No. 03- ____

In the Supreme Court of the United States

ADAMS COUNTY/OHIO VALLEY SCHOOL BOARD,
Petitioner,

v.

BERRY BAKER AND ANONYMOUS PLAINTIFF #1;
KENNETH W. JOHNSON, THOMAS D. CLAIRBORNE,
RONALD D. STEPHENS, AND DOUGLAS W. FERGUSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns four separate historical and educational public displays consisting of excerpts from five foundational legal documents: (1) the Preamble to the United States Constitution; (2) the Declaration of Independence; (3) the Magna Carta; (4) the Code of Justinian; (5) the Ten Commandments. The Sixth Circuit held, affirming the district court below, that because the Ten Commandments once stood alone, the presence of the Ten Commandments in a subsequent display, which included excerpts from other historical legal texts, violated the Establishment Clause. The following questions are presented:

1. In a case arising out of government displays of objects with religious connotations, did the Sixth Circuit err in holding, in conflict with the Third and Seventh Circuits, that a previous violation of the Establishment Clause gives rise to an "unconstitutional taint" which, *a priori*, operates to invalidate otherwise constitutional subsequent efforts to cure the violation?

2. Did the Sixth Circuit err in holding, in conflict with the Third, Fifth, and Tenth Circuits and the Supreme Court of Colorado, that the public display of the Ten Commandments is unconstitutional?

3. Do respondents, whose "injury" consists of no more than the psychological consequences produced by occasional, sporadic observation of conduct with which they disagree, have standing under Article III to bring an Establishment Clause challenge?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Adams County/Ohio Valley School Board is not a nongovernmental corporation. *See* Rule 29.6.

Respondents Baker and Anonymous Plaintiff No. 1 were plaintiffs-appellees below. The remaining respondents were intervenor-defendants-appellants below and have filed a separate petition for certiorari in this Court. *See* U.S. No. 03-1661.

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INTRODUCTION

In 2000, the Adams County/Ohio Valley School Board ("the Board") created at each of its four high schools an educational display consisting of excerpts from five foundational legal texts carved on stone monuments: (1) the Preamble to the United States Constitution; (2) the Declaration of Independence; (3) the Magna Carta; (4) the Code of Justinian; (5) the Ten Commandments. Plaintiffs, respondents here, alleged that the Board's inclusion of one particular text — the Ten Commandments — violated the Establishment Clause, despite the indisputable fact that the Ten Commandments have had "a significant impact on the development of secular legal codes of the Western World." *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting). The district court ordered, and the Court of Appeals affirmed, the removal of the Ten Commandments monuments from each of the displays.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. *See Baker v. Adams County/Ohio Valley School Board, Inc.*, 86 Fed. Appx. 104 (6th Cir. Jan. 12, 2004). The decision of the Sixth Circuit denying the Board's motion for a stay pending appeal is reported at 310 F.3d 927 (6th Cir. 2002). The decision of the district court on the merits is unreported. *See Baker v. Adams County*, 2002 U.S. Dist. LEXIS 262 (S. D. Ohio June 6, 2002).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this case on January 12, 2004. The Court of Appeals denied the Board's petition for rehearing on

March 15, 2004. Petitioner's application for extension of time within which to file a petition for writ of certiorari, to and including July 13, 2004, was granted on June 8, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

Berry Baker and Anonymous Plaintiff # 1 brought the underlying action pursuant to 42 U.S.C. § 1983, alleging that

the Board's inclusion of the text of the Ten Commandments as part of a "*Foundations of American Law and Government*" display ("*Foundations* display") violates the Establishment Clause, and seeking declaratory and injunctive relief.

A. Facts

In the fall of 1997, four new high schools opened in Adams County, Ohio. App. 20a. Prior to those schools officially opening, the Adams County Ministerial Association ("Ministerial Association") told the School Board President of its wish to donate a copy of the Ten Commandments to each of the new schools. App. 21a. After individually polling each Board member, the Board President accepted the Ministerial Association's offer of donation, with the condition that the Commandments be placed in monument form outside the school. The donation consisted of four monuments — one for each of the four new schools — containing the Ten Commandments, an American Flag, and an American eagle. App. 21a-22a.

These monuments — and two other donations received to commemorate the opening of the new schools — were placed near the front entrance of each of the four new schools. The Board also received American flags and small containers as donations to commemorate the opening of the new schools. The containers were used as time capsules, which were buried in the ground adjacent to the flag poles. All of these donations were received without official Board action. App. 22a.

Subsequent to the placement of these donations outside the front of each of the four new schools, the Board adopted a policy entitled "Policy Regarding Placement of Structures and Objects in Designated Area in Front of Adams County High

Schools." App. 22a-23a. This policy, which was later rescinded and replaced by the policy at issue in this case, provided that the area surrounding the flag poles may be used by citizens of Adams County to erect structures which symbolize local or national history. Also subsequent to placement of the donations, the Board had a disclaimer placed next to the monuments indicating that the Ten Commandments monuments were not constructed, nor paid for, by the Board and did not constitute an endorsement by the Board of any religious belief. App. 23a-24a.

The Board President testified that the monuments were not a "religious issue." App. 24a. The Board simply accepted the monuments as a donation similar to other donations received in connection with the opening of the new schools. App. 24a.

On May 16, 2000, the Board took two actions relating to the displays in front of the Adams County High Schools. First, the Board rescinded its previously adopted "Policy Regarding Placement Of Structures And Objects In Designated Area In Front Of Adams County High Schools." App. 24a-25a. Second, the Board adopted a "Resolution to Construct *Foundations of American Law and Government Display*." App. 24a.

This second Resolution sets forth the Board's purpose in creating the new display: "to inform Adams County high school students about some of the essential documents that the Board believes form the foundation of American law and government." App. 25a. In addition, the Board states its belief that the display and its accompanying commentary "will serve further to educate Adams County high school students regarding these documents' importance to the foundations of American law and government." App. 25a.

The *Foundations of American Law and Government* display (identical at all four high schools) consisted of excerpts from five well known historical texts which the Board considers important in the foundation of our legal system: (1) the Preamble to the United States Constitution; (2) the Declaration of Independence; (3) the Magna Carta; (4) the Code of Justinian; (5) the Ten Commandments. The excerpts are inscribed on stones of equal size, shape, color and substance. App. 65a-73a. In front of each stone in the display is a plaque containing a brief commentary or explanation of each particular text's historical significance. *See* Declaration of Board Vice President, Diane Lewis, and accompanying photographs, App. 65a-74a.

No public funds were used in the purchase of the displays. The Board stipulated that no public funds will ever be used to preserve or maintain the displays in the future. App. 68a.

With regard to standing, the basis of plaintiff Baker's claim has shifted considerably during the course of the lawsuit. When the original stand-alone monuments were installed at the four new high schools, Baker began corresponding with the Board under the guise of the "Interim Director" of something called "The Center for Phallic Worship." App. 30a, App. 94a-99a. Baker commended the Board for the Ten Commandments monuments at the new schools and requested, on behalf of The Center for Phallic Worship, the opportunity to erect at each school monuments reflective of the Center's beliefs. App. 30a, App. 94a-99a. In March, 1998, Baker sent a letter to the Board enclosing a picture of a six-foot tall marble phallic symbol he sought to have placed at each school. He further explained that a plaque would be mounted at the base of the display explaining the history of phallic worship. Each symbol would be inscribed with the phrase "Love One Another." Baker offered the

Board his legal opinion that "this phrase, along with our expressed desire to share with the community in its quest for cultural diversity, complies with the 'Lemon' test." App. 30a-31a, App. 98a-99a.

When deposed during the course of this litigation, Baker stated that, in fact, there was no such entity as The Center for Phallic Worship and that his entire letter writing campaign and offer to donate phallic symbols was nothing more than an elaborate ruse. App. 100a-112a. In response to the Board's motion for summary judgment Baker now claimed that, actually, he did not think the Board's display of the monuments was commendable after all. Instead, he averred that, although he was not a student or parent of a student at any of Adam County's schools, he regularly attends basketball games and Christmas concerts at the high school located in the town of Peebles. App. 82a-83a. Addressing his complaints to the five-monument *Foundations* display at Peebles high school, each time he attends a school function, and when he drives by the school, he is assertedly injured because the display makes him feel as if he is not "a full member of the Adams County political community because it states ideas and beliefs, both civic and religious, which I do not share." Baker's affidavit makes no mention of any of the other three displays at the other three Adams County high schools. App. 82a-84a.

In the Second Amended Complaint, Baker was joined as plaintiff by Anonymous Plaintiff No. 1, described as an Adams County resident and taxpayer who had a child who attended one of the high schools from 1997 through June of 2001. App. 85a-86a. By the time the case was adjudicated in the district court it appears that this plaintiff's child had graduated. Nevertheless, Anonymous Plaintiff No. 1 claimed to suffer continuing injury when attending theatrical and

sporting events as well as when driving by the display. As was the case with plaintiff Baker, Anonymous Plaintiff No. 1 specifically mentions only the Peebles high school. App. 86a.

B. Proceedings Below

Plaintiff Baker filed suit in the United States District Court for the Southern District of Ohio on February 9, 1999.[1] App. 6a. Baker alleged that the display of the monuments outside the high schools violated the Establishment Clause. App. 6a. Anonymous Plaintiff No. 1 was added as a plaintiff in May of 2000, alleging that, as a parent of one or more children who attended one of the Board's high schools, he or she objected to the *Foundations* display. App. 6a. After the addition of the Magna Carta, Justinian Code, Preamble, and Declaration of Independence, plaintiffs extended their allegations of violation of the Establishment Clause to the Board's expanded five-monument *Foundations* displays. Plaintiffs contended that the addition of these monuments did not alter the nature or purpose of the original display. App. 37a. Plaintiffs asked the court to declare that the Board's displays violated the Establishment Clause and asked the court to order the removal of the Ten Commandments monuments from all properties under the Board's control.

1. The District Court

The district court decided the case on the parties' cross-motions for summary judgment. The court granted the

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[1]At the time, the challenged display consisted of the Ten Commandments monument only, along with the disclaimer sign. The five-monument *Foundations* displays were put up after the Board's May 16, 2000 resolution authorizing same.

plaintiffs' motion for summary judgment and ordered the removal of the Ten Commandments monuments from the *Foundations* displays.

In concluding that both plaintiffs had standing to sue, the district court ignored this Court's decision in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), relying instead on Sixth Circuit precedents which hold that the relevant inquiry is "whether the individual plaintiff uses the facility and suffers actual injury," the "actual injury" requirement being satisfied by allegations of direct and unwelcome personal contact with an offensive object. App. 29a-30a. The court deemed as sufficient to confer standing that "[B]oth plaintiffs claim that they pass at least one of the school buildings as part of their regular course of business in the community and that the displays are visible from the road." App. 29a-30a.

The court then held that the Board's initial display of the stand-alone Ten Commandments monuments violated the Establishment Clause — something the Board did not dispute at the summary judgment stage. App. 36a-37a. The court rejected, however, the Board's argument that it had effectively cured the constitutional problems inherent in the original display by creating an educational display of historical texts with significant influence on the development of our legal system along with a formal Board resolution announcing that the Board's purpose for creating the *Foundations* display was to educate Adams County High School students about some of the essential documents in the formation of American law and government. According to the district court, which cited no evidence impeaching the credibility of the Board's assertions about the purpose of the *Foundations* display, the Board's actions were "a pretense to circumvent this lawsuit," and a "calculated attempt to

continue an unconstitutional action under the guise of a secular purpose." App. 51a. In the district court's view, the religious motives and purposes of the ministers who donated the monuments were to be imputed *in toto* to the Board,[2] in spite of the undisputed evidence in the record of the Board's exclusively secular purpose for creating the *Foundations* display. The court declared that the display of the Ten Commandments, whether alone or as part of the *Foundations* display, violated the Establishment Clause. App. 62a-63a. The court then ordered the Board to remove the Ten Commandments display from each of the four Adams County High Schools, not just the Peebles high school. App. 64a.

2. The Court of Appeals

The Sixth Circuit Court of Appeals affirmed the district court's judgment. The court found that both plaintiffs had standing because they must endure direct and unwelcome contact with the high school displays.[3] App. 11a-12a.

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[2] This certainly seems to contradict the district court's own actions in granting the ministers the right to intervene in this case on the grounds, *inter alia*, that the ministers and the Board had separate and distinct interests in this case and that the Board might not adequately protect the interests of the ministers. *See Order Granting Motion for Reconsideration of Motion to Intervene*. App. 88a-93a.

[3] The court does not appear to have conducted its own independent evaluation of the standing question; rather, it merely adopted the findings of the district court. Like the district court, the court of appeals failed even to cite this Court's leading case on standing in Establishment Clause challenges, *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982).

On the merits, the court of appeals confined its analysis to the "purpose prong" of this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 12a-15a. Without even mentioning in its legal analysis the unrefuted direct evidence of the Board's secular purpose for creating the *Foundations* display, the court of appeals concluded that the Board's purpose was a religious one and, thus, the display violated *Lemon*.[4] The court was persuaded of this by factors such as the fact the monuments were originally donated by the ministers who had agreed to indemnify the Board for any litigation expenses, and the fact that there was no contemporaneous, official statement of the Board's purpose for allowing the placement of the original stand-alone monuments. App. 14a. The court's conclusion that the

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[4] The court considered itself bound by another Sixth Circuit decision in a case with some similarities to — but also important differences from — the present case. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed*, No. 03-1693 (U.S. June 21, 2004), was the culmination of protracted litigation involving courthouse and schoolhouse displays of the Ten Commandments in three Kentucky counties. In each county, government officials began by attempting to display the Decalogue for religious reasons; then modified their displays to include several historical texts which emphasized the role of religion in American history; and finally, modified the displays again to include some of the texts in the *Foundations* display at issue herein as well as a number of other historical texts and symbols.

Among the many distinctions between *McCreary County* and the case at bar is the fact that, in *McCreary,* all of the religious statements of purpose contained in the record were attributable to government officials themselves, whereas here, the arguably religious statements of purpose are attributable to the ministers; the Board's statements are clearly secular.

modification of the display failed to fix the constitutional problem rested on the court's finding that "the fact that the original displays contained only the Ten Commandments monuments imprinted the defendants' purpose, from the beginning, with an unconstitutional taint . . ." (internal quotation marks and citations omitted). App. 14a.

Having concluded that the Board failed to satisfy *Lemon's* "purpose prong," the court did not address the second and third prongs of the *Lemon* test. App. 15a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT REGARDING UNCONSTITUTIONAL TAINT CONFLICTS WITH DECISIONS OF THE THIRD AND SEVENTH CIRCUITS.

The Sixth Circuit's decision in this case is premised upon the court's application of the constitutionally unsupportable and practically unworkable notion of "unconstitutional taint." This novel approach to Establishment Clause adjudication — a kind of "one strike and you're out" rule — has been expressly rejected by both the Third and Seventh Circuit Courts of Appeals.

A. The Third Circuit

ACLU of New Jersey v. Schundler, 168 F.3d 92 (3d Cir. 1999), involved a city's attempt to modify a Christmas holiday display which had been enjoined on Establishment Clause grounds. The plaintiffs in *Schundler* argued that in creating the modified display, "the city officials were motivated by a desire to evade constitutional requirements and

that this motivation required invalidation of the modified display." *Id.* at 105.

The Third Circuit flatly rejected this argument:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," [citation omitted], or that it was "intended to convey a message of endorsement or disapproval of religion." [Citation omitted]

Id. The court illustrated its point by referring to this Court's treatment of the two displays at issue in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). In spite of the fact that the same Allegheny County officials were responsible for both the Grand Staircase display (disapproved) and the City-County Building display (approved), "not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building." 168 F.3d at 105.

B. The Seventh Circuit

In *Doe v. Small*, 964 F.2d 611 (7th Cir. 1991), the Seventh Circuit reversed a district court decision that permanently enjoined the display in a park of certain religious paintings even by private persons. *Id.* at 620. The court rejected the implication of the district court's order that "once the government impermissibly endorses religious speech (e.g. the paintings), that particular speech becomes poisoned. . ." *Id.* at 621. Citing cases which stand for the principle that government can take steps to remove indicia of endorsement of private religious speech, the court held that the idea that

speech can be "eternally poisoned" is contrary to law. *Id.* at 621.

The Sixth Circuit's once-unconstitutional-always-unconstitutional approach also conflicts implicitly with the Seventh Circuit's decision in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001). In *Books*, having found that Elkhart had an invalid religious purpose for displaying a Ten Commandments monument on the lawn of its municipal building, the court remanded the case to the district court. The remand did not require removal of the monument from government property; rather, the court directed the district court to ensure that Elkhart retained "the authority to make decisions regarding the placement of the monument." *Id.* at 307. Elkhart was given considerable leeway with regard to possible modification of its display and was reminded by the court of its "obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend the strictures of the Establishment Clause." *Id.* at 307. Under the Sixth Circuit's "unconstitutional taint" doctrine, however, nothing Elkhart could do — short of removal of the monument — would possibly be deemed to pass muster.

