No. 13-1934

In the United States Court of Appeals for the Eighth Circuit

RED RIVER FREETHINKERS,

Plaintiff-Appellant,

v.

CITY OF FARGO,

Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, CIV. NO. 3:08-cv-00032-RRE HON. RALPH R. ERICKSON, DISTRICT JUDGE

BRIEF FOR AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLEE IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: July 30, 2013

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") – a nonprofit Illinois corporation headquartered in Saint Louis – submits this *amicus* brief with the accompanying motion for leave to file.[1] Since its founding in 1981, Eagle Forum has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum advocates that the Constitution be interpreted according to its original meaning. Eagle Forum has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum has a strong interest in protecting the right to publicly display the Ten Commandments. Eagle Forum has participated as *amicus curiae* in numerous religious-expression and monument cases, including *Van Orden v. Perry,* 545 U.S. 677 (2005), *McCreary County v. ACLU,* 545 U.S. 844 (2005), and *Salazar v. Buono,* 559 U.S. 700 (2010). For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This appeal represents the third strike in a long-running dispute between the Red River Freethinkers ("Freethinkers") and the City of Fargo, North Dakota (the

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

"City") over a public monument displaying the Ten Commandments. *Amicus* Eagle Forum adopts the facts set forth in the City's brief. See Appellees' Br. at 3-11.

In its first strike, Freethinkers lost because the First Amendment does not prohibit public displays of monuments – such as the Ten Commandments – that have moral and historical meaning in addition to their religious meaning. *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 984 (D.N.D. 2005). That loss, of course, was necessitated when the Supreme Court and this Court sitting *en banc* upheld nearly identical monuments. *Van Orden v. Perry*, 545 U.S. 677, 684-90 (2005) (plurality); *id.* at 700-01 (Breyer, J., concurring in the judgment); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774 (8th Cir. 2005) (*en banc*).

After regrouping to propose a sister monument to express Freethinkers' religious views, Freethinkers suffered its second strike in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), in which the Supreme Court unanimously held that government need not adopt the speech of all comers, simply because government elects – or, as is the case with many of these monuments, elected long ago – to place privately donated monuments in public places.[2] In response to *Summum*, Freethinkers dropped its claim that the City must display Freethinkers' proposed sister monument. *See* Appellant's Br. at 3.

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[2] Justice Souter concurred in the judgment, *id.* at 485, but all of the other eight justices joined Justice Alito's decision, *id.* at 463, with Justices Scalia, *id.* at 482, and Breyer, *id.* at 484, also writing concurring opinions.

The issue presented in this appeal – which should be Freethinkers' third strike – is whether the City's continued lawful display of the Ten Commandments somehow became unlawful when the City first decided to remove the Ten Commandments, then reversed course in response a public petition drive in which some of the petitioning public had religious motivations for wanting to preserve the Ten Commandments monument.

In *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012) ("*Freethinkers I*"), this Court reversed the district court's dismissal of this case for lack of Article III standing, but did not reach the merits. Although all three judges agreed that Freethinkers had standing, one judge dissented from the remand because the panel had enough information to reach the merits, notwithstanding that the district court did not reach the merits. *Freethinkers I*, 679 F.3d at 1028-30 (Shepard, J., concurring in part and dissenting in part). Accordingly, he therefore "s[aw] no reason to remand …, relegating the [district] court and parties to a new and needless round of litigation." *Id.* at 1029-30. *Amicus* Eagle Forum respectfully submits that Judge Shepard was right.

SUMMARY OF ARGUMENT

Freethinkers' suggestion that *Freethinkers I* somehow decided the merits or established the law of the case with respect to the merits confuses the doctrine of standing with the merits. Indeed, courts *assume* the plaintiff's merits position in

order to evaluate standing. As such, a decision that a plaintiff has standing cannot and does not implicitly approve the very same merits that the court assumed in its standing analysis. *See* Section I, *infra.*

On the merits, Freethinkers relies on the "endorsement test" from *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), which both the Supreme Court and this Court sitting *en banc* have rejected for passive monuments like those at issue here. *Van Orden*, 545 U.S. at 686-90 (plurality); *id.* at 700-04 (Breyer, J., concurring in the judgment); *City of Plattsmouth,* 419 F.3d at 778 n.8. As those controlling authorities have held, in this context, the endorsement test is hostile to religious expression and the rights of religious citizens to participate in our democracy. Although there are good reasons for a court – writing on a blank slate – to reject Freethinkers' argument, *Van Orden* as interpreted correctly by this Court *en banc* in *City of Plattsmouth* already has done so, which controls the merits result here. *See* Section II, *infra.*

ARGUMENT

I. IN HOLDING THAT FREETHINKERS HAS STANDING, *FREETHINKERS I* DID NOT RESOLVE ANY MERITS ISSUES

Freethinkers cites the law-of-the-case doctrine, bolstered by Freethinkers' claim that the *Freethinkers I* majority "decided by necessary implication" against the merits views in Judge Shepherd's partial dissent. Appellants' Br. at 11-12. As the City explains, the *Freethinkers I* majority carefully refrained from addressing

the merits in holding that Freethinkers has standing. *See* Appellee's Br. at 15.[3] Insofar as *Freethinkers I* reviewed the district court's dismissal for lack of standing, it was hardly unusual for *Freethinkers I* to rule only on standing and to remand for further proceedings. But put simply, Freethinkers' argument "confuses standing with the merits." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005). In this section, *amicus* Eagle Forum explains the relationship between standing and the merits.

