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SUPREME COURT
STATE OF OKLAHOMA
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MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DR. BRUCE PRESCOTT, JAMES HUFF, and CHERYL FRANKLIN,	)	
Plaintiffs/Appellants,	)	
vs.	)	No. 113332
OKLAHOMA CAPITOL PRESERVATION COMMISSION,	)	
Defendant/Appellee.	)	

REPLY TO APPELLANTS' RESPONSE TO APPELLEE'S PETITION FOR REHEARING WITH REQUEST FOR ORAL ARGUMENT

As Appellants note, rehearing is granted "to clarify [an] opinion." *Tomahawk Res., Inc. v. Craven*, 2005 OK 82, supp. op., ¶ 1, 130 P.3d 222. And at a minimum, this Court should do just that.

First, the Court begins by quoting Article II, Section 5:

> No public money or property shall ever be appropriated, applied, donated or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

OKLA. CONST. art. II, § 5.

But the Court then collapses those words, with their own specific meanings, *see* Def.'s Am. Mot. for Summ. J., ROA, Doc. 8, p. 9-14, to infer that "any religious purpose" is prohibited. Appellants argue that this Court's opinion is consistent with the Court's prior opinion in *Meyer v. Oklahoma*

City, 1972 OK 45, 496 P.2d 789. But there is no rational reading of *Meyer* that supports a fifty-foot-tall, lighted cross as not serving "any religious purpose." In fact, this Court acknowledged the sectarian purposes of the persons who erected the cross. *See id.* ¶ 11, 496 P.2d at 792 (holding the cross constitutional "[n]otwithstanding the alleged sectarian conceptions of the individuals who sponsored the installation of [the] cross").[1]

Indeed, *Meyer* stands for the proposition that even if a monument acknowledges religion—as the cross assuredly did—it does not violate Article II, Section 5 unless it has become "operative **in an effective way** to be appropriated, applied, donated or used for the use, benefit or support of any sect, church, denomination, system of religion or sectarian institution as such." *Id.* That is, there had to be a discernible benefit to an identifiable recipient for a violation to have occurred.

It, therefore, appears entirely inconsistent for Article II, Section 5 to prohibit use of public property "for any religious purpose" and yet allow a fifty-foot-tall, lighted cross placed on public property for an admittedly-religious purpose to stand. As such, either *Meyer* is wrong or the Court should revisit its current opinion, but the opinions cannot jurisprudentially coexist.

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[1] To the extent the Court was concerned that allowing this Monument might open the door to any and all other monuments, those concerns are illusory. The United States Supreme Court has unanimously rejected similar arguments in a similar context. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68, 481 (2009).

If the Court intended to overturn *Meyer* with its "any religious purpose" test, it should do so explicitly to dispel any confusion.

But even if "any religious purpose" is now the test, the Ten Commandments Monument should still prevail here. The Court's analysis simply stated that the Ten Commandments are religious. But the Ten Commandments also have an undeniable secular purpose as acknowledged by both courts, *see, e.g.*, *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 798 (10th Cir. 2009), and Congress, *see* Brief of the United States as Amicus Curiae Supporting Respondents at 9, *Van Orden v. Perry*, 545 U.S. 677 (2005) (citing S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997)) (stating that "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization"; that they "set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society"; and that they "are a declaration of fundamental principles that are the cornerstone of a fair and just society"). In fact, the United States Court of Appeals for the Ninth Circuit described this exact version of the Ten Commandments as "an inscription of a ***non-sectarian*** version of the Ten Commandments." *Card v. City of Everett*, 520 F.3d 1009, 1011 (9th Cir. 2008) (emphasis added).

Further, the Court is quite right that it is the Oklahoma Constitution at issue in this case. Nevertheless, the Court appears to have crafted a *per se*

ban on Ten Commandments displays on all public property in Oklahoma. Appellee knows of no other place in the United States having such a rule. *See, e.g.*, *Green*, 568 F.3d at 799 ("Accordingly, we reject Mr. Green's contention that we should deem the Board's display of the Monument as presumptively unconstitutional because the Monument is inscribed with the Ten Commandments."). Appellee would urge this Court to reconsider analogous state and federal provisions and cases before holding that such a *per se* ban exists. Indeed, this exact version of the Ten Commandments has been ruled constitutional by the United States Supreme Court; the United States Courts of Appeal for the Ninth, Eighth, and Fifth Circuits; and the Colorado Supreme Court.[2]

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[2] *See Van Orden*, 545 U.S. at 690 (finding a secular purpose for the Ten Commandments by concluding, "the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate"); *Card*, 520 F.3d at 1013 n.5 (finding that the city's Ten Commandments monument was consistent with Article I, Section 11 of the Washington State Constitution, which states, "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . ." because the city's monument was not motivated by a religious purpose); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776-77 (8th Cir. 2005) (finding that in light of the Supreme Court's *Van Orden* holding, the Ten Commandments monument made "passive-and permissible-use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage"); *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003) (holding that the Ten Commandments monument was not an "endorsement of religion" in the eyes of a reasonable observer, but instead contained a secular message); *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1026 (Colo. 1995) ("[T]he preeminent purpose of erecting the [Ten Commandments] statue was not plainly religious in nature, rather the monument represents [a] secular objective . . . .").

Finally, the "any religious purpose" test is inconsistent with the Oklahoma Constitution itself. The Oklahoma Constitution begins with a purpose statement:

> Invoking the guidance of Almighty God, in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we, the people of the State of Oklahoma, do ordain and establish this Constitution.

OKLA. CONST. pmbl. This invocation of Almighty God is a clear religious acknowledgement of a divine authority to which the State of Oklahoma looks to as a foundational element of all law for the State of Oklahoma. In other words, this invocation or purpose statement for the Oklahoma Constitution is an acknowledgment of religious influence that must be permissible under the Oklahoma Constitution given that it is the purpose statement of the document itself. *See also Meyer*, 1972 OK 45, ¶ 10, 496 P.2d at 790 - 92 (quoting *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, 602 ("It is not the exposure to religious influence that is to be avoided; it is the adoption of sectarian principles or the monetary support of one or several or all sects that the State must not do.").

And if, contrary to the very document in which Article II, Section 5 is placed, the Ten Commandments Monument violates the "any religious purpose" test, then *Meyer* should be overruled, and the State can begin the necessary but painful task of identifying all symbols, monuments, displays, words, paintings, and other pieces of art that have "any religious purpose."

CONCLUSION

For these reasons, Appellee urges the Court to grant its Petition for Rehearing and order oral argument in this case.

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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that on the 14th day of July, 2015, I mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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