The "unconstitutional taint" doctrine — a doctrine expressly rejected by both the Third and Seventh Circuits — was clearly the basis upon which the Sixth Circuit rejected the Board's good faith attempt to cure a previous Establishment Clause violation.[5] Consistent application of the doctrine

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[5] Application of the same notion was also a significant factor in the Sixth Circuit's striking down of modifications of Ten Commandments displays in *ACLU v. McCreary County*, 354 F.3d

would block *any* efforts by government to correct miscalculations of the contours of what is and is not allowed under current Establishment Clause jurisprudence, efforts which this Court itself has noted are fraught with peril. *See Tilton v. Richardson*, 403 U.S. 672, 678 (1971) ("candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area.")

The Sixth Circuit's "unconstitutional taint" doctrine is an unworkable anomaly. It has been expressly rejected by at least two other circuits which have considered it in analogous situations.

This Court should grant review to resolve this conflict.

II. THE DECISION OF THE SIXTH CIRCUIT REGARDING PUBLIC DISPLAYS OF THE TEN COMMANDMENTS CONFLICTS WITH DECISIONS OF THE THIRD, FIFTH, AND TENTH CIRCUITS AND THE SUPREME COURT OF COLORADO.

The Sixth Circuit's decision in this case is the most recent in a line of decisions from that court which conflict with decisions of three other circuits and one state's highest court regarding public displays of the Ten Commandments.

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438 (6th Cir. 2003), *petition for cert. filed*, No. 03-1693 (U.S. Jun. 21, 2004) and *Adland v. Russ*, 307 F.3d 471, 477 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003).

A. The Fifth Circuit

In *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3702 (U.S. Mar. 31, 2004) (No. 03-1500), the Fifth Circuit rejected an Establishment Clause challenge to the State of Texas's display of a Fraternal Order of Eagles Ten Commandments monument on the grounds of the state capitol in Austin. The court opined:

> Certainly, we disserve no constitutional principle by concluding that a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed — replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment.

Id. at 182.

B. The Third Circuit

Freethought Society v. Chester County, 334 F.3d 247 (3d Cir. 2003), was an Establishment Clause challenge to Chester County, Pennsylvania's courthouse display of a plaque containing the text of the Decalogue. With regard to the "purpose prong" analysis of *Lemon* (the only "prong" analyzed in the case at bar), the Third Circuit noted:

> . . . we note that the District Court found believable the testimony of the Commissioners that they thought the Ten Commandments plaque celebrated the

> significance of the decalogue as a foundational legal document. . . . Because the purpose prong is subjective, it appears that the Commissioners' articulation of a secular purpose for refusing to remove the plaque met the requirements of *Lemon*.[6]

Id. at 251.

The Third Circuit found that, under either the "endorsement" test or the traditional *Lemon* test, Chester County's display was constitutional in large part because of its finding that "the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity . . . ." *Id.*

C. The Tenth Circuit

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973), *cert. denied,* 414 U.S. 879 (1973), was a challenge to Salt Lake City's display of a Ten Commandments monument "in a prominent place near the courthouse entrance." *Id.* at 30.

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[6] This appropriately deferential treatment of the government's articulation of a secular purpose contrasts with that of the court below which flatly rejected the Board's assertion of its secular purpose for the *Foundations* display despite the fact that the record contains no evidence to dispute the Board's assertion. *See Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984) ("The city contends that the purposes of the display are 'exclusively secular.' We hold only that Pawtucket has a secular purpose for its display which is all that *Lemon v. Kurtzman* [citation omitted] requires.")

Noting that "the Decalogue is at once religious and secular," *id.* at 33, the Tenth Circuit observed that "the wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions," *id.* at 34. The court held that the monument was "primarily secular" and that "neither its purpose or effect tends to establish religious belief." *Id.*[7]

D. Colorado Supreme Court

In *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), *cert. denied,* 516 U.S. 1111 (1996), the Colorado Supreme Court rejected an Establishment Clause challenge to that State's display of an FOE Ten Commandments monument on the grounds of the State Capitol. Reviewing the evidence before the trial court regarding the origin, nature, and use of the Decalogue, the Colorado Supreme Court stated:

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[7] In *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) — a suit to compel a city to display another monument when the city already displayed a Ten Commandments monument —a panel of the Tenth Circuit stated that the *Anderson* decision had been "called into question" by this Court's decision in *Stone v. Graham. Id.* at 913 n.8. This is clearly not accurate, *Stone* neither cited nor referred to *Anderson* and is obviously distinguishable from it due to the markedly different factual settings. Notwithstanding the panel's misperception of *Stone*, the court expressly declined an invitation to overrule *Anderson,* which remains the law in the Tenth Circuit. *Id. See, e.g., Summum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002) (noting that *Anderson* remained law of Tenth Circuit and affirming district court's dismissal of Establishment Clause challenge to Ten Commandments monument.)

> All the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

Id. at 1024.

> The court also found significant the facts that the FOE monument does not reproduce exactly the Ten Commandments as accepted by any particular sect, that the monument contains symbols of more than one religious tradition, and that the monument contains patriotic symbols such as the eagle and the American flag.

Id.

In contrast to the foregoing courts, the Sixth Circuit has struck down every Ten Commandments display it has considered no matter the setting. In addition to the present case, the court has struck down both a courthouse and schoolhouse display in *ACLU of Kentucky v. McCreary County*, 354 F.3d 458 (6th Cir. 2003), *petition for cert. filed*, No. 03-1693 (U.S. June 21, 2004), as well as a state capitol display in *Adland v. Russ*, 307 F. 3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003).[8] While the Sixth Circuit

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[8] The Seventh and Eleventh Circuits have also struck down such displays. *See Books v. City of Elkhart*, 235 F. 3d 292 (7th Cir.

has dutifully acknowledged this Court's reminder that neither *Stone v. Graham*, 449 U.S. 39 (1980), nor any other case stands for the proposition that "no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization," *ACLU v. McCreary County*, 354 F.3d at 448, quoting *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), unlike its sister circuits cited above, the Sixth Circuit has consistently applied the equivalent of a "heckler's veto" whenever it has considered a case involving the display of the Decalogue on public property.

The Sixth Circuit's application of the Establishment Clause to public displays of the Ten Commandments is in conflict with numerous other courts. This Court should grant review to resolve this conflict.

2000), *cert. denied*, 532 U.S. 1058 (2001); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 497 (2003).

A panel of the Eighth Circuit struck down a Ten Commandments display in *ACLU of Nebraska v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004). That decision, however, was vacated by the granting of Plattsmouth's petition for rehearing en banc, 2004 U.S. App. LEXIS 6636 (8th Cir. Neb. Apr. 6, 2004). The case remains pending.

III. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS ON ARTICLE III STANDING.

A. "Offended Incidental Observer" Standing Contradicts the Teaching of *Valley Forge*.

The respondents claim to have standing based solely on the fact that they are offended by the Board's *Foundations* display which they might see on those occasions when they enter, or even just drive by, a high school in Adams County. Neither respondent is a student or employee at any of the high schools. Neither respondent is (any longer) a parent of a student at any of the schools. In addition, there is no claim that the school district allocated any expenditure for the challenged displays. Hence, the anonymous plaintiff's claim to be a local taxpayer is irrelevant. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968); *Board of Educ. v. Doremus*, 342 U.S. 429, 433-34 (1952). Both respondents mention only one of the four Adams County high schools (Peebles) when describing the source of their "injury." One of the respondents, Berry Baker, prior to suing the Board, even carried on an extended correspondence with the Board in which, as the pretended director of a Center for Phallic Worship, he lavished praise on the Board for installing the very displays which he now says are the source of his "injury." In short, this is exclusively an "offended incidental observer" case.

The Sixth Circuit's allowance of "drive-by standing" flies in the face of this Court's decisions on standing in Establishment Clause cases and converts the federal courts into mere debating societies. Such a low threshold for invoking the jurisdiction of the federal courts amounts to virtually no threshold.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), this Court held that plaintiffs who allege no injury beyond the "psychological consequence presumably produced by observation of conduct with which one disagrees" do not have standing under Article III.

The plaintiffs in *Valley Forge* were a nonprofit organization committed to the principle of separation of church and state and several of the organization's employees. The plaintiffs objected to the federal government's conveyance of surplus real property from the Department of Health, Education, and Welfare to a nonprofit school operated by the Assemblies of God. In reaching the conclusion that plaintiffs lacked standing, this Court said:

> Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

Id. at 487.

The Court labeled the following requirements for standing "an irreducible minimum": actual or threatened injury, traceable to the defendant's putatively illegal conduct, and likely to be redressed by a favorable decision. *Id.* at 472. The Court has not wavered from this "irreducible minimum" in the two decades since *Valley Forge*. *See Vermont ANR v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000). In fact, this Court has repeatedly emphasized the fundamental importance of these requirements to the entire framework of our constitutional form of government. *Whitmore v. Arkansas*,

495 U.S. 149, 155 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts"); *Steel Co. v. Citizens for Better Env.*, 523 U.S. 83, 101 (1998) ("constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers").

Three members of this Court have questioned whether mere exposure to a religious display or symbol that offends one's beliefs is sufficient to confer standing. *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., with whom Scalia, J., and Thomas, J., join, dissenting from denial of certiorari). In *Edmond*, plaintiffs successfully challenged a city's display of its official seal which contained, among other symbols, a Latin cross. The display of the seal was apparently ubiquitous, appearing on "City limits signs, on City flags, on the uniforms of City police officers and firefighters, on official City vehicles, on stickers identifying City property . . . in the City Council chambers . . . on each utility bill sent out by the City, as well as on official City stationery and the Utility and Sanitation Department's newsletters." *City of Edmond v. Robinson*, 68 F.3d 1226, 1228 (10th Cir. 1995). The Chief Justice observed: "Mere presence in the city, without further allegations of injury, quite clearly fails to meet the standing requirements laid down in cases such as *Valley Forge*." *Edmond*, 517 U.S. at 1202.

Respondents in this case are adults. They do not allege that their taxes were used to construct or maintain the *Foundations* displays. They claim only that they observe and are offended by the displays when they happen to be passing one of the Adams County high schools, or on those evidently infrequent occasions when they actually enter the building.

But respondents' quest for psychic satisfaction is insufficient: "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107.

Allowing litigants to enjoy standing in cases of this nature runs contrary to this Court's holding in *Valley Forge*. It encourages the very sort of licensing of roaming bands of self-appointed Establishment Clause police which this Court rejected in *Valley Forge*, 454 U.S. at 487. Citizens who have suffered no injury beyond the "psychological consequence presumably produced by observation of conduct with which [they] disagree" are given a veto power over the considered judgments of executives and legislative bodies. Legislators, such as the members of the Adams County School Board, find their good faith efforts to strike the often difficult balance between an exaggerated aversion to religion and "a tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) held up to exacting judicial scrutiny. Such an approach is not conducive to maintaining the "separation and equilibration of powers" which Article III standing doctrine is intended to protect. *Steel Co.*, 523 U.S. at 101. It creates a kind of free admission pass for litigious individuals whose "injuries" are trifling at best.[9]

---

[9] The trifling and contrived appearance of such claims has produced frustration among some members of the judiciary. *See, e.g.*, *Harris v. City of Zion*, 927 F.2d 1401, 1419-25 (7th Cir. 1991), (Easterbrook, J., dissenting), *cert. denied*, 505 U.S. 1218 (1992); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 684-85 (6th Cir. 1994), (Guy, Senior Circuit Judge, concurring), *cert. denied*, 514 U.S. 1095 (1995). Judge Guy's assessment of plaintiff's claim of "injury" caused by viewing a picture of Christ which has hung on a school wall for 30 years is deserving of note:

B. The Decision of the Sixth Circuit Conflicts With This Court's Decisions on "Standing in Gross."

In affirming the district court's granting of an injunction directing the removal of the Ten Commandments displays from each of the four Adams County high schools, the Sixth Circuit applied a notion of "standing in gross" which has been expressly rejected by this Court. While identical *Foundations* exhibits were located at each of the four high schools, the plaintiffs-respondents made specific reference to their exposure to, contact with, or observations of, only the exhibit at one of the schools — that located in the town of Peebles. Thus, even if plaintiffs met the prerequisites for standing to challenge the Peebles exhibit, they certainly did not prove "actual injury" caused by displays to which they have not been exposed.

In *Lewis v. Casey*, 518 U.S. 343, 357 n.6 (1996), this Court held that "standing is not dispensed in gross." *Id.* In *Lewis*, a group of inmates filed a class action against Arizona prison officials claiming that their right of access to the courts was being violated by the officials' failure to provide them with adequate legal research facilities. The district court identified only two instances of actual injury to one specific plaintiff. *Id.* at 358. The court nevertheless, issued an

---

> For me, at least, a discussion of "psychological damage" resulting from viewing this picture does implicate an "establishment" — but not one of religion. What is established is a class of "eggshell" plaintiffs of a delicacy never before known to the law. I can well understand that someone (perhaps this plaintiff) in some sense could be offended by this portrait, but "injured" is another matter.

Id. at 684.

injunction mandating detailed, systemwide changes in Arizona's prison law libraries and legal assistance programs. The Ninth Circuit affirmed the scope of the injunction.

This Court reversed. The Court held that a plaintiff who has been subject to injurious conduct of one kind does not possess, by virtue of that injury, the necessary stake in litigating conduct of another kind, however similar, to which he has not been subject. *Id.* The Court wrote that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.*, quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

In the instant case, neither plaintiff ever mentioned by name any of the Adams County high schools other than the Peebles school. The district court's injunction, however, orders the removal of, not only the Peebles display, but also the displays at each of the three other Adams County high schools. The court of appeals affirmed the judgment of the district court which included the systemwide injunction.

The relief approved below disregards this Court's clear precedent. It is stretching things well beyond even the most lenient reading of this Court's standing jurisprudence to allow standing for those who have not even seen and yet still take offense. At a minimum, this Court should grant review and summarily vacate that portion of the lower court's injunction which directs the removal of the Board's displays at locations other than the one allegedly frequented by the plaintiffs-respondents.

CONCLUSION

This Court should grant the petition and reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Dated July 13, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 02-3776/3777

[Filed March 15, 2004]

BERRY BAKER AND ANONYMOUS PLAINTIFF #1,
Plaintiffs-Appellees,

v.

ADAMS COUNTY OHIO VALLEY SCHOOL BOARD,
Defendant-Appellant.

KENNETH W. JOHNSON, ET AL.,
Intervening Defendants-Appellants.

ORDER

BEFORE: NORRIS and GILMAN, Circuit Judges; and BUNNING,[*] District Judge.

[*] Hon. David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 02-3776, 02-3777

[Filed January 12, 2004]

BERRY BAKER and	)
ANONYMOUS PLAINTIFF # 1,	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
ADAMS COUNTY/	)
OHIO VALLEY SCHOOL BOARD,	)
Defendant-Appellant,	)
	)
KENNETH W. JOHNSON,	)
THOMAS D. CLAIBOURNE, RONALD D.	)
STEPHENS, and DOUGLAS W. FERGUSON,	)
Intervening Defendants-Appellants.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.
99-00094. Hogan (M). 06-11-02.

JUDGES: Before: NORRIS and GILMAN, Circuit Judges; and BUNNING, District Judge.[*]

OPINION

RONALD LEE GILMAN, Circuit Judge. In the Fall of 1997, the Adams County/Ohio Valley School Board erected stone monuments inscribed with the Ten Commandments on the grounds of four newly constructed high schools. The Adams County Ministerial Association paid for the four monuments and agreed to indemnify the Board for any litigation expenses. County residents Berry Baker and an anonymous plaintiff sought an injunction against the Board, alleging that the display violated the Establishment Clause of the First Amendment to the United States Constitution. After the suit was commenced, the Board modified the display by adding monuments that included excerpts from the Justinian Code, the Preamble to the United States Constitution, the Declaration of Independence, and the Magna Carta. The district court granted summary judgment in favor of the plaintiffs and ordered the removal of the Ten Commandments monuments. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

The comprehensive opinion of Magistrate Judge Timothy Hogan provides a complete recitation of the facts. (By consent, the case was decided by a magistrate judge in the district court below.) Only the most pertinent facts are recounted here.

---

[*] The Honorable David Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

In 1997, the Board erected permanent stone monuments near the entrance of four new high schools within Adams County. Each monument had etchings of the American flag and an eagle on the sides, and bore the following inscription on biblical-looking tablets:

> THE TEN COMMANDMENTS
>
> THOU SHALT HAVE NO OTHER GODS BEFORE ME
>
> THOU SHALT NOT WORSHIP ANY GRAVEN IMAGE
>
> THOU SHALT NOT TAKE GOD'S NAME IN VAIN
>
> REMEMBER THE SABBATH TO KEEP IT HOLY
>
> HONOR THY FATHER AND THY MOTHER
>
> THOU SHALT NOT KILL
>
> THOU SHALT NOT COMMIT ADULTERY
>
> THOU SHALT NOT STEAL
>
> THOU SHALT NOT BEAR FALSE WITNESS
>
> THOU SHALT NOT COVET

The Board's president spoke informally with each Board member before accepting the donation of the four monuments from the Ministerial Association. No resolution or minutes document the action taken. After the monuments were

erected, the Board adopted a resolution designating the area where the monuments stood as land upon which county residents could erect structures symbolic of local or national history. The Board subsequently installed signs indicating that no costs were borne by the Board and that no endorsement of religion was intended by the display.

