division of Employment & Training, 650 P.2d 515 (Colo.

1982) (religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (school subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (school exempt from unemployment tax).

94 *Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); see also *N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980); *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M.D. Pa. 1978); contra *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

95 *Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977); cf. *Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

96 *Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); see also *Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

97 *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); contra *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); but see *E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

"reasonable accommodation" requirement may be enforced against secular employees.⁹⁸ As a result, religious institutions have been forced to departmentalize between those employees who carry on the ministry and mission of the institution from other employees who perform routine tasks. Thus, while a religious institution may discriminate on the basis of religion in hiring and firing a school professor, it may not do the same to a secretary.

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations⁹⁹ and may consider the religious preference of the parents for placement,¹⁰⁰ but the agency cannot impose its religious doctrine upon a child.¹⁰¹ Second, religious child care facilities exempted from licensure may or may not be deemed to fail the Lemon test.¹⁰² Church-run day care centers

98 *Protos v. Volkswagon of America, Inc.*, 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

99 *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

100 *Id.*, cf. *Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (awarding custody based on religious practices is abuse of discretion).

101 *Arneeth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988).

102 *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder*, 725 F. Supp. 488 (M.D. Fla. 1989); see *The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). cf.

are subject to zoning restrictions,¹⁰³ but a city may not exempt them from requirements imposed upon commercial operators.¹⁰⁴

Courts are divided over whether the state may¹⁰⁵ or may not¹⁰⁶ erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.¹⁰⁷ Crosses placed on government property have generally been prohibited,¹⁰⁸ but crosses and religious symbols on official seals may or may not be permissible.¹⁰⁹

State v. McDonald, 787 P.2d 466 (Okla. 1989) (religious affiliated "boy's ranch" subject to state licensing requirements).

103 *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

104 *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); cf. *Arkansas Day Care Association*, 577

F. Supp. 388 (statute disparately treated religious facilities).

105 *Eugene Sand & Gravel, Inc. v. Eugene*, 558 P.2d 338 (1976).

106 *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

107 *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

108 *Mendelsohn v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443

(C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox*

v. City of Los Angeles, 587 P.2d 663 (Cal. 1978).

109 *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).

The Ten Commandments have been removed from schools,¹¹⁰ but permitted to remain on other public property.¹¹¹ A legislature may designate a room for prayer and meditation, but religious

decorations or use of the room may be prohibited.¹¹²

An order of then-Governor Ronald Reagan giving state employees a three hour paid holiday on Good Friday violated the Establishment Clause,¹¹³ but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.¹¹⁴

In *Lamb's Chapel v. Center Moriches Union Free School District*,¹¹⁵ Justice Scalia noted in his concurrence the fact that the Court sometimes decides to use a test and sometimes it does not. 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 by frightening little children and school attorneys Its most recent burial, only last Term [in

110 *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

111 *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

112 *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

113 *Mandel v. Hodges*, 54 Cal. App. 3d 596 (1976).

114 *California School Employees Association v. Sequoia Union High School District*, 67 Cal. App. 3d 157

(1977); cf. *Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (state may declare Good Friday a legal holiday).

115 *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

Lee v. Weisman 116] was, to be sure, not fully six-feet under Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinion, personally driven pencils through the creature's heart 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 to do so, but we can demand it to return to the tomb at will When we wish to strike down a practice it forbids, we evoke it Sometimes we take a middle ground of course, calling its three prongs "no more than helpful sign posts." Such a docile and useful monster is worth keeping around, at least in a somnolent state: one never knows when one might need him.¹¹⁷

The decisions in both *McCreary County, Kentucky v. ACLU of Kentucky*¹¹⁸ and *Van Orden v. Perry* further show the conflicting and confusing interpretations of the Establishment Clause. Both of these cases involved the Ten Commandments and were argued and delivered on the exact same day; however, the Court's analysis was not consistent. In *McCreary*, the Court used a modified Lemon test, focusing primarily on the purpose prong.¹¹⁹ In *Van Orden*, the Court did not use the Lemon test at

