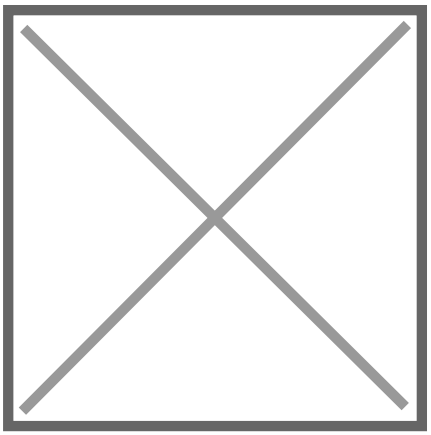

McCreary County, Kentucky v. ACLU of Kentucky (03-1693), Van Orden v. Perry (03-1500) and Metro-Goldwyn-Mayer Studios, Inc. v. Grokster (04-480)

Greetings, Court fans!

The Court released all of its remaining opinions today, leaving us with some real blockbusters. We'll address the Ten Commandment cases and ***Grokster*** (the file-sharing case) now and follow-up shortly with the final three cases and the new cert grants. Also, apart from the rulings, the biggest news might have been this: To the likely disappointment of pundits everywhere, no Justice announced his or her retirement. On to the cases!

The decisions that got the most media attention were the Court's split rulings in ***McCreary County, Kentucky v. ACLU of Kentucky*** **(03-1693)** and ***Van Orden v. Perry*** **(03-1500)**, the two cases concerning government displays of the Ten Commandments. [In the interest of full disclosure, Wiggin and Dana filed an amicus brief in both cases on behalf of the Anti-Defamation League and Boston College theologian Phil Cunningham, arguing that the displays violated the Establishment Clause. If you'd like more information, feel free to reply to this e-mail or contact Jeff Babbin or Ken at the number below.] ***McCreary*** concerned displays in the hallways of two Kentucky county courthouses, which were erected in 1999 as prominent displays of the King James version of the Ten Commandments. After the ACLU sued in District Court, the counties expanded the displays to include other historical documents (e.g., the Declaration of Independence, the Mayflower Compact) with their religious references highlighted. The District Court issued a preliminary ruling enjoining the revised displays, so the counties erected new displays that

included the Commandments as part of a larger “Foundations of American Law and Government” display that noted their value as a source of Western law. Finding that these displays still had a religious purpose, the District Court issued another preliminary injunction, and a divided Sixth Circuit panel affirmed.

A 5-4 majority led by Justice Souter upheld the preliminary injunction, finding that the ACLU was likely to prevail in its Establishment Clause challenge. The principal issue was the first prong of the now-familiar (and oft-maligned) test announced in *Lemon v. Kurtzman*, which asks whether the challenged law or display has a secular purpose. (The other prongs ask whether its primary effect is to advance/inhibit religion, and whether it fosters excessive government entanglement with religion.) The counties asked the Court to do away with the purpose test because the government’s true purpose is unknowable and, in light of *Lemon’s* inconsistent application, the test is really a cover for a judicial desire to invalidate a display; in the alternative, the counties sought to limit the test such that any stated secular purpose would pass it, regardless of the history of the display. In a strong reaffirmation of *Lemon’s* purpose prong, the Court rejected both arguments and made clear that the *Lemon* test is to be judged from the standpoint of a reasonable observer familiar with history and context. “Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country,” and official objectives are discernable from discoverable facts “without any judicial psychoanalysis of a drafter’s heart of hearts;” such inquiries are not “hunts for mares’ nests deflecting attention from bare judicial will.” And the purpose test is not so timid that any statement of secular purpose will pass it — notably, this part of the opinion recasts the test as looking for “adequate secular objects, as against a *predominantly* religious one,” a slight but possibly significant departure from past cases suggesting the impermissible purpose must be *wholly* religious. As to the history of a display, “reasonable observers have reasonable memories” that should account for probative contextual evidence. Here, the displays unmistakably began with a religious purpose, and the counties’ subsequent effort to recast that purpose was merely a litigating position. The Court clarified that the counties’ past actions did not, as a matter of law, forever taint the displays, only that “an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.” The Court also noted that it was not foreclosing any government display of the Ten Commandments that integrated them into a display on law or history, such as the displays in the Court’s own courtroom. Finally, the Court rejected the dissent’s view of the Framers’ understanding of the Establishment Clause, finding that there was “no common understanding” of its limits, leaving its “edges still to be determined. And none the worse for that.”