On February 9, 1999, Baker and the anonymous plaintiff filed suit against the Board alleging that the monuments violated the Establishment Clause of the First Amendment. The Board reacted by rescinding its earlier resolution and, on May 16, 2000, adopted a second resolution that read:

> 1. That the Adams County/Ohio Valley School Board has decided to create an educational display to inform Adams County high school students about some of the essential documents that the Board believes form the foundation of American law and government.
>
> 2. The Board believes it has the authority to create educational displays to further the knowledge and education of Adams County students.
>
> 3. The display will be entitled *Foundations of American Law and Government*.
>
> 4. It will consist of passages taken from five documents that the Board believes are essential to the foundations of this country's legal and governmental systems: (1) Preamble to the United States Constitution; (2) Declaration of Independence; (3) Magna Carta; (4) Justinian Code; (5) Ten Commandments.

5. Each document will be inscribed in stones coequal in size, shape, color, and substance. The stones will be positioned in a semi-circle and connected together to form a semi-circular wall.

6. Attached hereto is a true and correct copy of the current content of the *Foundations of American Law and Government* display, including the substance of each document to be inscribed and commentary regarding the document's importance to the foundations of American law and government.

7. The commentary will be inscribed on stone markers which will be positioned directly in front of each document.

8. This commentary will serve further to educate Adams County high school students regarding these documents' importance to the foundations of American law and government.

The Board, which had not previously articulated a secular reason for exhibiting the original Ten Commandments monuments, then surrounded each monument with four additional monuments of identical size to form a semi-circular wall with the Ten Commandments at the center. Two of the new monuments, placed to the left to the Ten Commandments, bore the following excerpts from the Justinian Code and the Declaration of Independence:

JUSTINIAN CODE

NOW NATURAL LAWS WHICH ARE FOLLOWED BY ALL NATIONS ALIKE,

> DERIVING FROM DIVINE PROVIDENCE, REMAIN ALWAYS CONSTANT AND IMMUTABLE: BUT THOSE WHICH EACH STATE ESTABLISHES FOR ITSELF ARE LIABLE TO FREQUENT CHANGE WHETHER BY TACIT CONSENT OF THE PEOPLE OR BY SUBSEQUENT LEGISLATION. IT REMAINS TO CONSIDER THE DUTY OF A JUDGE. AND, IN THE FIRST PLACE, THE JUDGE MUST ENSURE THAT HE DOES NOT JUDGE CONTRARY TO STATUTES, CONSTITUTIONS AND CUSTOMS.
>
> . . . .
>
> DECLARATION OF INDEPENDENCE
>
> WE HOLD THESE TRUTHS TO BE SELF-EVIDENT, THAT ALL MEN ARE CREATED EQUAL, THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN UNALIENABLE RIGHTS, THAT AMONG THESE ARE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS. THAT TO SECURE THESE RIGHTS, GOVERNMENTS ARE INSTITUTED AMONG MEN, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED.

The other two monuments were placed to the right of the Ten Commandments and bore the following excerpts from the Preamble to the United States Constitution and the Magna Carta:

PREAMBLE TO THE UNITED STATES CONSTITUTION

WE THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY, PROVIDE FOR THE COMMON DEFENSE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA.

. . . .

MAGNA CARTA

NO FREEMAN SHALL BE TAKEN OR IMPRISONED OR DISSEISED OR EXILED OR IN ANYWAY DESTROYED, NOR WILL WE GO UPON HIM NOR SEND UPON HIM, EXCEPT BY THE LAWFUL JUDGMENT OF HIS PEERS OR BY THE LAW OF THE LAND. MOREOVER, ALL THESE AFORESAID CUSTOMS AND LIBERTIES. THE OBSERVANCE OF WHICH WE HAVE GRANTED IN OUR KINGDOM AS FAR AS PERTAINS TO US TOWARD OUR MEN, SHALL BE OBSERVED BY ALL OF OUR KINGDOM, AS WELL CLERGY AS LAYMAN, AS FAR AS PERTAINS TO THEM TOWARD THEIR MEN.

Finally, plaques were installed at the base of each monument. The plaque for the center monument read:

THE TEN COMMANDMENTS

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence. This understanding of rights as God-given is rooted in the tradition of thought known as ethical monotheism. This is the belief--shared by Muslims, Jews, Christians, and others--in a Divine lawgiver who imposes upon earthly rulers a duty to recognize and respect each person's basic human rights and equal dignity. The Ten Commandments express the fundamental tenets of ethical monotheism. The Commandments remind us of our obligation to one another and to the Creator. They remind us that we owe one another respect. The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Comparable explanations were placed on plaques in front of the other four monuments. Despite these modifications to the original stand-alone display of the Ten Commandments monuments, the district court found that the display of the latter ran afoul of the purpose, effect, and entanglement prongs of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). It consequently ruled that the display violated the Establishment Clause of the First Amendment

II. ANALYSIS

A. Standard of review

We review a grant of summary judgment de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Standing

In order to meet Article III standing requirements, "a party must show (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff's injury." *Adland v. Russ*, 307 F.3d 471, 477-78 (6th Cir. 2002). In *Adland,* this court held that the plaintiffs satisfied the injury-in-fact requirement because they "frequently travel to the State Capitol to engage in political advocacy for a variety of organizations and . . . will endure direct and unwelcome contact with the Ten Commandments monument [erected there]." *Id.* at 478. The factors identified by the district court in the present case are sufficient under

Adland to satisfy the injury-in-fact component of Article III standing:

> The Anonymous Plaintiff avers that during the time his/her child or children attended one of the high schools, he/she came into contact with the original Ten Commandments monument, and subsequently the new display, as a result of transporting his/her child to and from school and as parent participant or spectator at school events. Both plaintiffs claim that they pass at least one of the school buildings as part of their regular course of business in the community and that the displays are visible from the road. Plaintiffs also claim that they come into direct contact with the displays as a consequence of attending sporting events, holiday shows, and theatrical performances at the high schools. Plaintiffs allege direct and unwelcome personal contact with the Ten Commandments monument display on public school property.

Furthermore, "this injury is plainly caused by the defendant's . . . [decision] to erect the Ten Commandments and . . . an injunction can redress plaintiffs' injury." *Adland*, 307 F.3d at 478. We therefore agree with the conclusion of the district court that the plaintiffs' averments are sufficient to confer standing for the purposes of this lawsuit.

B. The "purpose prong" of the *Lemon* test

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the Supreme Court held that Pennsylvania and Rhode Island statutes providing for state aid to church-related elementary and secondary schools violated the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an

establishment of religion." U.S. Const. amend. I. The Establishment Clause has been applied to state and local governmental action through the Due Process Clause of the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (noting that the Due Process Clause of the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment).

A three-prong test was formulated in *Lemon* to evaluate Establishment Clause challenges to government action: (1) the action "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (quotation marks and citations omitted). We are "bound to follow [the *Lemon*] test until the Supreme Court explicitly overrules or abandons it." *Adland*, 307 F.3d at 479.

The outcome of the present case is controlled by this court's recent decision in *ACLU v. McCreary County*, 354 F.3d 438, 2003 U.S. App. LEXIS 25606, No. 01-5935 (6th Cir. Dec. 18, 2003) (*McCreary County*), which dealt with a nearly identical factual situation. In *McCreary County,* the court upheld a supplemental injunction prohibiting the exhibition of a modified display titled "The Foundations of American Law and Government." The supplemental injunction was granted on the heels of an earlier injunction prohibiting the county and its school board from exhibiting the Ten Commandments alone. In her concurring opinion, Judge Gibbons explained that there was a strong indication of improper purpose behind the modified display in light of:

> (1) the inherently religious nature of the Ten Commandments, (2) defendants-appellants' failure to

> articulate a secular purpose until after litigation had commenced, (3) the "overtly religious" quality of the second display, (4) the absence of any evidence in the record indicating that the Ten Commandments have been or will be integrated into the school curriculum as part of an appropriate program of study, (5) the absence of any discussion integrating the Ten Commandments into a secular subject matter other than a conclusory assertion about the Declaration of Independence, and (6) the emphasis on the Ten Commandments as the only religious text in the displays[.]

Id. (Gibbons, J., concurring) (citations omitted) (numbers added). These same factors are manifested in the present case.

In particular, there is no evidence that the Ten Commandments monuments were originally erected with a secular purpose. The fact that the monument was donated by the Adams County Ministerial Association, a Christian religious organization that also agreed to indemnify the Board for any litigation expenses, implies the opposite. Furthermore, as the district court noted, "there are no contemporaneous minutes, documents, or formal policy explaining the intent or purpose of the School Board in permitting the permanent placement of [the original] monoliths." The fact that the original displays contained only the Ten Commandments monuments "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint . . . ." *McCreary County* (quotation marks omitted).

Failing to set forth a secular explanation until after the litigation had commenced is a further indication that the purported secular justification was belatedly adopted solely to avoid Establishment Clause liability. *See id.* (citing *Adland*,

307 F.3d at 481). Furthermore, "the secular purpose requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Id.* (quoting *Adland*, 307 F.3d at 480). In this regard, we note that even as the Board surrounded the Ten Commandments with four other stone monuments engraved with passages from selected historical documents, it added a plaque to the center of the display that stated, in part: "The Commandments remind us of our obligation to one another *and to the Creator.*" (Emphasis added.)

A failure to satisfy any one of the *Lemon* test's three prongs is fatal to government action that is being challenged on Establishment Clause grounds. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). Because the Board failed to satisfy the secular-purpose prong, we therefore have no need to address the second and third prongs of the *Lemon* test.

III. CONCLUSION

For all the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-94

[Filed June 11, 2002]

Berry Baker, et. al.,	)
Plaintiffs,	)
	)
vs	)
	)
Adams County/Ohio Valley	)
School Board, et. al.,	)
Defendants.	)
	)

Timothy S. Hogan, United States Magistrate Judge.

ORDER

This matter is before the Court on the motion of plaintiffs Berry Baker and Anonymous Plaintiff Number One for summary judgment as to all claims asserted in the Third-amended and Supplemental Complaint (Doc. 71), the motion for summary judgment by defendant Adams County/Ohio Valley School Board (Doc. 72), the summary judgment motion by intervenor-defendants Kenneth Johnson, Thomas D. Claiborne, Ronald D. Stephens, and Douglas W. Ferguson

(Doc. 77), and the parties' responsive and supplemental memoranda. (Docs. 76, 78, 83, 84, 85, 88, 89, 90, 91, 93). The parties have consented to entry of final judgment by the undersigned United States Magistrate Judge. (Doc. 8).

INTRODUCTION

This case involves the constitutionality of displaying the Ten Commandments on public school property. The question raised by the instant case is one of Constitutional interpretation. The job faced by any trial judge in such a case is to follow the Constitutional interpretations of higher courts and to deliver on the commitment made to the public when the oath of office was taken to support and defend the Constitution and to follow, not make, the law. The issue is not whether or not this judge believes that the Ten Commandments have great educational and moral value, because the answer is an enthusiastic yes. The issue is not whether society would be better served if its citizens learned about and adhered to the rules for living promulgated by the Ten Commandments for in the personal opinion of the undersigned it surely would. The issue is whether or not government, in this case, the public schools of Adams County, Ohio, should be used as a vehicle to endorse and promote the Ten Commandments. Higher courts have answered this question in the negative based on their interpretation of the Establishment Clause of the First Amendment to the United States Constitution and a trial judge, if he is true to his oath, must follow the directives of the appellate courts. This is not to say that families, churches, private businesses, non-governmental institutions, clubs and like organizations are or should be limited in the expression of their First Amendment rights to express support for and encourage allegiance to the family and moral values that are embodied in the document which forms the subject matter of

this case. This judge has a certain admiration for the members of the Adams County Ministerial Association and the members of the defendant School Board for their dedication to spreading the word of God, however misdirected that effort is determined to be by after-the-fact Constitutional analysis. Nevertheless, the role of government is neither to promote nor advance religion or any particular religious beliefs. Because the purpose and effect of the Ten Commandments display in this case is to advance the religious beliefs embodied therein, the display violates the First Amendment and must be enjoined.

The Facts of this Case must be Examined in the Context of the Public School Setting.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." In Establishment Clause cases under the First Amendment, the Court must be mindful of the particular concerns that arise in the context of the public elementary and secondary school system. *See Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). The Supreme Court has stated:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. *See, e.g., Grand Rapids*

> *School Dist. v. Ball*, 473 U.S. 373, 383, 105 S. Ct. 3216, 3222, 87 L. Ed. 2d 267 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60, n. 51, 105 S. Ct. 2479, 2492, n. 51, 86 L. Ed. 2d 29 (1985); *Meek v. Pittenger*, 421 U.S. 349, 369, 95 S. Ct. 1753, 1765, 44 L. Ed. 2d 217 (1975); *Abington School Dist. v. Schempp*, 374 U.S. 203, 252-253, 83 S. Ct. 1560, 1587-1588, 10 L. Ed. 2d 844 (1963) (BRENNAN, J., concurring). The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. *See Bethel School Dist. No. 403 v. Fraser, supra*, 478 U.S. at 683, 106 S. Ct. at 3164; *Wallace v. Jaffree, supra*, 472 U.S., at 81, 105 S. Ct., at 2503 (O'CONNOR, J., concurring in judgment). Furthermore, "the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231, 68 S. Ct. 461, 475, 92 L. Ed. 649 (1948) (opinion of Frankfurter, J.).

Edwards, 482 U.S. at 583-584 (footnote omitted). In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095, 115 S. Ct. 1822, 131 L. Ed. 2d 744 (1995), the Sixth Circuit noted the import of the Establishment Clause in protecting the rights of those outside the majority. The Court, in holding that the display of a portrait of Jesus Christ in a hallway outside a public school gymnasium violated the Establishment Clause, stated:

> Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem "de minimis" to the great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case.

Id. at 684. Keeping in mind the importance of the school setting and the special protection the First Amendment holds for individuals not in the majority, we now examine the facts of this case.

BACKGROUND AND FACTS

The facts of this case are largely undisputed. Plaintiff Berry Baker is a taxpayer and resident of Adams County, Ohio. Anonymous Plaintiff No. 1 is an individual taxpayer and resident of Adams County who, at the time the Third Amended Complaint was filed, was also a parent of one or more children who attend one of the public high schools of Adams County. Defendant Adams County/Ohio Valley School Board (the School Board) is the duly elected body which sets policy for and governs the Adams County schools located in the Adams County/Ohio Valley School District. Intervenor-defendants Kenneth Johnson, Thomas D. Claiborne, Ronald D. Stephens, and Douglas W. Ferguson are members of the Adams County Ministerial Association, and were permitted to join this case as defendants pursuant to Fed. R. Civ. P. 24. (Doc. 45).

In the Fall of 1997, four new high schools opened in Adams County, Ohio. Each school houses the seventh through twelfth grades in a junior high wing and high school wing.

Reverend Kenneth Johnson of the Adams County Ministerial Association contacted then School Board President Chris Armstrong about donating plaques containing the Ten Commandments to each of the new schools to commemorate the opening of the schools. The original idea of the Ministerial Association was to erect plaques of the Ten Commandments inside each of the four junior high/high schools. (Armstrong Depo. at 9-12). One Board member suggested placement of the Ten Commandments outside of the school buildings in monument form instead of inside the schools, referring to "the Kentucky case where the Ten Commandments were removed from the classroom." (Armstrong Depo. at 12, 19). The Board consented to the donation and erection of the Ten Commandments monuments outside the entrance of each school following the informal canvassing of Board members by the School Board President. The Ten Commandments monuments were viewed as permanent displays at the entrance of each junior high/high school. (Armstrong Depo. at 23; Hansgen Depo. at 19). There was an agreement that the Ministerial Association would pay any costs of litigation involving the Ten Commandments monuments. (Armstrong Depo. at 26; Hansgen Depo. at 14-15).

The monuments bear identical inscriptions of a Protestant[1] version of the Ten Commandments along with etchings of an American Flag and American eagle.[2] The Ten

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[1] Reverend Johnson testified that the wording appearing on the Adams County Ten Commandments monuments is different from the Catholic version. (Johnson Depo. at 79).

[2] Each stone tablet is inscribed with the following:

THOU SHALT HAVE NO OTHER GODS BEFORE ME
THOU SHALT NOT WORSHIP ANY GRAVEN IMAGE

Commandments monuments were purchased and designed by the Adams County Ministerial Association, an association of Christian church pastors and ministers in Adams County. The School Board did not expend any funds for the creation or placement of the monuments. The decision to accept the Adams County Ministerial Association's donation was never discussed at a Board meeting. Rather, Ms. Armstrong, then President of the School Board, contacted each Board member individually and then communicated the Board's consent to accept the donation and permit the erection of the monuments on school property. The School Board concedes that no official Board action was taken with respect to these original monuments either prior to the placement of the tablets or subsequent to the initiation of this litigation. At the same time, the Board received two additional donations to commemorate the opening of the schools: small caskets used as time capsules, which were buried near the flag pole at each school, and American flags. These additional donations were also accepted without official Board action. All three donations were placed near the front entrance of each high school building.

