

Justices ponder Ten Commandments displays: Court hears oral arguments

News in the [March 22, 2005](#) issue

If the U.S. Supreme Court prohibits public displays of the Ten Commandments nationwide, all heck may break loose, say some religious conservatives. They predict that the furor would exceed the reaction when a California court ruled that “under God” did not belong in the Pledge of Allegiance.

The high court heard oral arguments on March 2 on cases concerning displays of the Decalogue in Texas and Kentucky. Its written decision isn’t expected until June.

From the questions and comments by some justices during the hearing, it was evident that the justices were fully aware of public opinion. Not only that, they appeared rather evenly divided and unlikely to order sweeping change, according to observers.

Justices questioned how displays of the Ten Commandments on government property compared to Thanksgiving proclamations, legislative prayers and a marble frieze high on a wall above the justices that features Moses among other lawgivers, including Caesar Augustus, Napoleon and Justice John Marshall. All those religious displays are generally considered constitutionally tolerable.

When does a government display constitute endorsement of religion? Justice Sandra Day O’Connor remarked, “It’s so hard to draw that line.” O’Connor, who often casts the swing vote in 5-4 decisions, may be the one to draw it.

(O’Connor noted that the six-foot granite Texas monument sits among statues “in a parklike setting” on capitol grounds, whereas she sharply questioned the lawyer in the Kentucky case involving two courthouse displays because of the intent there to “demonstrate America’s Christian heritage” and to post the Decalogue where visitors would be all but obliged to see them, reported David G. Savage, the *Los Angeles Times*’s veteran Supreme Court reporter.)

More than one justice turned the discussion to American religiosity. Justice Antonin Scalia noted how many people nationwide affirm the essence of the commandments. “I think probably 90 percent of American people believe in the Ten Commandments,” he said, even though “85 percent couldn’t tell you what the ten are. It’s a symbol of the fact that government derives its authority from God.”

But Duke University law professor Erwin Chemerinsky, representing an Austin man who is suing to have the stone depiction of the commandments removed from the Texas capitol grounds, said the Decalogue is much more than a symbol. The Texas display “conveys a profound religious message. . . . It is the most powerful, devout religious message that this court has ever considered,” he said.

Justice Anthony Kennedy wondered if taking down the monuments to please the few would be seen as “hostility toward religion.”

Some defenders of prominent exhibits of the Ten Commandments on public property have urged defiance. Representative John Hostettler (R., Ind.) has sent President Bush a letter urging him to defy the court by not sending U.S. marshals to remove a Ten Commandments display in his home district. “As you know, the federal judiciary has no constitutional or statutory means by which to enforce its own opinion,” the congressman’s letter said.

Rob Boston, spokesman for Americans United for Separation of Church and State, called the letter “astounding,” adding: “It reminds me of the segregationist movement in the 1960s. And you see how that turned out. It’s not a good idea to encourage people to do these things.”

Boston says public outcry over the removal won’t be as immense as some predict. “There will be some grumbling. Jerry Falwell will mail out fund-raising letters. People will go on Fox News and huff and puff,” Boston said. “But the country will survive.”

The bigger danger to society would be if the monuments were allowed on public land, putting a huge crack in the wall between church and state, say opposition groups.

Attorney Matthew Staver, a Florida attorney, argued that the display of the commandments in Kentucky courthouses affirmed their role in shaping national history. “There’s clearly no evidence that the display [is] solely intended to be a religious display,” said Staver, adding that the commandments contain “some

statements about God—but very few.”

Justice Ruth Bader Ginsburg—one of two Jewish members of the court—countered, “Have you read the first four commandments?” eliciting laughter from the courtroom. “It’s a powerful statement of the covenant that the Lord is making with his people.”

In the Kentucky case, the justices were asked to determine whether displays of a framed version of the commandments—surrounded by other law-related documents—belong on courthouse walls. Staver discussed how government officials struggled to make the display constitutional by adding other historical documents such as the Declaration of Independence.

Justice David Souter questioned whether the other documents were added in good faith. Justice John Paul Stevens wondered if they were merely “litigation dressing.”

The arguments marked the first time the Supreme Court had considered a Ten Commandments case since it ruled in 1980 that they were improperly posted on schoolhouse walls.

Two and half decades later, Texas attorney general Greg Abbott argued for letting his state’s monument to the commandments stand. “This court should agree that the Texas monument should not be torn down,” he said, contending that the commandments have been historically recognized as a symbol of law and that the monument has stood for decades “without controversy.”

Souter attempted to distinguish the Supreme Court frieze from the Texas monument, saying that the depiction of Moses on the Supreme Court building fits into a common theme about lawgivers, while he saw no specific theme to the monuments on the Texas campus, which honor veterans and pioneer women.

David Friedman, who represented the American Civil Liberties Union in the Kentucky case, also made comparisons to the Supreme Court frieze. He said the Kentucky display more explicitly ties government to religion. “It is not a neutral display of lawgivers like the frieze in this court,” he said. *—Religion News Service, Associated Baptist Press*