116 The Court did not use the Lemon test, but instead used a newly-created "coercion" test.

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

118 *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

119 *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (2005). The majority in that case certainly implies Lemon's continued vitality by conducting purpose analysis. The majority never explicitly reaffirms Lemon because the inquiry ended when the Court held the displays unconstitutional as having an impermissible purpose.

all.¹²⁰ On December 20, 2005, the Sixth Circuit Court of Appeals upheld the identical Ten

Commandments display the Supreme Court had declared unconstitutional in the McCreary County case. In *ACLU of Kentucky v. Mercer County, Kentucky*, the federal court of appeals denoted that the different interpretations and applications of Establishment Clause have left lower court judges in "Establishment Clause purgatory."¹²¹

To add to the confusion, the Court has been inconsistent on when something is or is not a violation of the Establishment Clause. In *McCreary*, the Court held that the Ten Commandments display may be constitutional in one county, while unconstitutional in another.¹²² The eyes that look to purpose belong to an " 'objective observer,' " one who takes account of the traditional external signs that show up in the " 'text, legislative history, and implementation of the statute,' " or comparable official act.¹²³ Therefore, the constitutionality of a Ten Commandments display would depend on a person's subjective understanding of its purpose, which could vary from county to county.

¹²⁰ *Id.* A plurality of the Court in *Van Orden* disregarded the Lemon test, noting that Lemon is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. The plurality instead employed an analysis driven by both the nature of the monument and by our Nation's history.

¹²¹ *Id.*

¹²² *McCreary*, 125 S. Ct. at 2722.

¹²³ *Id.* at 2734.

Similar to *McCreary* was *Van Orden*.¹²⁴ There, the constitutionality of a Ten Commandments display was dependent upon how long it had been present on the State Capitol grounds.

"Acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."¹²⁵

Following suit, the circuit courts, like the Supreme Court, have bought into the confusing and changing interpretations of the Establishment Clause in the context of prayer at school board meetings. Prayers are frequently said at county, municipal and school board meetings, as well as other meetings of public officials. In many respects, these prayers are very similar to prayers preceding legislative sessions.

A federal court of appeals ruled that a resolution of the Board of St. Louis County in Minnesota which provided for an invocation at its public meetings was not a violation of the First Amendment Establishment Clause.¹²⁶ Under this policy, a board of commissioners invited local

¹²⁴ *Van Orden*, 125 S. Ct. at 2854.

¹²⁵ *Id.* at 2862.

¹²⁶ *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

clergymen to offer prayers prior to the commencement of each board meeting. The chairman of the board would generally announce the following: As is our practice, the Reverend John Doe will now give a prayer. The Court found that this practice was consistent with the First Amendment because the prayer had a "secular legislative purpose of setting a solemn tone for the transaction of governmental business" and assisted the maintenance of order and decorum.¹²⁷ The practice of opening these board meetings with prayers was not "an establishment of religion proscribed by the establishment clause of the First Amendment in any pragmatic, meaningful and realistic sense of that clause."¹²⁸ Similarly, the state Supreme Court of New Hampshire ruled that inviting local ministers to open town meetings with an invocation was not prohibited by the

First Amendment Establishment Clause.129

127 Id. at 1114-115.

128 Id. at 1115.

129 *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968). Other courts have similarly ruled that prayers offered at the outset of public assemblies are constitutional. See, e.g., *Marsa v. Wernik*, 430 A.2d 888 (N.J.), app. dismissed and cert. denied, 454 U.S. 958 (1981) (prayer at the outset of borough council meeting constitutional); *Lincoln v. Page*, 341 A.2d 799 (N.H. 1968) (invocation at town meeting constitutional); *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (salaries for legislative chaplains constitutional); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995) (statements by a minister at outset of council meeting constitutional).