Justice O’Connor wrote a brief but strong concurrence, finding that the purpose of the displays was unmistakably to endorse religion in the eyes of the reasonable observer. She noted further that while reasonable minds can disagree about how to apply the Religion Clauses in a given case, their goal is clear: preserving religious liberty in a pluralistic society. “At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate . . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?” While many Americans may find the Ten Commandments in accord with their beliefs, “we do not count heads before enforcing the First Amendment.”

Justice Scalia, joined by the Chief, Thomas and (for the most part) Kennedy, wrote an equally impassioned dissent. First (without Kennedy), he argued that, based on the historical practices of the Framers

acknowledging a monotheistic God, there is a difference between government acknowledgment of a single Creator and the prohibited establishment of a religion. “Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so,” i.e., the *Lemon* test that has been thoroughly discredited and is incapable of principled application. Second (now with Kennedy), he rejected the majority’s conversion of the *Lemon* purpose test from a subjective one to an objective one, and the new apparent requirement that a secular purpose now “predominate” over any religious purpose. Third, even accepting the majority’s recasting of *Lemon*, he would uphold the displays as serving a secular purpose of highlighting sources of Western law. Finally, he noted the constitutional mess that has resulted from deriving purpose from context, with Kentucky being ordered, for reasons known only to the parties and their lawyers, to take down a display that has been upheld elsewhere.

McCreary was contentious enough, but ***Van Orden*** was downright messy. ***Van Orden*** concerned a much older display on the Texas statehouse grounds, a single monument with a version of the Ten Commandments that had been donated in 1961 by the Fraternal Order of Eagles, a benevolent society that gave similar monuments to communities nationwide in hopes of reducing juvenile delinquency. Van Orden, a Texas lawyer, challenged the displays as endorsing the Jewish and Christian faiths. The District Court and the Fifth Circuit disagreed, finding no purpose or effect of endorsing religion. The Court affirmed, but there was no majority — just a four-Justice plurality, three concurrences, and three dissents. The Chief led the plurality, which also included Scalia, Kennedy, and Thomas, in a typically (and, we might add, thankfully) succinct opinion. Notwithstanding the ***McCreary*** majority’s reaffirmation of *Lemon*, the plurality found it “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.” The Ten Commandments are clearly religious. But given the unbroken history of governmental acknowledgement of religious belief, and the Commandments’ undeniable historical meaning, the mere presence of religious content does not violate the Establishment Clause. There are limits on such displays, as evidenced by *Stone v. Graham*, a 1980 case that struck down a display in a Kentucky schoolhouse, but the schoolhouse setting presented special concerns that are not present here. Scalia wrote a brief concurrence to state that the Chief’s opinion “accurately reflects our current Establishment Clause jurisprudence — or at least the Establishment Clause jurisprudence we currently apply some of the time.” Thomas also concurred to repeat his previously stated view that the Establishment Clause was never incorporated against the states; even if incorporated, however, it would be far simpler and more consistent if the Court limited its inquiry to the Framers’ concern of guarding against actual coercion (which is not present here). At least that approach would avoid having courts act as “theological commissions, judging the meaning of religious matters.”

Surprisingly, the fifth vote for affirmance was *not* Justice O’Connor, as many had speculated, but Justice Breyer. Breyer rejected the plurality’s approach in favor of a return to the “basic purposes” of the Religion Clauses, which he took to be avoiding “divisiveness based upon religion that promotes social conflict.” In borderline cases, Breyer sees “no test-related substitute for the exercise of legal judgment” based on how the display in question is used. Here, the Eagles’ effort to come up with a “nonsectarian” version of the Commandments demonstrated their non-religious purpose, the monument’s physical setting suggests nothing sacred, and it has stood for 40 years without challenge, suggesting that it is not divisive. In fact, to strike down such a display might encourage divisiveness. This opinion might well take on the importance of Justice Powell’s fifth-vote concurrence in *Bakke*, with future challenges to religious displays devoting significant attention to Breyer’s “divisiveness” test.