Following the placement of the Ten Commandments tablets on school grounds, plaintiff Baker initiated this lawsuit in February 1999. Thereafter, the Board adopted a policy entitled "Policy Regarding Placement of Structures and

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THOU SHALT NOT TAKE GOD'S NAME IN VAIN
REMEMBER THE SABBATH TO KEEP IT HOLY
HONOR THY FATHER AND THY MOTHER
THOU SHALT NOT KILL
THOU SHALT NOT COMMIT ADULTERY
THOU SHALT NOT STEAL
THOU SHALT NOT BEAR FALSE WITNESS
THOU SHALT NOT COVET

Objects in Designated Area in Front of Adams County High Schools." (Armstrong Depo. at 50; Hansgen Depo. at 37-38). The policy established guidelines for determining whether a proposed donated item warrants approval for placement at any of the schools. The policy stated in part:

> At each high school in Adams County a flag pole is located in a small area in front of the schools. The small parcels of land on which these flag poles are located, may be used, with permission from the Adams County School Board ("Board"), only by citizens of Adams County with prior permission of the Board, to erect, place, construct, or otherwise locate on that property statues, monuments, or other structures or objects, so long as such statues, objects, etc., symbolize or reflect one or more aspects of our local and/or national history, heritage, or traditions, and are not inconsistent with the educational goals of the School District.

(Doc. 72, Def. Summary Judgment Motion, Declaration of Diane Lewis, Ex. A, attached). The policy further stated that if the board determined that a donated object may "reasonably be considered to be religious in nature," but otherwise satisfied the Board's criteria set forth in the policy, the Board would require that either the structure itself or a separate plaque placed next to the structure contain the following language:

> This [monument, structure, etc.] was not constructed with, nor is it maintained by, public funds, and it does not constitute an endorsement by the Adams County School District of any religion or religious belief.

(Id.). A plaque containing the above-quoted disclaimer language was then placed adjacent to the Ten Commandments monuments at each high school. Board members admit that the policy and disclaimer plaques resulted from the filing of this lawsuit. (Armstrong Depo. at 50; Hansgen Depo. at 38-39). The Ten Commandments display was never reexamined in light of the new policy adopted by the Board. (Hansgen Depo. at 38). Lucinda Hansgen, the current Board President, testified that she didn't view the Ten Commandments as a "religious issue," but rather a donation from the Ministerial Association similar to other donations received by the Board. (Hansgen Depo. at 39-40). The Ten Commandments display at each school remained in place, as described above and with the addition of the placement of the disclaimer plaque, for approximately one year.

On May 16, 2000, the Board convened a meeting and undertook two actions relating to the Ten Commandments display. First, it rescinded its "Policy Regarding Placement of Structures and Objects in Designated Area in Front of Adams County High Schools." Second, the Board adopted a resolution to construct a new display entitled "Foundations of American Law and Government." (Id., Exs. B & C, attached). The new display consists of five stone monuments coequal in size, shape, color, and substance, positioned in a semi-circle and connected together to form a semi-circular wall. (Id., Ex. C, ¶ 5). On each stone is inscribed a passage taken from five documents that the Board "believes are essential to the foundations of this country's legal and governmental systems." (Id., Ex. C, ¶ 4). The documents selected by the Board are: (1) the Preamble to the United States Constitution; (2) the Declaration of Independence; (3) the Magna Carta; (4) the Justinian Code; and (5) the Ten Commandments. The "Resolution to Construct *Foundations of American Law and Government* Display" states in part that

its purpose is "to create an educational display to inform Adams County high school students about some of the essential documents that the Board believes form the foundation of American law and government." (Id., Ex. C, ¶ 1). In addition, commentary concerning each document's importance to the foundations of American law and government is inscribed on a stone marker which is positioned in front of each stone monument. The Board's resolution states that the commentary "will further serve to educate Adams County high school students regarding these documents' importance to the foundations of American law and government." (Id., Ex. C, ¶ 8). Currently, the new five monument display has been constructed at each high school. Public funds were not used for its construction; rather, the Adams County for the Ten Commandments organization, which functioned as the successor to the Adams County Ministerial Association,[3] paid for the new display. The Board states that school funds will not be used to preserve or maintain the new displays in the future. (Lewis Aff., ¶¶ 16-17). Photographs of the display and copies of the text inscribed thereon are attached to the Lewis declaration. (Id., Exs. D & E).

Plaintiffs brings this action pursuant to 42 U.S.C. § 1983, alleging that the School Board violated the First and Fourteenth Amendments to the United States Constitution by permitting the permanent placement of religious monuments in the shape of two tablets, representing and inscribed with a Protestant version of the Ten Commandments, on school property and within approximately thirty feet of the entrance to each of Adams County's four high schools. Plaintiffs also allege that the School Board's erection of additional stone

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[3] See Doc. 78 at 31 n. 17 and citations therein.

tablet monuments adjacent to the original Ten Commandments during the course of this litigation does not alter the nature and purpose of the original display and therefore "promotes and endorses the religious beliefs that are inherent in and inextricably a material part of the Ten Commandments." (Doc. 65, p. 6, ¶ 28). Plaintiffs claim that the erection and maintenance of these monuments on public school property violate the First Amendment's Establishment Clause and constitute an unconstitutional endorsement of religion. Plaintiffs also assert that this conduct violates Article I, Section 7 of the Ohio Constitution. Plaintiffs seek declaratory and injunctive relief, including a court order finding the placement of these monuments to be unconstitutional, and therefore a violation of plaintiffs' rights under the First Amendment and the Ohio Constitution, and requiring defendants to immediately remove the monuments from school property. Plaintiffs also request that the Court issue an order prohibiting the School Board from continuing to establish or maintain policies, practices, or customs which encourage the erection of these, or any other religious symbols on school property. Plaintiffs further seek an order designating plaintiffs and any other witnesses as entitled to witness protection under federal law. Lastly, plaintiffs seek attorney's fees and costs pursuant to 42 U.S.C. § 1988.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the burden of

showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgment motion. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes v. Runyon*, 912 F. Supp. 280, 283 (S.D. Ohio 1995) (Spiegel, J.).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes*, 912 F. Supp. at 283. *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

APPLICABLE LAW AND ANALYSIS

Plaintiffs Have Standing in this Matter.

The Board argues that plaintiffs lack standing to bring the present action because there is no evidence that they have come in contact with the new display, and because the Anonymous Plaintiff, while a parent of a former student who attended one of the high schools, no longer has children who attend any of the four Adams County high schools at issue in this case. To demonstrate standing, a plaintiff must show an actual injury, caused by a defendant's conduct, which can be remedied by a court. *City Communications, Inc. v. Detroit*, 888 F.2d 1081 (6th Cir. 1989). Generally, in First Amendment cases, the injury can be non-economic. *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985). A sufficient injury exists to support standing where plaintiff alleges the use of governmental authority to encourage a sectarian religious view directed toward plaintiff. *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 682 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095, 115 S. Ct. 1822, 131 L. Ed. 2d 744 (1995). While the Board argues that plaintiffs have not demonstrated sufficient injury because the harm they allege is hypothetical, psychological harm particular only to the plaintiffs, Sixth Circuit precedent makes clear that "unwelcome direct contact with the offensive object is

enough" to confer standing. *Id.* (quoting *Harvey v. Cobb County*, 811 F. Supp. 669, 674 (N.D. Ga. 1993)(internal quotations omitted). Therefore, the *Washegesic* Court noted that the student-plaintiff's graduation from the high school where a portrait of Jesus Christ hung in the hallway did not eliminate or render moot the plaintiff's standing. *Id.* Relying on the reasoning of *Hawley, supra,* the Court of Appeals found that:

> [T]he portrait does not affect students only-- it potentially affects any member of the public who attends an event at the school. A member of the PTA or a member of the public would have standing if she attended events in the gymnasium and took the portrait as a serious insult to her religious sensibilities.

Id. (citing *Jager v. Douglas County School District*, 862 F.2d 824, 826 n.1 (11th Cir. 1989).

Like *Washegesic,* the relevant inquiry in this case is "whether the individual plaintiff uses the facility and suffers actual injury." *Id.* Both plaintiffs have submitted affidavits indicating that they suffered actual injury caused by the display of the Ten Commandments and that they continue to suffer such injury as a result of the Ten Commandments tablets which form part of the new display. (*See* Doc. 78, affidavits of plaintiff Baker and Anonymous Plaintiff attached). The Anonymous Plaintiff avers that during the time his/her child or children attended one of the high schools, he/she came into contact with the original Ten Commandments monument, and subsequently the new display, as a result of transporting his/her child to and from school and as a parent participant or spectator at school events. Both plaintiffs claim that they pass at least one of the school buildings as part of their regular course of business in

the community and that the displays are visible from the road. Plaintiffs also claim that they come into direct contact with the displays as a consequence of attending sporting events, holiday shows, and theatrical performances at the high schools. Plaintiffs allege direct and unwelcome personal contact with the Ten Commandments monument display on public school property. Plaintiffs' averments are sufficient to confer standing for purposes of this lawsuit. *See Books v. City of Elkhart*, 235 F.3d 292, 300-301 (7th Cir. 2000); *Doe v. Porter*, 188 F. Supp.2d 904, 907-909 (E.D. Tenn. 2002); *Doe v. Harlan County School District*, 96 F. Supp.2d 667, 669-70 (E.D. Ky. 2000).

Plaintiff Baker's Claim is Not Barred by the Doctrine of Clean Hands.

Defendants' argument that plaintiff Baker's claims are barred by the equitable doctrine of unclean hands is without merit. Defendants argue that Baker perpetrated a fraud on the Board through a series of letters in which he represents himself to be the Director of a non-existent organization seeking to erect a phallic symbol on school property. Baker contends his letter writing campaign was an exaggerated stratagem to show the Board's misguided policy if properly applied would require it to accept donation of any and all religious objects, even those devoted to phallic worship. The last letter written by Baker was sent five months before this lawsuit was instituted. Baker maintains that at the time he filed this lawsuit and consistently thereafter he has held the belief that the permanent placement of the Ten Commandments on public school property violates the Establishment Clause.

The doctrine of unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith

relative to the matter in which he seeks relief. . . ." *Cleveland Newspaper Guild v. Plain Dealer Pub. Co.*, 839 F.2d 1147, 1155 (6th Cir. 1988), *cert. denied*, 488 U.S. 899, 109 S. Ct. 245, 102 L. Ed. 2d 234 (1988), quoting *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945). In *Kinner v. Lake Shore & Mich. S. Ry.*, 69 Ohio St. 339, 69 N.E. 614, 1 Ohio L. Rep. 752, 1 Ohio L. Rep. 853 (1904), cited by defendants, the Ohio Supreme Court described the unclean hands doctrine as follows: "The maxim, 'He who comes into equity must come with clean hands,' requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit." Baker's letter writing campaign, while certainly unusual from some points of view, does not constitute reprehensible conduct which should bar equitable relief in this case. It occurred prior to the institution of this lawsuit and was collateral thereto. The fact that his conduct was merely collateral to his Establishment Clause claim in this case weighs against a finding of unclean hands. 27A Am Jur. 2d Equity § 133. Defendants have neither alleged nor shown they suffered any injury or prejudice as a result of Baker's conduct. 27A Am Jur. 2d Equity § 136. In addition, Baker's conduct did not affect the equitable relations between the parties to the litigation. Moreover, the standing of the Anonymous Plaintiff to challenge the Ten Commandments display is not affected by this contention against Baker. For these reasons, the doctrine of unclean hands is inapplicable in this matter and does not require a dismissal of plaintiff Baker's claim.

The *Foundations of American Law and Government* Display Violates the Establishment Clause of the First Amendment.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The First Amendment proscriptions are made applicable to States and their subdivisions by the Fourteenth Amendment. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). The heart of the matter confronting the Court on the parties' cross-motions for summary judgment is whether the *Foundations of American Law and Government* display violates the Establishment Clause of the First Amendment.[4]

As an initial matter, plaintiffs urge the Court to apply a strict scrutiny analysis in examining the constitutionality of the Board's actions in this case. Plaintiffs argue that the Ten Commandments tablets as originally posted serve to favor one religion over another because the version of the Ten Commandments inscribed on the monuments is a Protestant version which is inconsistent with the versions commonly recognized by other faiths, including Catholic and Jewish traditions. According to plaintiffs, by manifesting an official preference in favor of Protestant Christian sects over other

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[4] Because the constitutional limits of Article I, § 7 of the Ohio Constitution have never been construed by the Ohio Supreme Court to be more restrictive than boundaries of the First Amendment, the Court's findings with respect to whether the Board's conduct violates the Establishment Clause applies with equal force and effect to plaintiffs' claims based on an alleged violation of the Ohio constitution. *See South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 676 F. Supp. 799 (S.D. Ohio 1987).

denominations through the wording of the inscription, the Board's posting of the Ten Commandments is subject to a "strict scrutiny" analysis as set forth in *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

Contrary to plaintiffs' assertions, the Court does not find that the evidence supports a conclusion that the version of the Ten Commandments inscribed on the tablets grants denominational preference for one religion over another. While the affidavit of plaintiffs' expert, Arthur Dewey, PhD., indicates that the inscribed version at issue is not consistent with catechisms of the Catholic Church and is inconsistent with Jewish traditions concerning how to read and understand Scripture, neither is the version identifiable with any particular religious sect or denomination. The fact that the posted version may be more like a traditional Protestant version than Catholic or Jewish, does not mean that the posting of the tablets favors one denomination or one religion over another. Plaintiffs cannot equate the posted version with the "official" version of the Ten Commandments associated with any particular religious denomination. In other words, the strict scrutiny analysis set forth in *Larson,* is inapplicable to the case at bar.

The Sixth Circuit has made clear that the appropriate analytical framework for the question pending before this Court is the well-known (and oft criticized) *Lemon* test as set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). *See American Civil Liberties Union v. Capitol Square Review & Advisory Board*, 243 F.3d 289, 305-308 (6th Cir. 2001)(en banc); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383-85 (6th Cir. 1999); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994)*, cert. denied*, 514 U.S. 1095, 115 S. Ct. 1822, 131 L. Ed. 2d 744 (1995). To comply with

the Establishment Clause of the First Amendment, the government action must (1) have a secular purpose; (2) have the primary effect of neither advancing nor inhibiting religion; and (3) not foster an excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Supreme Court has also utilized an "endorsement test," a refinement of the *Lemon* test. Under the endorsement test, a governmental practice or action violates the Establishment Clause if it has the "purpose or effect of 'endorsing' religion …." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1980). The Sixth Circuit has found the endorsement test to be a refinement of the "effects" element of the *Lemon* test. *See Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999), and cases cited therein. The endorsement test prohibits governmental actions which convey or attempt "to convey a message that a religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593, citing *Wallace v. Jaffree*, 472 U.S. 38, 70, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)(O'Connor, J., concurring). Under this test, the Court must determine whether a "reasonable observer" would conclude that the government is endorsing religion through its action. *Capitol Square Review*, 243 F.3d at 302; *Granzeier*, 173 F.3d at 574. This "reasonable observer" is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review*, 243 F.3d at 302, quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring). *See also Santa Fe Independent School Dist.*, 530 U.S. at 308; *Books*, 235 F.3d at 306.

As indicated above, the Court must view with special scrutiny religious activity in the public school setting. "Public schools play a key role in 'the maintenance of a democratic

pluralistic society.'" *Doe v. Porter*, 188 F. Supp.2d 904, 911 (E.D. Tenn. 2002), quoting *Coles*, 171 F.3d at 377. Because "students are young, impressionable, and compelled to attend public schools," *Coles*, 171 F.3d at 377, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in schools." *Lee v. Weisman*, 505 U.S. 577, 592, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992). Against this backdrop, we apply the *Lemon* test to the facts of this case.

Application of the *Lemon* Test

1. Purpose

The focus of the Court in examining whether the posting of the *Foundations of American Law and Government* display has a secular purpose must be on the intentions of the government. *Coles*, 171 F.3d at 384. Specifically, the Court must ask whether the government subjectively intended to convey a message of endorsement or disapproval of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). *See also Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring); *Coles*, 171 F.3d at 384.

> A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, *see Wallace v. Jaffree, supra*, 472 U.S., at 52-53, 105 S. Ct., at 2487 (Establishment Clause protects individual freedom of conscience "to select any religious faith or none at all"), or by advancement of a particular religious belief, *e.g., Stone v. Graham, supra*, 449 U.S., at 41, 101 S. Ct. at 194, (invalidating requirement to post

> Ten Commandments, which are "undeniably a sacred text in the Jewish and Christian faiths").

Edwards, 482 U.S. at 585 (additional citations omitted). If the Board had a secular purpose in posting the *Foundations of American Law and Government* display, its action cannot survive this First Amendment challenge if that purpose was dominated by a religious purpose. *Lynch*, 465 U.S. at 690-91. While the stated purpose of the Board is entitled to deference, *Santa Fe Independent School Dist.*, 530 U.S. at 308; *Capitol Square Review*, 243 F.3d at 307, the stated secular purpose "must be sincere and not a mere sham." *Santa Fe Independent School Dist.*, 530 U.S. at 308. *See also Capitol Square Review*, 243 F.3d at 307; *Coles*, 171 F.3d at 384. Relevant to the issue of determining the subjective intent of the Board is the text, history and context surrounding the implementation and display of the *Foundations of American Law and Government* monument. *Santa Fe Independent School Dist.*, 530 U.S. at 308-309.