In a 2-to-1 decision, one federal appeals court ruled that prayer offered at the opening of a school board meeting is unconstitutional.¹³⁰ The Cleveland school board traditionally opened its deliberative session with prayer. Historically, the school board invited representatives of the protestant, Roman Catholic, Jewish and Muslim faiths. The federal district court upheld the practice, but two of the three appeals court judges voted to reverse the decision.¹³¹

A California federal court found that the Palo Verde Unified School District's practice of opening each meeting with prayer did not violate the Constitution.¹³² In upholding the practice, the court relied on the Supreme Court's legislative prayer case in *Marsh*. The court noted that school board meetings, unlike classroom sessions, are composed primarily of adults. The "fact that at any given board meeting there may be children present in the audience, some of whom may participate in an awards session or address the board on a particular topic, does not change the nature or the function of the board meeting. A board meeting is a meeting of adults with official business

¹³⁰ *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

¹³¹ *Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337 (N.D. Ohio 1996) (reasoning that prayers at school board meetings are no different than prayers at legislative meetings, thus finding that the Supreme Court decision in *Marsh* controls the outcome).

¹³² *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp.2d. 1192 (C.D. Cal. 1998). and policymaking functions."¹³³ Clearly, prayer can still play a role in public assemblies and meetings.

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.¹³⁴ In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must allow government officials to correct their conduct. One misstep cannot forever haunt the future. The Third, Sixth, and Seventh Circuits have permitted government officials to modify the purposes for a Good Friday holiday, a display that began with only a crèche, and displays of the Ten Commandments.¹³⁵

V. THE PUBLIC EXPRESSION OF RELIGION ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

¹³³ Id. at 1197.

¹³⁴ See, e.g., *Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

¹³⁵ See *Adland v. Russ*, 307 F.3d 471, 489-90 (6th Cir. 2002), cert. denied, 538 U.S. 999 (2003) (Ten Commandments); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999)(Good Friday); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999)(Creche); *Books*, 235 F.3d at 307-08 (Ten

Commandments); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995)(Good Friday). See also *F reethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003)(the current purpose of a Ten Commandments display is more relevant than the original purpose).

The purpose of S. 3696, the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Act of 2006 ("Act"), is to preserve the ability of litigants to seek injunctive relief against the Federal and State governments under the Establishment Clause. This purpose is neutral and serves a secular purpose. The object is to limit the exposure of government entities in an area of law that is extremely unclear. The Act does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The Act has a predominately secular purpose and does not have the primary effect of advancing or inhibiting religion.

The Supreme Court has held that a law must have a secular legislative purpose if it is to survive Establishment Clause review. See *Lemon v. Kurtzman*.¹³⁶ The government may not act "with the ostensible and predominant purpose of advancing religion."¹³⁷ This requirement "does not mean that the law's purpose must be unrelated to religion;" it means only that Congress may not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters."¹³⁸

¹³⁶ 403 U.S. 602, 612 (1971).

¹³⁷ *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722, 2733 (2005).

¹³⁸ *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

Although the Act addresses the subject of religion, its purpose is not to advance any particular religion, or to promote religion over nonreligion. Creating an environment that fosters lawful activity or speech, including religious speech, is a legitimate secular purpose.¹³⁹ In *Widmar*, a religious student group challenged a state university policy that allowed only secular student organizations to use campus facilities. The university attempted to defend its policy on the grounds that an "open forum" policy would offend the Establishment Clause. The Supreme Court dismissed that argument and held that an equal access policy, having the secular purpose of providing a forum for religious as well as secular speech, would be constitutional.¹⁴⁰

Several federal courts have applied the *Widmar* rationale in other settings. In *Chabad-Lubavitch of Ga. v. Miller*,¹⁴¹ a religious group wanted to place a Chanukah menorah in the rotunda of the Georgia capitol. Although Georgia had allowed other groups to use the rotunda for expressive activities, it refused to permit the menorah display. When the religious group filed suit, claiming that the state had violated its right of free speech, Georgia stated in its defense that it had a compelling state interest in avoiding the Establishment Clause violation that would result from the

¹³⁹ *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

¹⁴⁰ *Id.*

¹⁴¹ 5 F.3d 1383 (11th Cir. 1993) (en banc).

display. Siting en banc, the Court of Appeals for the Eleventh Circuit held that neutral treatment of the menorah would "advance the secular purpose of providing an arena for its citizenry's exercise of the constitutional right to free speech."¹⁴² Other courts have similarly found that government policies permitting religious displays in public parks have a valid secular purpose.