"[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *McConnell v. FEC*, 540 U.S. 93, 227 (2003) (internal quotations omitted); *Freethinkers I*, 679 F.3d at 1023 (same). Instead, quite the contrary to Freethinkers' position, courts must be careful *not* to decide questions on the merits – either for or against the plaintiff – and instead *assume* the merits of the plaintiff's claims. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *see, e.g., Catholic Social Services v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994) (courts "must assume the validity of a plaintiff's substantive claim at the standing inquiry"); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (same). In other words, the doctrine of standing poses the following question: assuming that the plaintiff is

[3] *Amicus* Eagle Forum agrees with the City's argument that Freethinkers needed to oppose the City's summary-judgment motion by creating a genuine factual dispute or by demonstrating pursuant to FED. R. CIV. P. 56(d) the need for further discovery. *See id.* at 15-21. There is no need, however, for Eagle Forum to supplement the City's briefing on those issues.

correct about the law, is this an appropriate case or controversy for this Court to decide? Freethinkers' argument turns the standing inquiry on its head by assuming that *Freethinkers I* necessarily *held* what *Freethinkers I* merely *assumed.* Freethinkers cannot use the prior panel's decision *not to reach the merits* to argue that the prior panel necessarily reached the merits.[4]

II. NEITHER THE CITY'S CONTINUED DISPLAY OF THE TEN COMMANDMENTS NOR THE CITY'S POST-*TWOMBLY* ACTION VIOLATES THE FIRST AMENDMENT

Freethinkers argues that the City's decision to maintain the monument, after first considering its removal as a cost-savings device to avoid expensive litigation, constitutes the endorsement of religion, even if the original monument did not (as *Twombly* held it did not). In making this argument, Freethinkers essentially seeks to capitalize on the religious motivations of citizens who supported the petition to convince the City not to surrender to Freethinkers' various flawed litigation strategies. In doing so, Freethinkers claims for itself not only a forbidden "heckler's veto," *Summum,* 555 U.S. at 468 (*citing Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574-75 (2005) (Souter, J., dissenting); *Elk Grove Unified Sch.*

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[4] Judge Shepherd was certainly correct that this Court *could have* reached the merits in the prior appeal: The "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976). The point here is that the prior panel did not reach the merits.

Dist. v. Newdow, 542 U.S. 1, 34-35 (2004) (Rehnquist, C.J., concurring in the judgment), but also – and what is even worse – the right to silence the public participation of City residents who have religious views that differ from Freethinkers' religious views. While Freethinkers' members no doubt consider themselves tolerant, Freethinkers' actions here are intolerant.

At the outset, however, neither the Constitution nor our history prohibits official acknowledgments of religion by the government.[5] As the Supreme Court has consistently recognized, "religion has been closely identified with our history and government" throughout our nation's history. *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 212 (1963). "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213. As such, "[i]nteraction between church and state is inevitable," *Agostini v. Felton*, 521 U.S. 203, 233 (1997), and we indeed have had "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least

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[5] Consistent with the approach in *Van Orden,* the Supreme Court repeatedly has upheld government displays of religious symbols where such displays also conveyed a secular meaning. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 766 (1995) (upholding display of a cross); *Lynch,* 465 U.S. at 684 (upholding display of a creche); *County of Allegheny v. ACLU,* 492 U.S. 573, 592 (1989) (upholding display of a menorah).

1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). At bottom, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Against that backdrop, *amicus* Eagle Forum now evaluates Freethinkers' merits claims.

The *Van Orden* plurality expressly rejected the notion that the endorsement test should be used to evaluate a passive, longstanding historical monument on public land, such as the one at issue here. 545 U.S. at 686-87 (plurality opinion); *see also id.* at 700-01 (Breyer, J., concurring in the judgment) (explaining that "this Court's other tests," including the "endorsement test," cannot "readily explain the Establishment Clause[]"). Instead, the Establishment Clause analysis in such cases is "driven both by the nature of the monument and by our Nation's history," *id.* at 686, and "[s]imply having religious content or promoting a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. A contrary rule would "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Id.* at 684. Thus, a longstanding display of the Ten Commandments on public land does not violate the Establishment Clause.

Concurring in the *Van Orden* judgment, Justice Breyer likewise observed that monuments or displays may be constitutionally permissible even with an "undeniably … religious message," because they could also convey a "secular moral message" or "historical message." *Id.* at 700-01 (Breyer, J. concurring in the

judgment). Indeed, "a contrary conclusion … would … lead the law to exhibit a hostility to religion that has no place in our Establishment Clause traditions" and could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704. Freethinkers' new arguments threaten the very hostility against which Justice Breyer warned.

While staking out the role of the victim, Freethinkers in fact has created the situation in which it now finds itself. First, Freethinkers coerced the City to consider removing the Ten Commandments monument, not because it is illegal, but to save the effort of defending it against Freethinkers' litigation. Second, in response to the democratic petition drive by City residents to preserve the monument, Freethinkers takes offense that religion motivated some citizens. To return to baseball, *amicus* Eagle Forum does not doubt that – somewhere in Saint Louis – Chicago Cubs fans secretly wish to remove any sign of the Saint Louis Cardinals, but they do not. They simply coexist with their fellow citizens. Freethinkers should consider the same. In any event, this Court should reject Freethinkers' efforts to impose its viewpoint on the City and the City's residents.

CONCLUSION

For the foregoing reasons and those argued by City, this Court should affirm the entry of summary judgment in favor of the City.

Dated: July 30, 2013

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(c)(5) because:

This brief contains 2,224 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2013, I electronically submitted the foregoing *amicus curiae* brief – together with the motion seeking leave to file the *amicus curiae* brief – to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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