Defendants urge us to start our examination of this issue at the point the five monument display was erected. The Board contends that plaintiffs' claims concerning the original Ten Commandments monuments are moot because the monuments have been incorporated into the new display and no longer exist as described when the suit was initially filed. According to the School Board, there is no longer a case or controversy concerning the posting of the original Ten Commandments monuments and to find otherwise would require the Court to issue an advisory opinion, thereby offending the case or controversy clause of Article III of the Constitution. Defendants contend that the current display does not offend the Establishment Clause.

Plaintiffs argue that this matter is not moot. They argue that the Foundations of American Law and Government display was established solely for purposes of defeating this lawsuit. Plaintiffs contend that the Ten Commandments as incorporated into the new display continue to violate First Amendment.

We cannot agree with defendants' contention to begin our analysis with the erection of the five monument display. Defendants ask us to disregard the genesis of the display. This would require us to ignore evidence relevant to discerning the true purpose behind the display. "As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case." *American Civil Liberties Union of Kentucky v. McCreary County, KY*, 96 F. Supp.2d 679, 687 (E.D. Ky. 2000). *See, e.g., Edwards*, 482 U.S. at 590; *Stone v. Graham*, 449 U.S. at 41. Thus, an examination of the history and context surrounding the Foundations of American Law and Government display is critical to discerning the Board's purpose in this lawsuit. *Santa Fe Independent School Dist.*, 530 U.S. at 308-309.

An examination of the history behind the Ten Commandments display shows the Board had no secular purpose in displaying the original Ten Commandments monument. The Ten Commandments tablets were proposed and purchased by a Christian religious group, the Adams County Ministerial Association in 1997. From the inception of the display, the Board recognized the religious nature of the Ten Commandments. A decision was made to abandon the idea of Ten Commandments plaques to be hung inside the school in favor of monuments outside of the school after one

Board member raised concerns about "the Kentucky case where the Ten Commandments were removed from the classroom." (Armstrong Depo. at 12, 19). In addition, the Board premised its acceptance of the Ten Commandments donation on the agreement of the Adams County Ministerial Association to pay the costs of litigation involving the display. (Armstrong Depo. at 26; Hansgen Depo. at 14-15). In addition, the Board has articulated no secular purpose in conjunction with the acceptance and erection of the Ten Commandments display donated by the Adams County Ministerial Association. *See Ring v. Grand Forks Public School District Number 1*, 483 F. Supp. 272, 274 (D.N.D. 1980) (posting of Ten Commandments without any explanation plainly failed to convey secular message of instilling in students basic mores of civilization and principles of common law). There was no formal Board meeting discussing the placement of the Ten Commandments tablets at the high schools. There are no contemporaneous minutes, documents or formal policies explaining the intent or purpose of the Board in permitting the display of the Ten Commandments. (Armstrong Depo. 11-12, 23-24; Hansgen Depo. 11-12). Nor has the Board ever articulated a position on the educational purpose behind the display of the Ten Commandments monument at the high schools. (Armstrong Depo. at 24; Hansgen Depo. at 35-36). Finally, although the lawsuit prompted a new policy governing displays at the Adams County high schools, the Board never reexamined the Ten Commandments display in light of the new policy. (Hansgen Depo. at 38).

The text of the Ten Commandments display also indicates the Board had no secular purpose in placing the monuments on school grounds. Numerous courts have found the text and content of the Ten Commandments to be unquestionably religious. *See ACLU of Tenn. v. Hamilton County*, 202 F.

Supp.2d 757, 2002 W.L. 971791, *4 (E.D. Tenn. 2002)("In determining the purpose of the posting [of the Ten Commandments], one need look no further than the text of the posted plaques); *ACLU Neb. Found. v. City of Plattsmouth*, 186 F. Supp.2d 1024, 1033 (D. Neb. Feb. 19, 2002)(noting the "vibrant religious nature of the text of the Ten Commandments" and its "overwhelming religious nature"); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001)(Ten Commandments is an inherently religious text), *cert. denied*, 534 U.S. 1162, 122 S. Ct. 1173, 152 L. Ed. 2d 117 (2002); *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993)("The content of the panel, the Ten Commandments and the so-called Great Commandment attributed to Jesus of Nazareth, is undeniably religious."), *aff'd w/o opinion,* 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129 (1994). *See also Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (Ten Commandment monument on lawn of municipal building unconstitutional), *cert. denied*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001); *Freethought Society v. Chester County*, 191 F. Supp.2d 589, 598 (E.D. Pa. 2002) (Ten Commandments plaque on courthouse exterior found unconstitutional), *injunction modified in part*, 194 F. Supp.2d 437 (E.D. Pa. 2002); *ACLU v. McCreary County, Ky.*, 145 F. Supp.2d 845, 848-50 (E.D. Ky. 2001)(posting of Ten Commandments in courthouse unconstitutional); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp.2d 667 (E.D. Ky. 2000) (posting of Ten Commandments in public schools unconstitutional); *American Civil Liberties Union of Ky. v. Pulaski County*, 96 F. Supp.2d 691 (E.D. Ky.2000) (posting of Ten Commandments in courthouse unconstitutional).

Nevertheless, defendants argue that the Ten Commandments are part of secular history and have played a

role in the development of our society and legal traditions.[5] The Kentucky legislature, in 1978, similarly argued that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone v. Graham*, 449 U.S. 39, 41, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980). The Supreme Court in *Stone* rejected this avowed secular purpose and held that a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom violated the First Amendment's Establishment Clause and was therefore unconstitutional. Applying the *Lemon* test, the Supreme Court found that the statute violated the first part of the *Lemon* test, that the statute have a secular purpose: "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms has no secular legislative purpose, and is therefore

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[5] Defendant cites the concurring opinion of Justice Stevens in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) as an example where the Supreme Court has recognized the secular significance of the Ten Commandments. On the wall of the Supreme Court there is a frieze that contains Moses holding the Ten Commandments. The frieze also contains depictions of Confucius and Mohammed, two other religious figures, as well as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. Justice Stevens has stated that the placement of all of these historic figures together on the frieze "signals respect not for great proselytizers but for great lawgivers." 492 U.S. at 652-53. In the context in which it is presented, the display is "a fitting message" for a courtroom. *Id.* at 653. Rather than recognizing the "secular significance" of the Ten Commandments (Doc. 72 at 12), *County of Allegheny* points out the importance of examining religious symbols and displays in the context in which they are presented.

unconstitutional." 449 U.S. at 39, 101 S. Ct. at 193. The High Court rejected the articulated secular purpose, finding:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6- 15.

449 U.S. at 41-42.

Likewise, the display of the Ten Commandments in the instant case is undeniably religious. The Adams County Ministerial Association defendants have acknowledged the obvious religious nature of the Ten Commandments. (Claiborne Depo. at 19: the message of the Ten Commandments must "be viewed in the context of urging respect for God;" Claiborne Depo. at 30: the Ten Commandments encourage a belief in a divine or supernatural power; Stephens Depo. at 57: Ten Commandments must be viewed as a whole in context and should not be presented in such a way "that they are completely devoid of religious content or meaning or message;" Johnson Depo. at 122: the Ten Commandments make a religious statement; Ferguson Depo. at 49: the Ten Commandments "make a religious statement;" Ferguson Depo. at 50-51: "Q. Well, part of the power and the force of the Ten Commandments is the fact that

they're uttered in the context of religious belief in God, correct? A. There is a transcendence that's implied there, yes, that go beyond human origin." Ferguson Depo. at 66: the Ten Commandments promulgates an objective moral order, the source of which is a supreme being; Ferguson Depo. at 106: Ten Commandments expresses a relationship between people and God.). The display of the Ten Commandments, in the absence of any explanation of a secular reason for the display, leads to the indisputable conclusion that the purpose of the display was to promote religious ideals and not any secular beliefs. Therefore, the stand-alone monument of the Ten Commandments violated the purpose prong of the *Lemon* test and thus the First Amendment.

The question then becomes whether the Board's actions in altering the display to include the four other stone monuments is sufficient to support their avowed secular purpose of educating Adams County students about the foundations of American law, or whether the additions were merely a pretense to circumvent this lawsuit and continue the display of the Ten Commandments on school property.

Defendants argue that the Court must defer to the Board's articulated secular purpose. They argue that plaintiffs have come forward with no evidence other than the statements of the intervening defendants to prove that the Foundations of American Law and Government display conveys a religious rather than a secular message. The Board argues that the statements of the Ministerial Association cannot be ascribed to the Board.

The intent and identity of the donor is relevant to discerning the purpose behind the Foundations display. *See Books*, 235 F.3d 292, 303-304. *See also American Civil Liberties Union of Tennessee v. Hamilton County, Tennessee*,

202 F. Supp.2d 757, 2002 W.L. 971791, *4 (E.D. Tenn. 2002)(statements by prime sponsor of Ten Commandments resolution relevant in discerning purpose). As indicated above, the Court may "not blindly accept an allegedly secular purpose which is contrary to the facts of the case." *McCreary County, KY*, 96 F. Supp.2d at 687. *See also Edwards*, 482 U.S. at 590; *Stone v. Graham*, 449 U.S. at 41. To ignore the statements of the Adams County Ministerial Association as the Board urges would require us to ignore the factual history and context in which the Foundations display and this dispute arose, something the Supreme Court and other courts have said is crucial to discerning the purpose prong of *Lemon*. *See Santa Fe*, 530 U.S. at 308-309; *Edwards*, 482 U.S. at 590; *Books*, 235 F.3d at 294.

In the present case, the views and the actions of the intervening defendants are relevant in discerning the purpose behind the Foundations of American Law and Government display. The Adams County Ministerial Association is an association of Christian ministers and pastors in Adams County. The Adams County Ministerial Association proposed, paid for, and provided the original stand-alone Ten Commandments display. The Adams County Ministerial Association also agreed to pay any costs of litigation involving the Ten Commandments monument. The successor organization to the Ministerial Association, "Adams County for the Ten Commandments," was organized and led by the intervenor defendants. (Johnson Depo. 26, 53). Adams County for the Ten Commandments paid for the new display and agreed to support the Board financially with any ensuing court battle. (Johnson Depo. at 146-148). In view of its intimate involvement in the creation and continuation of the displays, the Court cannot ignore the Adams County Ministerial Association and their predominant religious purpose in donating, erecting and defending the displays.

As indicated above, the Adams County Ministerial Association defendants have conceded that the Ten Commandments are indisputably religious in nature. (Claiborne Depo. at 19, 30; Stephens Depo. at 57; Johnson Depo. at 122; Ferguson Depo. at 49, 50-51, 66, 106). Intervening defendant Reverend Douglas W. Ferguson is a member of the Adams County Ministerial Association and on the steering committee of Adams County for the Ten Commandments, "an organization of citizens that felt like that they needed to come together to say that we believe in what the school board did in Adams County." (Johnson Depo. at 23; Ferguson Depo. at 28-29). Reverend Ferguson testified that it is his desire to have the Ten Commandments in their entirety become the moral and civil touchstone in the public schools. (Ferguson Depo. at 95). He testified that one of the purposes in erecting the Ten Commandments monument was as an example of "absolute moral standards and guidelines" given by God. (Ferguson Depo. at 111, 113). He testified he viewed the Ten Commandments as an educational tool that was backed up by "the word of God." (Ferguson depo. at 103-104). A consistent theme running through the deposition testimony of the Adams County Ministerial Association defendants is the value of repetition as a pedagogical tool. (See, e.g., Johnson Depo. at 37; Ferguson Depo. at 102-103). The Ten Commandments monuments, erected as permanent displays outside the school entrances, are viewed as valuable reminders of the moral values they seek to "inculcate" into students. (Ferguson Depo. at 103). Reverend Stephens testified that "the teaching of the Ten Commandments needs to be part of our school system." (Stephens Depo. at 65). He explained, "I mean that there is a God and that . . . is, you know--much of our society believes that there is a creator and that he has his laws to govern the world that he made." *Id.*

Significantly, the Adams County Ministerial Association defendants testified that the essential character of the Ten Commandments display did not change as a result of the addition of the four other monuments. (Ferguson Depo. at 130-131; Johnson Depo. at 158; Stephens Depo. at 36-37; Claiborne Depo. at 41-42). This evidence highlights the fact that the Ten Commandments is "a *religious code* that focuses not only on subjects that are beyond the ken of any government and that address directly the relationship of the individual human being and God." *Books*, 235 F.3d at 303 (emphasis added). The evidence shows that the purpose in continuing to display the Ten Commandments on public school grounds is to entreat students to "embrace the specific religious code of conduct taught in the Ten Commandments." *Id.*

Examining the history and context of the Foundations display is also critical in scrutinizing the Board's stated intent. *Santa Fe*, 530 U.S. at 308-309. In *Santa Fe,* the Supreme Court struck down a policy of student-initiated and student-led "invocations" at high school football games. Prior to 1995, a student elected "chaplain" delivered a prayer over the public address system before each football game. Suit was filed challenging the practice under the Establishment Clause. During the pendency of the lawsuit, the school district adopted a different policy authorizing student elections to determine whether "invocations" should be delivered at football games and, if so, to select a student to deliver them. The Supreme Court, in examining whether a secular purpose existed for the new policy, stated:

> Most striking to us is the evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation. This history indicates that the

> District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'

530 U.S. at 309.

The history and context of a religious display by public officials was also found to be important in *American Civil Liberties Union v. McCreary County*, 145 F. Supp.2d 845 (E.D. Ky. 2001). In that case, the court issued a supplemental injunction barring the display of the Ten Commandments in courthouses and schools by county officials. The display at issue originally consisted of only a framed copy of the Ten Commandments. Several other documents were later added to the display. Finding the amended displays lacked a secular purpose and had the effect of endorsing religion, the court ordered their removal from the courthouses and school system. The defendants again modified the display, posting several historical documents alongside the Ten Commandments. This display, entitled "The Foundations of American Law and Government Display," included the full text of the Magna Carta as enacted in 1215 A.D., the Declaration of Independence, the Bill of Rights of the Constitution of the United States, the Star Spangled Banner, the Ten Commandments with a Biblical citation, the Mayflower Compact of 1620, a picture of Lady Justice and an

explanation of its significance, the National Motto of the United States ("In God We Trust") emblem, the Preamble to the Kentucky Constitution, and an explanation of each of the documents' historical and legal significance. The stated purpose of the defendants in enacting this new display was to educate the citizens of McCreary and Pulaski Counties and the schoolchildren of Harlan County regarding the history of the nation's law and government. Despite this articulated purpose, the court evaluated the totality of the circumstances and held:

> In light of the history of the government's involvement in these displays, the defendants' purpose is clear. This purpose--posting the Ten Commandments--is improper and violative of the Establishment Clause "because it sends the ancillary message to . . . nonadherents '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.'"

McCreary, 145 F. Supp.2d at 850, quoting *Books*, 235 F.3d at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)(O'Connor, J., concurring)). *See also Edwards*, 482 U.S. at 590 (in view of historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution court need not be blind to legislature's preeminent religious purpose in forbidding teaching of evolution in public schools unless accompanied by instruction in creation science); *Stone v. Graham*, 449 U.S. at 41 ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)(statute "requiring the selection and reading at the

opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison," despite proffer of such secular purposes as the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature," held unconstitutional).

The history of the Foundations of American Law and Government display also reveals the primary purpose behind the display was religious, and not secular. *See Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Here, the Ten Commandments display started from a distinctly religious premise. As explained above, the stand alone Ten Commandments monument was religious in content and had no stated secular purpose. *Supra,* at pp. 15-18. Like the display of the Ten Commandments in *McCreary County, Ky.,* "It is significant that the first display[], containing only the Ten Commandments, [was] erected in violation of the Supreme Court's clear ruling in *Stone*." 145 F. Supp.2d at 849. The free-standing Ten Commandments monument remained in place for almost four years before the addition of the four other monuments. It is undisputed that the additional monuments were donated only after the initiation of this lawsuit challenging the original Ten Commandments display. The intervenor-defendants have testified at depositions that the purpose in constructing the new display was to defeat this litigation and to ensure that the Ten Commandments tablets could remain on their original site on school property. Reverend Johnson testified that these additional monuments were proposed as "the best way to win the case." Johnson Depo. at 145. *See Lynch* 465 U.S. at 687 (history of display showed original display contained only Ten Commandments and only in face of litigation did defendants attempt to flank Commandments with other documents). Adams County for the Ten Commandments paid for the additional monuments. The

record indicates that the original Ten Commandments tablets were neither disassembled nor removed from school grounds prior to the Board's adoption of the Foundations resolution and the construction of the new display. The new display was constructed around and incorporated into the original tablets, with the Ten Commandments tablets taking center stage. The history of the Foundations display demonstrates that a religious purpose--the display of the Ten Commandments--dominated the Board's stated secular purpose. *See Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). It is reasonable to infer from the history and evolution of the display that the specific purpose of the Board in erecting the Foundations display was to preserve a popular religious practice--the display of the Ten Commandments. *See Santa Fe*, 530 U.S. at 309.

