No. 09-4256

In the
United States Court of Appeals
for the Sixth Circuit

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.,
Plaintiff-Appellee,

v.

HON. JAMES DEWEESE, in his official capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland

BRIEF OF APPELLANT

EDWARD L. WHITE III
AMERICAN CENTER FOR LAW & JUSTICE
5068 PLYMOUTH ROAD
ANN ARBOR, MICHIGAN 48105
(734) 662-2984

Co-Counsel for Appellant

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER FOR LAW & JUSTICE
6375 NEW HOPE ROAD
NEW HOPE, KENTUCKY 40052
(502) 549-7020

Co-Counsel for Appellant

December 17, 2009

ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1, Hon. James DeWeese makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

/s/ Francis J. Manion December 17, 2009
Francis J. Manion

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Appellant requests that oral argument be set in this matter due to the complexity and constitutional issues involved in this appeal.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a suit for declaratory and injunctive relief concerning Judge DeWeese's display in his Richland County courtroom of a poster alleged to violate the Establishment Clause of the U.S. Constitution and Article I, § 7 of the Ohio Constitution. Jurisdiction in the district court was based on the existence of a federal question and pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202, 1331 and 1343.

The district court entered its final judgment on October 6, 2009. Appellant DeWeese filed a timely notice of appeal on October 9, 2009.

This court's jurisdiction is based on 28 U.S.C. § 1291, which provides for jurisdiction over final judgments from the district courts of the United States.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in ruling that the plaintiff has standing under Article III.

2. Whether the district court erred in ruling against the non-moving party in the face of disputed issues of material fact on a motion for summary judgment.

3. Whether the district court erred in ruling that defendant Judge DeWeese's expression of his jurisprudential viewpoint in his courtroom by means of the challenged poster violates the Establishment Clause and Art. I, § 7 of the Ohio Constitution.

4. Whether Judge DeWeese's expression of his jurisprudential viewpoint is protected by the Free Speech Clause of the First Amendment.

STATEMENT OF THE CASE

In this case, the district court held that a state actor violates the Establishment Clause when he publicly expresses, through a passive display in his courtroom, the legal philosophy of the people who wrote and adopted the Establishment Clause. The court further held that a state actor violates that section of Ohio's Constitution which describes "Religion, morality and knowledge" as "essential to good government," Art. I, § 7, when he asserts the viewpoint that religion and morality are, in fact, essential to good government.

Procedural History

Plaintiff filed its Complaint on October 7, 2008, naming as defendant, the Honorable James DeWeese. (R. 1, Complaint). On June 5, 2009, plaintiff moved for summary judgment. (R. 16, Pltf. Motion for Summary Judgment). Defendant DeWeese filed his opposition to the motion on July 3, 2009. (R. 17, Def. Opposition to Motion for Summary Judgment).

On October 8, 2009, the district court issued a Memorandum Opinion and Order granting plaintiff's motion for summary judgment on all counts. (R. 19, Memorandum Opinion and Order). Judgment was entered for the plaintiff on October 6, 2009. (R. 20, Judgment Entry).

On October 9, 2009, DeWeese filed both a Notice of Appeal (R. 21, Def. Notice of Appeal), and a motion for a stay of judgment pending appeal (R. 22, Def. Motion to Stay). The ACLU filed its opposition to this motion on October 23, 2009 (R. 25, Pltf. Opposition to Motion to Stay), and the court denied the motion on November 4, 2009 (R. 27, Memorandum Opinion and Order).

STATEMENT OF FACTS

The defendant, Judge James DeWeese, is a judge in the General Division of the Court of Common Pleas in Richland County, Ohio. (R. 17, Def. Opposition to Motion for Summary Judgment, EX. A, ¶ 1). For many years, DeWeese has presided over the trial of cases in Courtroom #1 in Mansfield, Ohio. *Id*.

In 2000, Judge DeWeese created and hung in his courtroom two posters. *See ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 487 (6th Cir. 2004). The first poster consisted of the text of the Bill of Rights. *Id.* The second poster consisted of a version of the Ten Commandments. Across the top of each poster was the phrase "rule of law." *Id.* Judge DeWeese hung both posters for the purpose of illustrating educational talks about rights and duties he was in the custom of giving to school and community groups who would visit his courtroom, and also as a way of fostering debate about the relative merits of a legal philosophy based on moral absolutes versus one based on moral relativism. *Id.* at 491-92.

The ACLU of Ohio sued DeWeese, alleging, through an affidavit of Mr. Bernard Davis, an ACLU member who claimed to be injured by the courtroom display, that the display of the Decalogue in Courtroom #1 violated the Establishment Clause of the First Amendment to the U.S. Constitution. The district court agreed, *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2002), and a divided Court of Appeals affirmed, *ACLU of Ohio v. Ashbrook*, *supra*. Following the latter ruling, Judge DeWeese permanently removed the Ten Commandments poster from his courtroom. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 4).