Justice Stevens (joined by Ginsburg) dissented. Noting that a majority of the Court has reaffirmed the rule of government neutrality toward religion, Stevens noted the impossibility of neutrality in a display of the Ten Commandments. “If a State may endorse a particular deity’s command to ‘have no other gods before me,’ it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.” Stevens also criticized the reliance of the plurality (and Scalia in ***McCreary***) on selected statements of the Framers, as he found the preincorporation history of the Clauses too indeterminate to be a reliable interpretive guide.

Justice Souter (joined by Stevens and Ginsburg) also dissented, noting that the display was inherently religious from the standpoint of an observer, and thus was distinct from displays that would be constitutional, such as exhibits that explained how the Commandments have influenced modern law, or public-school courses on religion and history. Its presence on statehouse grounds with other monuments did not dilute its message, as it stood largely in isolation and was not part of any unifying theme in the displays. Finally, responding to the plurality and to Breyer, Souter would not limit *Stone* to the school context, and he did not find the monuments’ previously peaceful 40-year existence dispositive. Though she did not join Souter’s dissent, Justice O’Connor issued a one-sentence dissent that agreed “essentially” with his reasons and pointed to her ***McCreary*** concurrence.

In ***Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*** **(04-480)**, a unanimous Court found that a distributor of a product capable of both infringing and lawful uses can be held liable for acts of copyright infringement by its users, where the distributor intends to induce infringing uses as shown by clear expression or affirmative acts. Grokster and StreamCast distribute popular, free, peer-to-peer file sharing software that permit users to download digital files, including music and video files. Unlike Napster, peer-to-peer software does not utilize a central server, but instead permits users’ computers to communicate directly with one another; the predominant use of this software has been to download copyrighted material. Despite that, Grokster and StreamCast argued that they should not be held secondarily liable for infringement because their software is capable of substantial non-infringing uses and because they do not have actual knowledge of unlawful file sharing because of the peer-to-peer nature of the software. The district court agreed and granted summary judgment for the distributors, and the Ninth Circuit affirmed.

Distributors of products that can be used for both lawful and infringing purposes generally have found a safe harbor in the Court’s 1984 decision in *Sony Corp. of America v. Universal Studios, Inc.*, which found that Sony could not be held secondarily liable for infringing uses of its VCR based merely on Sony’s awareness that some consumers would likely use the VCR to infringe. The Ninth Circuit construed Sony to mean that whenever a product is capable of substantial lawful use, the distributor cannot be held liable for infringing uses absent knowledge that *specific* infringing uses are taking place at the time they are taking place and a failure to act upon that information. The Court (Souter, J.) disagreed, explaining that *Sony* dealt only with the situation where there was no evidence of intent. In contrast, here there was substantial evidence that Grokster and StreamCast intended to induce infringement. First, they aimed to fill the void left by Napster, marketing their services to former Napster users, who were using the service almost exclusively for unlawful purposes. Second, they made no efforts to filter out protected material despite knowledge that the vast majority of downloads involved copyrighted items. Third, they charged nothing for their services, depending on advertising revenues that were predicated on volume – volume driven by the copyrighted materials. The direct evidence got even better, though, with proposed advertising exclaiming:

“Napster has announced it will soon begin charging you a fee. . . . What will you do to get around it?” and an internal email saying: “The goal is to get in trouble with the law and get sued. It’s the best way to get in the news.” This evidence was sufficient to establish intent to induce or encourage direct infringement. And evidence of scope of actual infringement by users of the software users was “staggering.” Because the Court found this evidence sufficient to survive summary judgment on an active inducement theory of liability, the Court had no reason to reconsider *Sony* and modify the “substantial non-infringing use” requirement.

Despite unanimously finding no need to reach the issue of how much non-infringing use is enough to be “substantial” and fall within *Sony’s* safe harbor, the concurring justices plunged right in. Ginsburg, joined by the Chief and Kennedy, argued that the amount of lawful use here — perhaps 10 percent — was not sufficient and constituted an alternative basis to deny summary judgment on remand. Justice Breyer, joined by Stevens and O’Connor, would find that the non-infringing use here is sufficient to meet *Sony’s* threshold and would not “revisit” that threshold given that it has provided a workable rule for nearly two decades and appears to strike the right balance in protecting both artistic expression and technology innovation.

Three down, three to go — until next time, thanks for reading!

Ken & Kim

From the Appellate Practice Group at Wiggin and Dana
For more information, contact Kim Rinehart, Ken Heath, Aaron Bayer,
or Jeff Babbin at 203-498-4400