The Board urges the Court to view the stated secular purpose in a vacuum, without reference to the history and context of the original display of the stand-alone Ten Commandments tablets and this litigation. To do so would be to ignore reality. The Board's Foundations of law display began from a distinctly religious premise. It is clear that the Board intended to convey a message of endorsement of religion by maintaining the Ten Commandments display throughout the nearly four years it remained as a stand-alone display in clear violation of the Supreme Court's decision in *Stone*. The secondary purpose, the education of Adams County students about the foundations of American law, only came about in response to litigation. That this secondary purpose could be achieved without resort to the inclusion of a highly religious document is additional evidence that the Board's stated purpose is illusory. *Coles*, 171 F.3d at 384. While the Supreme Court suggested in *Stone* that where the "Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an

appropriate study of history, civilization, ethics, [or] comparative religion" such a system would not run afoul of the constitution, this is not such a case. There is no integration of the Ten Commandments into the *curriculum* of the Adams County public schools. There is no serious attempt to present the monuments as a comprehensive lesson in history. The visual proximity of the explanatory footers reinforces the conclusion of a primarily religious purpose. The explanations carved into the footers are relatively undersized. The footers are placed at the base of each monument. To read, let alone comprehend any serious history lesson from the footers, one must walk over the grass and landscaping to hover above them. (Doc. 72, Exh. D; Doc. 78, Fifth Baker Aff. P3). *See, e.g., Kimbley v. Lawrence County*, 119 F. Supp.2d 856, 872 (S.D. Ind. 2000).

Defendants attempt to distinguish *Stone v. Graham* and the cases which rely on *Stone* by arguing that *Stone* predates the Supreme Court's "far more comprehensive treatment of religious displays on public property . . .," citing to *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995), *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1980). Those cases, however, did not involve religious displays on school property. *See Lynch* (nativity scene in Christmas display in park in city shopping district); *Pinette* (Ku Klux Klan cross in public plaza next to state capitol); *City of Allegheny* (creche in a county courthouse and Chanukah menorah outside city and county building). In fact, the Supreme Court in *City of Allegheny* noted it would be faced with a much different case if the displays arose in a school setting: "This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it

may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. *Cf. Edwards v. Aguillard*, 482 U.S., at 583-584, 107 S. Ct., at 2577 (Establishment Clause must be applied with special sensitivity in the public-school context)." *City of Allegheny*, 492 U.S. at 620 n. 69.

It is clear that the addition of the four other monuments to the original Ten Commandments monument is a calculated attempt to continue an unconstitutional action under the guise of the secular purpose of educating students on the foundations of American law. In view of the history and context of the Foundations of American Law and Government display and the views expressed by the Adams County Ministers Association, the Court finds the Foundations display violates the purpose prong of the *Lemon* test and therefore the Establishment Clause of the First Amendment.

2. Effect

Even if the Court were to accept the stated secular purpose behind the Foundations display, we find that the display has the primary or principal effect of advancing religion. The endorsement test requires us to ask whether reasonable observers would think that the Adams County School Board is endorsing religion by its Foundations display. *Capitol Square Review*, 243 F.3d at 302; *Granzeier*, 173 F.3d at 574. The "reasonable observer" is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review*, 243 F.3d at 302, quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring). *See also Santa Fe*

Independent School Dist., 530 U.S. at 308; *Books*, 235 F.3d at 306.

In *American Civil Liberties Union v. McCreary County*, 145 F. Supp.2d 845 (E.D. Ky. 2001), the court examined the "totality of the circumstances surrounding the display" in determining whether the display, the Ten Commandments surrounded by historical documents such as the Magna Carta, the Declaration of Independence, the Bill of Rights of the United States Constitution, and the Star Spangled Banner, among others, had the primary effect of advancing religion. The court looked to the "reasonable observer" who "is 'familiar with the history and placement' of the display, rather than one who sees it with no prior knowledge." *Id.* at 851, quoting *Books*, 235 F.3d at 306. The court held that "the composition, setting, and history of the current displays would lead a reasonable observer to interpret them as the county governments' endorsement of religion." The court stated:

> The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

145 F. Supp.2d at 851, footnotes omitted.

In the instant case, the "reasonable observer" is deemed to be aware of the following history behind the Foundations display: A stand-alone Ten Commandments display was originally donated by the Adams County Ministerial Association in 1997 for permanent placement outside the entrances of four Adams County high schools. The Board accepted the donation and endorsed the erection of the Ten Commandments display without articulating any secular purpose behind the display. The Ten Commandments display stood outside schoolhouse doors for nearly four years before the addition of four other monuments, which included excerpts from the Preamble to the United States Constitution, the Declaration of Independence, the Magna Carta, and the Justinian Code. The additional monuments were co-equal in size and shape and surrounded the original Ten Commandment display. Adams County for the Ten Commandments, the successor organization to the Adams County Ministerial Association, paid for the additional monuments. The resolution proposing the additional four monuments was made only after this lawsuit was initiated. Deposition testimony indicates that the proposal for the Foundations display was viewed as "the best way to win the case." Johnson Depo. at 145. Finally, Adams County for the Ten Commandments agreed to defend the Board in any litigation that might arise from the posting of the Ten Commandments.

A reasonable observer, imbued with the foregoing history of the Foundations display, would perceive State endorsement of religion in this case. Like the reasonable observer in *McCreary,* the reasonable observer here would know of the defendants' previous attempts to post the Ten Commandments

alone and the ensuing controversy surrounding the current display, which has concentrated on only one of the five monuments: the Ten Commandments. "The defendants' non-secular purpose would be known to such a viewer and would increase the displays' religious effect by conveying the message that the [school board] had succeeded not in posting a display of 'The Foundations of American Law and Government,' but in posting the Ten Commandments." 145 F. Supp.2d at 852. In addition, the visual presentation of the Ten Commandments conveys a message that "a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593. The stone monument is a permanent fixture on the grounds of a public school. It is located at the entrance to the school building. Its distinctive "tablet" shape and placement at the center of the four other documents sends a message of endorsement of the Ten Commandments by the School Board. The reasonable observer would understand the Foundation display, in view of its history and context, communicates the message that the Adams County School Board endorses religion. The Foundations display thus has the effect of advancing religion and fails the second prong of the *Lemon* test.

3. <u>Entanglement</u>

Finally, there is evidence of impermissible governmental entanglement with religion in this case. "To assess entanglement, [courts] have looked to 'the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 232-33, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), quoting *Lemon*, 403

U.S. at 615). Here, the Board received the donation of the original Ten Commandments from a religious organization, the Adams County Ministerial Association. The Adams County Ministerial Association agreed to maintain the monument and "fight" any litigation arising from the Ten Commandments display. Board members relied on this guarantee to pay for costs of litigation surrounding the monuments in assenting to the display on school property. After litigation ensued, the successor organization to the Adams County Ministerial Association paid for the additional four monuments and agreed to continue funding the litigation. These factors, taken together, show sufficient entanglement under the *Lemon* test.

The Cases Cited by Defendants do Not Compel a Different Result.

The defendants rely primarily on four cases in support of their position on the constitutionality of the Foundations of American Law and Government display. The first, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879, 94 S. Ct. 50, 38 L. Ed. 2d 124 (1973), was decided before the Supreme Court's decision in *Stone v. Graham* and its continuing validity has been questioned by the Tenth Circuit itself. *See Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997)("Although we recognized the religious nature of the Ten Commandments, we also noted its 'substantial secular attributes' as a precedent legal code and concluded that the 'monolith is primarily secular, and not religious in character; that neither its purpose nor effect tends to establish religious belief . . . .' Since *Anderson* was decided, however, more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in

nature."). Therefore, this Court finds *Anderson* to be of dubious value in evaluating this case.

In *Suhre v. Haywood County, North Carolina*, 55 F. Supp.2d 384 (W.D. N.C. 1999), also relied on by the Board, the court of appeals upheld the display of a Ten Commandments plaque containing an abridged version of the Ten Commandments on a county courtroom wall, finding the county clearly had the secular purpose of honoring and respecting the development of the judicial system when the display was erected. The display of the Ten Commandment plaque was part of a larger display dominated by a statue of Lady Justice and which contained other secular objects including the sword of justice and scales of justice flanked by the American and North Carolina flags. In upholding the display, the Court considered the historical context in which the display was erected. At the dedication of the new county courthouse in 1932, "great effort was taken to recount the historical development of law, including the ancient mythical gods and goddesses, and the laws of Rome and the Tribes of Israel." 55 F. Supp.2d at 385. The court reviewed the remarks presented at the dedication ceremony and found they "clearly establish that the historical component of the plaques within the display was to honor and respect the development of the judicial system." *Id.* at 394. Also relevant to the historical context was the fact that in 1972 the courthouse, including the display, was entered on the National Register of Historic Places by the United States Department of Interior recognizing the property to be "significant in American history, architecture, archaeology and culture--a comprehensive index of the significant physical evidences of our national patrimony." *Id.* at 388. The court also considered the size of the Ten Commandments display in relation to rest of the display:

> For the past 67 years, the 6 foot, 6 inch sculptured form of Lady Justice has welcomed all who came into the main courtroom of the Haywood County Courthouse, holding her Scales of Justice in one hand and her 3-foot-long Sword of Justice in the other . . . On either side of her are marble plaques measuring 1 foot, 8 inches wide by 2 feet, 7 inches high, and on which are contained the Decalogue, commonly referred to as the Ten Commandments, in lettering which is 1 inch high.

Id. at 386. The court noted that in the 68-foot-wide courtroom, the total display consumed 22 feet and of that, one and one half feet displayed the abridged version of the Ten Commandments in one inch lettering. Relevant to the court was the fact "that the plaques are the smallest part of the display which is overwhelmingly dominated by Lady Justice and which contains other secular objects such as the sword of justice and the scales of justice flanked by the American and North Carolina flags," signifying respect not for religion but for the law. *Id.* at 395-96. The "reasonable observer," who is deemed "aware of the history and context of the community and forum in which the religious display appears," would understand the overall message of the display to be equal justice under the law. *Id.* at 396, 397. Finally, the court noted that there was no excessive entanglement with religion because, among other things, "the display was not erected and is not maintained by any religious organization. No religious faith, denomination or organization is affiliated with or identified as a sponsor of the display." *Id.* at 398.

Unlike *Suhre,* the setting of the present display is on school property, and not a historically significant county courthouse. Unlike *Suhre,* the enactment of the Ten

Commandment display in 1997 was for religious purposes, and not for the secular purpose of honoring and respecting the development of the judicial system. Only after this lawsuit was brought did the display change its character to include the four other historical documents. These four monuments mimic the shape universally recognized as the stone tablets handed down by God to Moses and surround the original Ten Commandments. The so-called secular monuments do not "overwhelmingly" dominate the centered Ten Commandments monument. Significantly, unlike *Suhre,* the original and modified display here were purchased, erected and maintained by a religious group, who view the Ten Commandments as "absolute moral standards and guidelines" given by God. (Ferguson Depo. at 111, 113). Rather than support defendants' position, *Suhre* points out the vast differences in the historical and aesthetic context of the Foundations of American Law and Government display in this case.

The third case cited by defendants, *State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1018 (Colo. 1995), *cert. denied*, 516 U.S. 1111, 116 S. Ct. 909, 133 L. Ed. 2d 841 (1996), is likewise distinguishable from the instant case. In *Freedom From Religion Foundation,* the Colorado Supreme Court held that a Ten Commandments monument in a public park near the capitol did not violate the *Establishment Clause*. The monument was donated by a fraternal group as part of a National Youth Guidance Program to demonstrate codes of conduct. The monument included symbols of Judaism and Christianity, and contained an "all-seeing eye." It was one of the smallest and least conspicuous memorials in a one square city block park and stood with a taller statue honoring an Hispanic Congressional Medal of Honor recipient, Veterans and Civil War Memorials, a Pearl Harbor memorial, a grove of trees honoring the memory of

the Challenger Astronauts who perished in a shuttle disaster, and a statue of a Native American and buffalo, among others. The court held "that the monument's content and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion." *Id.* at 1019. The Court found that the "preeminent purpose of erecting the monument was not plainly religious in nature--rather, the monument represents the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal significance." *Id.* at 1026. Significantly, the Colorado Supreme Court took pains to distinguish the case before it with school religion cases which "require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, especially susceptible to influence." *Id.* at 1023. The court stated, "It has been where the display or publication of the Ten Commandments concerns public schools--where young and impressionable minds are in need of greater protection--the courts have been less tolerant of the potential to inappropriately persuade or coerce students by religious views." *Id.* at 1022.

Unlike *Freedom From Religion Foundation,* the instant case involves a permanent display at the entrance of school buildings, requiring "a more stringent analysis." 898 P.2d at 1023. In addition, the monuments in the instant case were donated by a religious, and not fraternal organization, whose donative intent was primarily religious. *Id.* at 1024. Also, the Ten Commandments monument in the Colorado case was one of numerous more prominent monuments in a public park, unlike the instant Ten Commandments which is centered between four monuments of co-equal size and shape outside

school entrances. *Freedom From Religion Foundation* does not persuade us that the Foundations display sufficiently neutralized the undeniably religious message of the Ten Commandments, especially in view of its permanent placement outside the schoolhouse doors.

Defendants also cite to *Books v. City of Elkhart, Indiana,* No. 3:98cv0230 AS (N.D. Ind. March 4, 2002), on remand from the Seventh Circuit in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001). On remand, the court adopted a stipulation presented by the parties stating it "represents a proper balance concerning all of the constitutional values that are involved in this case . . . ." (Doc. 91, attachment). The parties agreed to erect a new display in front of the Elkhart Municipal Building. The new display, called "The Cornerstones of Law and Liberty" includes monuments containing excerpts from the texts of the Bill of Rights, the Preamble to the United States Constitution, the Declaration of Independence, and the Magna Carta. In front of the display will be an explanatory sign which will briefly explain the historical significance of each text.

Books is distinguishable in that the display does not appear on school grounds. As the dissent in the Seventh Circuit decision in *Books* points out, "context is critical." *Books*, 235 F.3d at 322 (Manion, J., concurring in part and dissenting in part). "While *Stone* speaks for the school setting--where student attendance is compulsory, and pupils are particularly susceptible to influence--it does not answer the question in the context of an open courtyard where citizens may divert their eyes, if confronted by a discomforting reference to God, to one of the other secular monuments forming the larger historical display." *Id.*

Therefore, the cases cited by defendants do not compel a different result in this matter.

CONCLUSION

The Establishment Clause of the First Amendment prohibits the promotion or advancement of religion by government. Because the Adams County/Ohio Valley School Board has accomplished that by their display of the Ten Commandments on public school property, their actions violate the First Amendment and the Ten Commandments must be removed from school property. This is not to say that the Ten Commandments may not be displayed in every church, synagogue, mosque, home, storefront, yard, or business in Adams County, for surely they may. Posting the Ten Commandments on private property, where the residents of Adams County may read and observe the precepts of the Ten Commandments if they so choose, satisfies the best interests of both government and religion. The Establishment Clause recognizes:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form

> of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.

Engel v. Vitale, 370 U.S. 421, 431-32, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)(footnotes omitted). In this case, the Adams County/Ohio Valley School Board symbolically set the "government's seal of approval on one religious view--the Christian view," *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987), by erecting the Ten Commandments on public school grounds. As this Court noted from the outset, courts must be particularly scrupulous in Establishment Clause challenges involving the posting of religious messages where young and impressionable children attend school. The permanent posting of the Ten Commandments at the school house door, while undoubtedly popular with numerous Adams County residents, sends the message to the minority "'that they are outsiders, not full members of the political community . . . .'" *Books*, 235 F.3d at 309-10, quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 *(1984)*(O'Connor, J., concurring).

For these reasons, this Court finds the display of the Ten Commandments on public school property, whether alone or as part of the Foundations of American Law and Government display, violates the Establishment Clause of the First

Amendment of the United States Constitution and must be enjoined.

IT IS THEREFORE ORDERED THAT:

1. The motion of plaintiffs Berry Baker and Anonymous Plaintiff Number One for summary judgment as to all claims asserted in the Third-amended and Supplemental Complaint (Doc. 71) be GRANTED.

2. The motion for summary judgment by defendant Adams County/Ohio Valley School Board (Doc. 72) and the summary judgment motion by intervenor-defendants Kenneth Johnson, Thomas D. Claiborne, Ronald D. Stephens, and Douglas W. Ferguson (Doc. 77) be DENIED.

3. The Court DECLARES that the display on public school property of the Ten Commandments, whether alone or as part of the Foundations of American Law and Government display, violates the Establishment Clause of the First Amendment of the United States Constitution and Article 1, § 7 of the Ohio Constitution.

3. Defendant Adams County/Ohio Valley School Board is ORDERED to remove the Ten Commandments display from each Adams County high school.

4. Plaintiffs' request for a court order prohibiting the Adams County/Ohio Valley School Board from continuing to establish or maintain policies, practices, or customs which encourage the erection of these, or any other religious symbols on school property is DENIED as overly broad.

5. Plaintiffs' request for an order designating plaintiffs and any other witnesses as entitled to witness protection under federal law is DENIED, except to the extent provided in the Court's Protective Order of May 24, 2000 (Doc. 47), as plaintiffs have failed to establish that further relief is warranted in this matter.