¹⁴³

Although the above-cited opinions address the issue of equal access to government property for religious speech, those cases are relevant to the constitutionality of this Act because they stand for the principle that government accommodations of religious speech serve a secular purpose. The Act accomplishes that purpose by eliminating the chill on speech that results from the threat of Establishment Clause suits. That the Act mentions only religious expression presents no constitutional concerns because Establishment Clause actions, with their lax standing requirements coupled with the potential for damages and attorney's fees, create an exposure for government entities that does not exist in other types of cases.

Just as the Act has a predominantly secular purpose, it does not have as its primary effect the advancement or inhibition of religion. When deciding whether legislation runs afoul of the Establishment Clause, courts

142 *Id.* at 1389.

143 *McCreary v. Stone*, 739 F.2d 716, 726 (2d Cir. 1984); *Flamer v. City of White Plains, N.Y.*, 841 F.Supp. 1365, 1376-77 (S.D.N.Y. 1993).

consider "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]." 144

Because the Act is still in its formative stages, there currently is little legislative history and no implementation for a reasonable observer to consider. The plain meaning of the text does not suggest that it primarily benefits or burdens religion. The type of speech the Act seeks to protect consists only of constitutionally protected expressions of religion. An objective reading of the Act's language reveals that its intent and effect is merely to free government actors from the shadow of potential liability for damages and fees in an area where free speech has been significantly chilled by frivolous lawsuits. No reasonable observer could conclude that the Act conveys the message to any religious group "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." 145

In sum, the Act passes constitutional muster be

1 A detailed curriculum vitae is available upon request. In reference to the relevant issue before this Committee, my specialty is constitutional litigation. I have earned B.A., M.A. and J.D. degrees, an honorary

LL.D. degree am an AV rated attorney and Board certified by the Florida Bar in Appellate Practice. I have written ten books, most of which deal with constitutional law, including a recent 572 page book devoted exclusively to constitutional law. In reference to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, the sections under consideration before this Committee, I have conducted numerous continuing education credit courses for attorneys and law professors. I have also been called to testify in federal court regarding 42 U.S.C. § 1988, and have been recognized by federal courts as an expert on Section 1988 attorney's fees. I have written numerous briefs before the United States Supreme Court and presented oral argument before the High Court twice as lead counsel.

2 Liberty Counsel is a nonprofit litigation, education and policy organization founded in 1989. Liberty Counsel has offices in Florida and Virginia and has hundreds of affiliate attorneys in all 50 states. Liberty Counsel specializes in constitutional law.

3 Liberty University School of Law was founded in 2004 and received provisional accreditation by the American Bar Association on February 13, 2006.

4 42 U.S.C. § 1983 (1996).

6 Adickes v. S.H. Kress & Co., 398 U.S. 144, 164 (1970).

7 Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

8 H.R. Rep. No. 96-548.

9 Carey v. Piphus, 435 U.S. 247, 255 (1978).

10 Id.

11 BLACK'S LAW DICTIONARY (8th ed. 2004). The American rule is the general policy that all litigants, even the prevailing one, must bear their own attorney's fees; see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260-262 (1975) (holding that prevailing parties in federal litigation may not recover their attorney's fees unless Congress has expressly authorized a fee-shifting statute pertinent to the case at bar.).

12 Equal rights under the law: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

13 Provides damages in cases of intentional discrimination in employment.

14 Property rights of citizens: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15 Provides a cause of action for conspiracy to interfere with civil rights.

16 Provides a cause of action for neglect to prevent violations of 42 U.S.C § 1985.

] of this title, the court, in its 17[2000d et seq.], or section 13981

17 Provides that "All persons within the United States shall have the right to be free from crimes of violence

motivated by gender..."

18 42 U.S.C § 1988(b) (2000).

19 S. Rep. No. 94-1011 (1976).

20 Id.

21 Id.