Date: June 6, 2002

Timothy S. Hogan

United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99094
MAGISTRATE JUDGE HOGAN

BERRY BAKER and	)
ANONYMOUS PLAINTIFF,	)
NO. 1	)
Plaintiffs,	)
	)
v.	)
	)
ADAMS COUNTY/OHIO VALLEY	)
SCHOOL BOARD	)
Defendant.	)
	)

DECLARATION OF DIANE LEWIS

AND NOW COMES Diane Lewis and declares as follows:

1. My name is Diane Lewis. I am Vice President of the Adams County/Ohio Valley School Board ("Board"), the Defendant in this action.

2. I am a resident of Adams County, Ohio and the United States of America.

3. I am over eighteen years of age.

4. I have personal knowledge of the facts in this affidavit.

5. In 1997, the Adams County Ministerial Association donated four monuments each containing a copy of the Ten Commandments, an American Flag, and an American Eagle to the Adams County/Ohio Valley School District.

6. Pursuant to the Board's "Policy Regarding Placement of Structures and Objects in Designated Area in Front of Adams County High School" (a true and correct copy of which is attached hereto as EXHIBIT A) these monuments, along with a time capsule, were placed in front of the four new high schools in Adams County, Ohio.

7. On May 16, 2000 the Board passed a Resolution rescinding its "Policy Regarding Placement of Structures and Objects in Designated Area in Front of Adams County High Schools" (a true and correct copy of which is attached hereto as EXHIBIT B).

8. Pursuant to its May 16, 2000, "Resolution to Construct *Foundations of American Law and Government* Display" (a true and correct copy of which is attached hereto as Exhibit C), the Board created a new, educational display to inform Adams County High School students about some of the essential documents that the Board believes form the foundation of American law and government.

9. The Board believes it has the authority to create educational displays to further the knowledge and education of Adams County students.

10. The display is entitled *Foundations of American Law and Government*.

11. The display consists of passages taken from five documents that the Board believes are essential to the foundations of this country's legal and governmental systems: (1) the Preamble to the United States Constitution; (2) the Declaration of Independence, (3) the Magna Carta; (4) the Justinian Code; and (5)the Ten Commandments.

12. Each document is inscribed in stones coequal in size, shape, color, and substance. The stones are positioned in a semi-circle and connected together to form a semi-circular wall. Photographs of the display are attached hereto as Exhibit D.

13. Attached hereto is a true and correct copy of the current content of the *Foundations of American Law and Government* display, including the substance of each inscribed document and the commentary regarding the document's importance to the foundations of American law and government. Exhibit E.

14. The commentaries are inscribed on stone markers and are positioned directly in front of each document.

15. The commentary will serve further to educate Adams County high school students regarding the important relevance of these documents to the foundations of American law and government.

16. No school district funds, or similar public funds, were used in the purchase or acquiring of the four *Foundations of American Law and Government* displays.

17. No school district funds, or similar public funds, are used, or will be used, to preserve or maintain the four *Foundations of American Law and Government* displays.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 19th of May, 2001, in Winchester, Ohio:

/s/
Diane Lewis

State of Ohio, County of Adams ss:
On May 19, 2001 Diane Lewis signed this document before me.

/s/
Kathy Willman
Notary Public
My Commission Expires 03/02/2003

EXHIBIT A

POLICY REGARDING PLACEMENT OF STRUCTURES AND OBJECTS IN DESIGNATED AREA IN FRONT OF ADAMS COUNTY HIGH SCHOOLS

At each high school in Adams County a flag pole is located in a small area in front of the schools. The small parcels of land on which these flag poles are located may be used with permission from the Adams County School Board ("Board"), only by citizens of Adams County with prior permission of the Board, to erect, place, construct, or otherwise locate on that property statues, monuments, or other structures or objects, so long as such statues, objects, *etc.*, symbolize or reflect one or more aspects of our local and/or national history, heritage, or traditions, and are not inconsistent with the educational goals of the School District.

No structure or object placed upon the property shall detract from the aesthetic quality of the high school building, nor shall it unreasonably obstruct or obscure from view any object or structure already on the property, nor shall it unreasonably interfere with the view from the windows located immediately behind and adjacent to the property.

If the Adams County School Board believes a proposed object or structure may reasonably be considered to be religious in nature but otherwise satisfies the requirement set forth above, the Board shall require, on the structure itself, or by separate plaque placed next to the structure, in letters easily legible from at least 10 feet, the following inscription:

> This [monument, structure, etc.] was not constructed with, nor is it maintained by, public funds, and it does not constitute an endorsement by the Adams County School District of any religion or religious belief.

The cost shall be borne solely by the donating individual or group.

Permission to utilize the property described above shall be granted by the Adams County School Board if all the foregoing conditions are satisfied. Erection and maintenance of all structures on the property shall be at the sole expense of the sponsoring individual or group. Any object or structure that is placed upon the property but is not property maintained, shall, upon request by the Board, be removed from the school property at the expense of the sponsoring individual or group.

EXHIBIT B

RESOLUTION TO RESCIND "POLICY REGARDING PLACEMENT OF STRUCTURES AND OBJECTS IN DESIGNATED AREA IN FRONT OF ADAMS COUNTY HIGH SCHOOLS"

BE IT RESOLVED:

1. That the Adams County/Ohio Valley School Board has rescinded its "POLICY REGARDING PLACEMENT OF STRUCTURES AND OBJECTS IN DESIGNATED AREA IN FRONT OF ADAMS COUNTY HIGH SCHOOLS."

ADOPTED 5/16/00

ADAMS COUNTY/OHIO VALLEY SCHOOL DISTRICT

EXHIBIT C

RESOLUTION TO CONSTRUCT *FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT* DISPLAY

BE IT RESOLVED:

1. That the Adams County/Ohio Valley School Board has decided to create an educational display to inform Adams County high school students about some of the essential documents that the Board believes form the foundation of American law and government.

2. The Board believes it has the authority to create educational displays to further the knowledge and education of Adams County students.

3. The display will be entitled Foundations of American Law and Government.

4. It will consist of passages taken from five documents that the Board believes are essential to the foundations of this country's legal and governmental systems: (1) Preamble to the United States Constitution; (2) Declaration of Independence; (3) Magna Carta; (4) Justinian Code; and (5) Ten Commandments.

5. Each document will be inscribed in stones coequal in size, shape, color, and substance. The stones will be positioned in a semi-circle and connected together to form a semi-circular wall.

6. Attached hereto is a true and correct copy of the current content of the *Foundations of American Law and*

Government display, including the substance of each document to be inscribed and commentary regarding the document's importance to the foundations of American law and government.

7. The commentary will be inscribed on stone markers which will be positioned directly in front of each document.

8. This commentary will serve further to educate Adams County high school students regarding these documents' importance to the foundations of American law and government.

ADOPTED 5/16/00

ADAMS COUNTY/OHIO VALLEY SCHOOL DISTRICT

EXHIBIT D

Colored Photos

EXHIBIT E

- **Preamble to the United States Constitution**

  We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

- **Declaration of Independence**

  We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

- **Magna Carta**

  No freeman shall be taken or imprisoned or disseised or exiled or in anyway destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

  Moreover, all these aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us toward our men, Shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them toward their men.

- **Justinian Code**

  Now natural laws which are followed by all nations alike, deriving from divine providence, remain always constant and immutable: but those which each state establishes for itself are liable to frequent change whether by tacit consent of the people or by subsequent legislation.

  It remains to consider the duty of a judge. And, in the first place, the judge must ensure that he does not judge contrary to statutes, constitutions and customs.

- **Ten Commandments**

  Thou shalt have no other gods before me
  Thou shalt not worship any graven image
  Thou shalt not take God's name in vain
  Remember the Sabbath to keep it holy
  Honor thy father and thy mother
  Thou shalt not kill
  Thou shalt not commit adultery
  Thou shalt not steal
  Thou shalt not bear false witness
  Thou shalt not covet

PREAMBLE TO THE UNITED STATES CONSTITUTION

The Preamble to the United States Constitution clearly states the goals for which the Constitution was established. These great social concepts are the foundation of American society; without them, democracy cannot exist. The Constitution sought to provide a framework for ordered domestic peace, which would allow Justice and Liberty to flourish. The solution that provided for the co-existence of these ideals was a strong government of divided powers able to protect the rule of law and the Bill of Rights, the first ten amendments added to the Constitution as a check upon the exercise of national government power. Hence, a constitutional republic, a society in which government is based upon a written constitution and to which both the governed and the government itself are subject, was formed.

DECLARATION OF INDEPENDENCE

By signing the Declaration of Independence, the American patriots broke free from the tyranny of England and declared independence for the American colonies. The Declaration is what makes the founding of the United States of America unique. It is, as President Abraham Lincoln proposed, the "frame" into which the "Framers" placed the Constitution. The Declaration's fundamental premise is that one's right to "Life, Liberty, and the pursuit of Happiness" is not a gift of government. Government is not a giver of rights, but a protector of God-given rights. Moreover, government is a creation of the "governed" and derives all its power from the consent of its people. As the Preamble of the Constitution states, "We the People" *are* the government.

MAGNA CARTA

In 1215, King John of England consented to the demands of his barons and agreed for the Magna Carta to be read publicly throughout the land. By this act, he bound himself and "his heirs, forever" to grant to the people of his kingdom the rights pronounced in the Magna Carta, bringing himself and England's future rulers within the rule of law. The rule of law places a restraint on the exercise of arbitrary government power and places all people and civil government under law. The American patriots, therefore, waged war against England to preserve liberties originating in 13th century England. A distinction, however, is noted between the Magna Carta and the American concept of liberty. While the Magna Carta is a guarantee from a king that he will follow the law, the Constitution of the United States is the establishment of a government consisting of and created for, "We the People."

JUSTINIAN CODE

In 527 A.D., Emperor Justinian began his rule over the Eastern Roman Empire. At that time, the law of the Eastern Empire spanned thirteen hundred years and contained countless repetitious and contradictory statutes. Justinian commissioned the lawyer Tribonian to systemize this mass of unworkable legal rules. Tribonian organized the law by subject matter; important rules were placed first and the law was stated clearly. He removed contradictory or repetitious material. The result was the Justinian Code, which provided the foundation of civil law for many continental European countries. This work greatly impacted future Western legal systems. It established the importance of developing a set of laws uniformly applied to all people. It exemplified how a legal code should clearly organize and state important rules of law so laymen know the laws exist and can find and understand them.

THE TEN COMMANDMENTS

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence. This understanding of right as God-given is rooted in the tradition of thought known as ethical monotheism. This is the belief—shared by Muslims, Jews, Christians, and others— in a Divine lawgiver who imposes upon earthly rulers a duty to recognize and respect each person's basic human rights and equal dignity. The Ten Commandments express the fundamental tenets of ethical monotheism. The Commandments remind us of our obligation to one another and to the Creator. They remind us that we owe one another respect. The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT
WESTERN DIVISION

Case No. C-1-99 094
(Magistrate Judge Hogan)

BERRY BAKER, et al.	)
Plaintiffs,	)
	)
vs.	)
	)
ADAMS COUNTY/OHIO VALLEY	)
SCHOOL BOARD, et al.	)
Defendants.	)
	)

FIFTH AFFIDAVIT OF BARRY BAKER

Berry Baker, being duly cautioned and sworn, hereby deposes and says:

1. There are numerous events held at the Adams County High Schools that I attend. For example, during this past holiday season, I attended a Christmas Concert at Peebles High School and saw the new 5-tablet display. In addition, as I drive into and out of Peebles, Ohio on the main road going into the city, I cannot help but notice the new five-tablet display. The Christmas concert mentioned above is one of

several events held at the high school open to the public. Other such events include sporting events, plays and musicals, one meeting of the Adams County Board of Education. I have attended the following events at the Peebles High School since the Ten Commandments monuments were erected in 1997: basketball games and other Christmas musical concerts. I plan to attend others in the future. Each time one attends one of these events the former and new displays at Peebles High School are very noticeable, especially with the distinct tablet shape of the monument or monuments.

2. The new display is even more visible from the road and the repetition of the traditional tablet shape of the Ten Commandments in five tablets, reemphasizes to me that the Ten Commandments standing alone was the original display and still the focal point of it. This gives offense to me because of the endorsement by the public school system of the religious message of the Ten Commandments. In addition, it gives me a sense of not being a full member of the Adams County political community because it states ideas and beliefs, both civic and religious, which I do not share.

3. The extreme right and extreme left explanatory plaques accompanying the new, five-monument display can be read from the sidewalk. The other three plaques are noticeable from the sidewalk, but cannot be read unless you walk off the sidewalk into the middle of the display to read them. When there is a moderate snowfall on the ground, the plaques may not be noticeable at all. So the casual passer-by may never notice let alone read and consider the explanatory tablets. One would have to make a special effort to read them. The plaques are not noticeable at all when one sees the monument from a distance or uses the rear entrance of Pebbles High School to attend sporting events.

Further affiant sayeth naught.

/s/_____
Berry Baker

STATE OF OHIO)
) SS:
COUNTY OF CLERMONT)

On the 28th day of June, 2001, Berry Baker appeared before me, a Notary Public in and for said County and State, and being first duly cautioned and sworn, acknowledged his signature above.

/s/_____
Notary Public

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT
WESTERN DIVISION

Case No. C-1-99 094
(Magistrate Judge Hogan)

BERRY BAKER, et al.	)
Plaintiffs,	)
	)
vs.	)
	)
ADAMS COUNTY/OHIO VALLEY	)
SCHOOL BOARD, et al.	)
Defendants.	)
	)

AFFIDAVIT OF
ANONYMOUS PLAINTIFF

I, Anonymous Plaintiff, being duly cautioned and sworn, hereby deposes and says:

1. I have lived in Adams County continuously since May, 1988.

2. From 1997 through June of this year, at least one of my two children have attended one of the public high schools of Adams County.

3. From 1997 through June of 2001 I have been on the premises of this high school on numerous occasions such as, dropping off or picking up my children for school and/or extracurricular events, parent-teacher conferences, or other of the many events held at the high school that are open to the public. On every one of these occasions, I could not help but see the monument and/or the current five monuments display. I have read the contents of the Ten Commandments monument on numerous occasions.

4. It is impossible to use the high school facility without at least seeing the monument or monuments and taking note of their distinctive tablet shape, even if one cannot read the actual wording of the monuments.

5. In the future I will continue to see the ten commandments display as I will continue to drive by high schools such as Peebles where the monuments are visible from the road and I attend the many community events, such as Christmas shows, theatrical events, and sporting events that are held at local high schools.

6. I take offense to seeing both the single monument and the five tablet display posted at the Adams County High Schools because it is a blatant display of lack of respect for our tennant of separation of church and state that I feel is so important in our free country. It is a display of Christian dogma that discounts other citizen's beliefs thereby alienating the rest of the community. Also, it is a poor example to our youth of intolerance of all society's beliefs as well as disregarding the law. Seeing these monuments gives me a personal sense of alienation and feeling like an outsider in my own community.

7. The issue of posting the Ten Commandments monuments has been highly controversial in Adams Country both before and after the filing of this lawsuit. Based on the welter of negative comments that I have heard and/or read about Berry Baker and the ACLU, I wish to remain anonymous, both for my own sake and for fear of retribution or harassment that my children may have suffered while enrolled at the high school. That is why I wish to remain anonymous as to identity, address, gender, gender of my children and the precise high school, which they attended.

Further affiant sayeth naught.

/s/_____
Anonymous Plaintiff

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

On the 27th day of June, 2001, Anonymous Plaintiff appeared before me, a Notary Public in and for said County and State, and being first duly cautioned and sworn, acknowledged his signature above.

/s/_____
Notary Public

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-94
(Hogan, M.J.)

[Filed May 11, 2000]

Berry Baker,
Plaintiff,

vs.

Adams County/Ohio Valley School Board,
Defendant.

ORDER

The parties have consented to entry of final judgment by the undersigned United States Magistrate Judge. (Doc. 8). This matter came before the Court on a motion to intervene as defendants by Kenneth Johnson, Thomas D. Claiborne, Ronald D. Stephens, and Douglas W. Ferguson (Doc. 6). On June 3, 1999, the Court denied the motion to intervene. (Doc. 18). Not long after this Court's Order denying intervention, the Sixth Circuit Court of Appeals issued a decision in *Grutter v. Bollinger,* 188 F.3d 394 (6th Cir. 1999), effectively

overruling the District Court decision in *Gratz v. Bollinger,* 183 F.R.D. 209, 212 (E.D. Mich. 1998), upon which this Court had relied. Consequently, on September 1, 1999, the Court conducted a telephonic status conference at which time it informed the parties and counsel for the proposed intervenors of the decision in *Bollinger,* and granted the parties leave to file a motion to reconsider the Court's prior order on intervention in light of the recent appellate decision. On September 30, 1999, the proposed intervenors filed a motion to reconsider. (Doc. 30). This matter is currently before the Court on the motion to intervene and plaintiff's memorandum in opposition to intervention. (Docs. 30, 31).

The background facts of this case are adequately set forth in the Court's June 3, 1999 Order and need not be repeated here. The Intervenors seek leave to intervene as of right pursuant to Rule 24(a), or in the alternative, for permissive intervention under Rule 24(b). As the Court noted in its previous order, the purpose of intervention under Rule 24 is to prevent a multiplicity of lawsuits where common questions of law or fact are involved. *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997). Therefore, Rule 24 is to be construed liberally, with all doubts resolved in favor of permitting intervention, so as to secure the just, speedy, and inexpensive determination of the action. *Id. The* question before the Court is whether proposed intervenors Johnson, Claiborne, Ferguson, and Stephens can establish the existence of a substantial legal interest in the case at bar, or a risk of impairment to that interest if they are denied leave to intervene. To be granted intervention as of right, the intervenors must also demonstrate that the parties in this case would not adequately represent their interests.

A. Substantial Legal Interest

The proposed intervenors bear the burden of establishing that they have a substantial legal interest in the subject matter of the litigation they seek to enter. *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990). The Sixth Circuit has adopted a fairly expansive view of what interest is sufficient to support intervention as of right. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)(in context of intervention analysis, "interest" to be construed liberally). Thus, an intervenor need not have the same standing necessary to initiate a lawsuit. *Purnell v. City of Akron,* 925 F.2d 941, 948 (6th Cir. 1991). Nor does Fed. R. Civ. P. 24(a)(2) require the intervenor to demonstrate a specific legal or equitable interest. *Miller*, 103 F.3d at 1245. *See also Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1990)(Chabad demonstrated sufficient interest in menorah it proposed to temporarily display on public plaza as property owner has an interest in the disposition of his property during a specific time span). Rather the inquiry into the substantiality of a claimed interest is fact specific. *Bollinger*, 188 F.3d at 398.

In the present case, the proposed intervenors are members of the ministerial association which paid for and sponsored placement of the Ten Commandment tablets in front of the Adams County high schools. They argue that the placement of the monuments on school property occurred as a consequence of the School Board's willingness to create a limited public forum, and that removal of the monuments implicates their free speech and freedom of religion rights under the First Amendment. Without addressing the merits of such an

argument, the Court finds that the intervenors have articulated a substantial legal interest which is as compelling as the legal interests identified in *Bollinger* and the eases cited therein. *See* 188 F.3d at 399. For these reasons, the Court finds that the intervenors have a substantial legal interest in the present case. To the extent that the facts of this case create a "close case" on the question of intervention, the Sixth Circuit has made clear that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Id.* (quoting Miller, 103 F.3d at 1247).

B. Impairment

To satisfy this element of the intervention test, the proposed intervenor's burden is minimal. A would-be intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied." *Bollinger*, 188 F.3d at 399; *Miller*, 103 F,3d at 1247. While the *Gratz* Court determined that because these was no substantial legal interest there could be no impairment, the Sixth Circuit reversed upon finding that a substantial legal interest existed in *Bollinger*. 188 F.3d at 400. While this case does not raise any time-sensitive issues, the intervenors have identified a substantial legal interest. Because the intervenor's interest in maintaining the monuments on Adams County school property as an expression of their rights to free speech and freedom of religion may be impinged by removal of the tablets, this Court finds that the intervenors have an impairment of their rights is possible.

C. Inadequate Representation

The proposed intervenor bears the burden of demonstrating that the current participants in a case do not

adequately represent his interests. *Miller*, 103 F.3d at 1247; *Jansen*, 904 F.2d at 342-43. However, this burden is minimal. *Bollinger*, 188 F.3d at 400. Th intervenors need not show that the representation will in fact be inadequate. Rather, "it may be enough to show that the existing party which purports to seek the same outcome will not make all the prospective intervenor's arguments." *Id.* (quoting *Miller*, 103 F.3d at 1247)(internal quotations omitted). In addition, the Sixth Circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved. *Id.* In the present case, it appears that the School Board may not raise the same arguments as the proposed intervenors with respect to whether the monuments were erected on a limited public forum or whether their removal violates the free speech and freedom of religion rights of Adams County residents in general or the ministers in particular. Accordingly, because the intervenors have articulated specific defenses that the County School Board may not present, they have established the possibility of inadequate representation. *Id.*

For all these reasons, the proposed intervenor's motion to reconsider will be granted and the proposed intervenors shall be permitted to intervene as of fight as parties defendant. Having determined that the intervenors may intervene as of right, the Court need not address their motion insofar as it seeks permissive intervention. The intervenors are directed to file a pleading responsive to plaintiff's second amended complaint within twenty (20) days of the filing date of the second amended complaint.[1] Following the intervenors' filing of responsive pleading, the Court shall conduct a status/scheduling conference with the parties.

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[1] By order issued this same date, the Court has granted plaintiff leave to file a second amended complaint.

IT IS THEREFORE ORDERED THAT:

The motion to reconsider the application to intervene is GRANTED. The intervenors may enter the case as of right as parties defendant and are directed to file a pleading responsive to plaintiff's second amended complaint within twenty (20) days of the filing date of the second amended complaint. Following the intervenors' filing of a responsive pleading, the Court shall conduct a status/scheduling conference with the parties.

Date: May 10, 2000

/s/
Timothy S. Hogan
United States Magistrate Judge

APPENDIX H

The Center for Phallic Worship 10 January, 1998
2655 Steam Furnace Road
Peebles, Ohio 45660-0736
Tel 937 974-0263

Adams County Ohio Valley School District
141 Lloyd Road
West Union, Ohio 45693

Attn: Albert A. Porter, Interim Superintendent

Dear Mr. Porter:

We wish to commend the Board of Education for its outstanding leadership in the community. While the four new high schools and the state of the art communications systems are noteworthy and commendable, it is the Board's leadership role in an apparent spiritual and cultural revival that we find the most commendable. It is this renaissance in spirituality that led us to open our center in Adams County.

As an integral part of the community, we wish to share with the community some of the symbols and philosophies of our belief system. Toward that end, we request of the Board permission to cause to be erected upon the campi of the four new high schools monuments that are reflective of our belief system. We also request that the space allocated to us of approximately the same area and no more than three meters from the space allocated to the Adams County Ministerial

Association for the erection of the Ten Commandments Monuments.

Thank you for your prompt attention in this matter.

Yours very truly,

/s/
Berry Baker, Interim Director

THE CENTER FOR PHALLIC WORSHIP
2655 STEAM FURNACE ROAD
PEEBLES, OHIO 45660

Mr. Albert A. Porter, Interim Director 01 March, 1998
141 Lloyd Road
West Union, Ohio 45693

Dear Mr. Porter:

Please excuse my tardiness in responding to your letter of 20 January, 1998. I was quite busy with some work in Argentina and was unable to respond more quickly. The enclosed materials should give you a general idea of what the proposed monuments will look like. The figurines will be nearly anatomically correct. However, they will be on a scale of one inch to one foot. Therefore, the figurines will be approximately six and on-half feet tall and about forty inches in circumference.

We are currently seeking a source for ones made of blue veined marble and red granite. Should be not be able to find such a source, we shall construct them of reinforced concrete. In either case, there shall be a plaque mounted on the base explaining that they are phallic symbols and are reflective of a form of worship that has been engaged in since pre-historic times.

We are looking forward to the Board's prompt approval of our request and to the day when the monuments are erected.

Yours truly,

/s/
Berry Baker
Interim Director

THE CENTER FOR PHALLIC WORSHIP
2655 STEAM FURNACE ROAD
PEEBLES, OHIO 45660

Adams County Ohio Valley School District
141 Lloyd Road
West Union, Ohio 45693

19 September, 1998

Attn: Albert A. Porter, Superintendent

Dear Mr. Porter:

It has been quite some time since our last correspondence. As I recall, we had once again requested a response from the Board concerning our earlier request for the Board's permission to erect our monuments at the new high schools. To date, we have not received any response. Perhaps the request has inadvertently been misplaced or perhaps your letter was lost by the postal system. In any case we are iterating our request. Should the original documents have been misplaced, we would be happy to supply you with copies.

One of the questions posed to us by you pertained to what inscription would be placed on the monuments. We have elected to go with the phrase: "LOVE ONE ANOTHER". I hope this will help resolve any concerns the Board may have.

I believe that this phrase, along with our expressed desire to share with the community in its quest for cultural diversity, complies with the "Lemon" test, as discussed in Lemon v. Kurtzman (403 U.S. 502:1971). It also seems to comply with

the Court's ruling in Allegheny County v. American Civil Liberties Union (106 L.Ed.2d 472:1989). In short, it is my belief that our monuments would be in full compliance with the Constitution and all applicable Federal Codes.

Once again, we request the Board's PROMPT response to this request.

Yours very truly,

Berry Baker
Director, the Center of Phallic Worship

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-1-99-094

BERRY BAKER,	)
PLAINTIFF,	)
	)
vs.	)
	)
ADAMS COUNTY/OHIO VALLEY	)
SCHOOL BOARD,	)
DEFENDANT.	)
	)

The deposition of BERRY BAKER, taken upon oral examination, pursuant to the Federal Rules of Civil Procedure, before Karen L. Schell, Court Reporter and Notary Public in and for the State of Ohio, at the offices of Ennis, Roberts & Fischer Co., LPA, 121 West Ninth Street, Cincinnati, Ohio 45202, on Wednesday, December 29, 1999, at 1:05 p.m.

CINCINNATI REPORTING SERVICE
25 Ritchie Avenue Cincinnati, Ohio 45215

(513) 948-1700

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A. It is a letter that I wrote to the school's central office to the acting superintendent.

Q. You wrote that letter?

A. I did.

Q. You authored that letter?

A. I did.

Q. And you signed the letter, correct?

A. That's correct.

Q. And the letter was sent by you as interim director for The Center for Phallic Worship, correct?

A. That's correct.

Q. In that letter you commend the Board, do you not, for its, quote, leadership role in an apparent spiritual and cultural revival?

A. I did put that in the letter, yes.

Q. You were commending the Board for its display of the Ten Commandments?

MR. JACOBS: Objection, go ahead.

A. No.

Q. Well, if you now want to explain to me what it was that you were commending the Board for in its apparent spiritual and cultural revival.

A. That was a somewhat tongue and cheek remark.

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Q. So does that mean that it wasn't the truth?

MR. JACOBS: What wasn't?

Q. That statement that you're commending the Board for its apparent spiritual and cultural revival, that was not the truth?

MR. JACOBS: Objection, misrepresents the record. Go ahead.

Q. Is that what it means?

THE WITNESS: Do I answer them?

Q. Yes, please.

MR. JACOBS: Yes.

A. No, I was not commending the Board.

Q. So you weren't truthful in that letter; is that correct?

MR. JACOBS: Objection, argumentative.

Q. I've asked the question, was that statement the truth? It's a yes or no answer.

MR. JACOBS: I still object to the form of the question as argumentative.

Q. Was that statement the truth?

MR. JACOBS: Go ahead and answer. If I object, you go ahead unless I instruct you not to answer.

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A. No.

Q. You also indicate in that letter that we wish to share with the community, Adams County community, some symbols and philosophies of your belief system, correct?

A. That is correct.

Q. My first question, when you say "we," who are you referring to?

A. To me.

Q. To you?

A. That's correct.

Q. The "we" then refers to you and only you?

A. That's correct.

Q. It does not refer to the Center -- the we does not refer to The Center for Phallic Worship, does it?

A. At that time I was The Center for Phallic Worship.
Q. So when you said "we" in your letter, you were meaning you and only you?

A. That's correct.

Q. And also in that letter of January 10th, 1998, you requested a certain space to be allocated to you --

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improper for you to engage in this line of questioning, this argumentative line of questioning with this witness. He's never used the word lie.

Q. Mr. Baker, did you or did you not just a few minutes ago testify that you did not tell the truth in this letter?

MR. JACOBS: Objection.

A. I do not recall whether I said that exactly.

Q. What does tongue and cheek mean to you, Mr. Baker?

A. I know that it is a statement of sarcasm I should think more than anything.

Q. What does sarcasm mean to you?

A. That you are making a statement that appears to have one meaning when actually may have another.

Q. So that I can understand the purpose of this letter, what you formally requested in writing was not really what you wanted from the Board?

MR. JACOBS: Objection. You are assuming that it truly was a formal request. You're not asking him what it was, you're assuming what it was, therefore the question --

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Q. I didn't say formal.

MR. JACOBS: You said formally. Even if you didn't, I make the same objection.

Q. Let me go back and repeat the question.

A. Uh-huh.

Q. Did you want the Board, Adams County School Board, to comply with the request that you set out in this letter?

MR. JACOBS: Objection, Same basis.

A. No.

Q. Then you did not want the Board to allocate certain space to you and your Center for Phallic Worship?

A. No.

Q. The Center for Phallic Worship, is it physically located in a building separate from your home?

A. There is no physical Center for Phallic Worship.

Q. You signed the letter interim director. Is there a board, is there an association or something that you as interim director directs?

A. No.

Q. You stated in your letter that we wish to

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share with the community some of the symbols and philosophies of our belief system. Did you really want to do that?

A. No.

(Defendant's Exhibit No. 2 was marked for identification.)

Q. Mr. Baker, you now have before you Defendant's Exhibit No. 2. Do you recognize that document?

A. I do.

Q. Could you describe what it is, please.

A. It is a letter I addressed to Albert Porter, the interim director, for the Adams County school system.

Q. Again, that's a letter that you authored, correct?

A. That's correct.

Q. And you signed?

A. Correct.

Q. In that letter you were describing to Mr. Porter the, quote, figurines as you say in your letter, that you plan on displaying in front of the high school; isn't that correct?

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A. That's correct.

Q. You indicate that the figurines will be nearly anatomically correct. Can you please describe what you mean by that.

A. That they would resemble the male sexual organ, the penis.

Q. You further state that it would be approximately, that figurine would be approximately six and one half feet tall and about 40 inches in circumference?

A. I believe that's correct.

Q. Now, that's what you told Mr. Baker your intentions were in terms of displaying this figurine, correct?

A. That is not correct.

Q. That is not correct?

A. I did not tell that to Ms. Baker.

Q. I'm sorry, Mr. Porter. That's what you told Mr.Porter in this letter, correct?

A. I believe that's correct, yes.

Q. But was it really, actually, your intention to display that figurine?

A. No.

Q. You further indicate in your letter that there shall be a plaque mounted on the base

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explaining that they were phallic symbols and are reflective of a form of worship that has been engaged since prehistoric times?

A. That's correct.

Q. Was it your intention to prepare a plaque explaining what you set out in your letter?

A. Well, no.

Q. Finally, you indicate that you were looking forward to the Board's prompt approval of your request?

A. That's correct.

Q. When in reality you were not seeking the Board's approval?

A. That's correct.

(Defendant's Exhibit No. 3 was marked for identification.)

Q. I hand you now, Mr. Baker, what's been marked for purposes of identification as Defendant's Exhibit No. 3. Do you recognize that document?

A. I do.

Q. And could you please describe for the record what that is.

A. It is a letter from me to Albert Porter dated September 19, 1998.

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Q. Again, you authored that letter?

A. I did.

Q. And you signed it?

A. I did.

Q. You indicate in your letter that in response to a question as to what would be inscribed on your monument you say we -- quote, we have elected to go with the phrase love one another?

A. That is correct.

Q. That's what you write in your letter.

MR. JACOBS: Objection, go ahead.

A. Would you repeat the question, please.

Q. I said that was not true, was it?

A. The preface to the question, would you repeat it?

Q. You say inyour letter of 19 September 1998 that the inscription that you plan on placing on the monuments would be the phrase, quote, love one another. You are indicating to Mr. Porter that that's what you plan on inscribing on your monument?

A. That is correct.

Q. What I'm saying to you, my question now is, that statement that you had in the letter was

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A. It occurred to me that the Ten Commandments monuments were placed illegally. But it also occurred to me that there might have been a bear possibility that if the Board permitted any and all religious displays that there would be -- that it would be legal for the monuments to be up. To that end, since I did not wish for the Ten Commandments monuments or any monuments to be on the school grounds, I created The Center for Phallic Worship, recognizing that to be a valid agency but still practiced religion, that if the Board was indeed open to a revival that they would not object to other monuments being up. That if they were not too open-minded about it, then they were placing the Ten Commandments monuments there specifically to endorse what I believe to be the Protestant

versions of the Ten Commandments and the Protestant religion.

It was my hope that once the Board saw that there could be other bonafide requests, although, I did not necessarily consider this one bonafide, but it was within realm of the possibility of being bonafide, that they would reconsider having the monuments in place. That the Board chose to ignore the two letters, I had a local attorney write

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to the Board. Wellj they responded to one, I guess, or two, and ignored and failed to further communicate with that attorney after that. And then after the second or third letter from The Center for Phallic Worship that chose no response and then prior to filing the lawsuit I had determined that I would -- the establishment calls which I found to be a valid argument, I sent a registered letter or a certified letter to the School Board which they acknowledged, receipt of that is the letter of 19 of September.

Q. I want to clarify, the suit that we filed here in February of 1999, is the purpose of that suit to get any type of monument erected as it relates to phallic worship, is that the purpose for your filing this suit?

A. The purpose of filing the suit is to have the current monuments removed.

Q. The current monuments, you mean what?

A. The Ten Commandments monuments.

MR. JACOBS: Thank you.

MR. STEPANOVICH: I have no further questions.