In June, 2006, Judge DeWeese put up a new poster in his courtroom. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 2). The new poster is markedly different in appearance and content from the poster challenged in the prior case. This one bears the title, "Philosophies of Law in Conflict." *Id.* Most of the space on the poster is occupied by two columns of numbered statements: on the left, the Ten Commandments, labeled "Moral Absolutes"; on the right, seven Humanist Precepts, labeled "Moral Relatives." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A-3) (Text of "Philosophies of Law in Conflict" poster). The Commandments and the Precepts are the same in style, type, and appearance. *Id*. (Actually, because they are somewhat lengthier, the Humanist Precepts take up more space on the poster than the Commandments.)

In addition to the title and the Commandments and the Precepts, the poster contains — in type considerably smaller than its other elements — four separate numbered paragraphs in which Judge DeWeese expresses his viewpoint about what he sees as a conflict of legal philosophies in the United States. He describes these philosophies in terms of moral absolutism versus moral relativism. As examples of each, he directs the reader to the Commandments and the Precepts. He concludes by stating that he joins with America's Founders in recognizing the need to ground legal philosophy on fixed moral standards as opposed to moral relativism. Beneath the last line of the poster, DeWeese has placed his own name as a signature. Finally, in the lower right corner of the frame, a note tells the reader that an explanatory pamphlet, also written by DeWeese and explaining his views in greater detail, is available from the receptionist. *Id.*

In the declaration he filed in response to the ACLU's summary judgment motion, DeWeese explains his purpose, not only for putting up the new poster, but also for the many differences in appearance and content between the current poster and the previous one. DeWeese acknowledges that, in the earlier display, his "purpose was not clear from looking at the display"; thus, he was "careful in the new 2006 display to explain my philosophical purpose in the text of the poster." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 6). He expressly disclaims any purpose "to display the Ten Commandments," noting that

the "Commandments are no more prominent a part of the poster than are the Humanist Precepts." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 5). The sole purpose DeWeese gives for creating and displaying the 2006 poster is "to express my views about two warring legal philosophies that motivate behavior and the consequences that I have personally witnessed in my 18 years as a trial judge of moving to a moral relativist philosophy and abandoning a moral absolutist legal philosophy." *Id.*

Regarding the "editorial comments" appearing on the top and bottom of the poster, DeWeese says their purpose is to "explain the point of the poster." He further states that he put his own name at the bottom of the poster "to show the thoughts were my own." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 2). DeWeese notes that judges in Richland County have the authority to decorate their courtrooms as they see fit. The courtrooms are not uniformly decorated. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 9).

The "Philosophies of Law in Conflict" poster went up in June, 2006. It was not until *two years later*, however, that the ACLU of Ohio got around to complaining about it, by way of a Motion for an Order to Show Cause why Judge DeWeese should not be held in contempt for allegedly violating the 2001 injunction. *ACLU v. Ashbrook*, 1:01-cv-0556 (N.D. Ohio), Doc. 67. (The

contempt motion was not supported by an affidavit from the aforementioned Mr. Davis but, rather, by declarations from two individuals who have not appeared in the current action.) But, because the 2001 injunction ordered nothing beyond the removal of the poster at issue in that case — an injunction DeWeese had fully complied with — the district court denied the ACLU's motion in August, 2008. *Id.*, Doc. 74.

The current lawsuit followed.

As with the first case, the ACLU claims, on behalf of its members in Richland County, that Judge DeWeese's display of "a poster depicting, *inter alia*, the Ten Commandments," violates the First Amendment's Establishment Clause as well as Article I, § 7 of the Ohio Constitution. (R. 1, Complaint). And, as with the first case, although he is not a named plaintiff, in support of its motion for summary judgment the ACLU included a Declaration of Bernard Davis, Esq. (R. 16, Pltf. Motion for Summary Judgment, EX. 4). Mr. Davis is a Richland County attorney who "frequently and routinely" practices in Judge DeWeese's court. Davis says he is personally offended by DeWeese's "espousal of a legal philosophy," which, in Davis' opinion, is a "clearly religious message." Davis says this offends him "in that I perceive it as an inappropriate expression of a religious viewpoint as well as a display of a sacred text in a public building." He calls the display "demeaning." *Id.*

In opposing the ACLU's claims, Judge DeWeese asserts that the poster is essentially a tangible expression of his viewpoint on legal philosophy and the consequences of a society choosing to follow a legal philosophy based on relativism as opposed to moral absolutes (R. 17, Def. Opposition to Motion for Summary Judgment, EX. A, ¶ 5). He says that the purpose of hanging it in his courtroom is both to convey his viewpoint and to foster debate and discussion among readers of the poster about the philosophical issues addressed in the poster. (R. 17, Def. Opposition to Motion for Summary Judgment, EX. A, ¶ 7). DeWeese asserts that it was *not* his purpose to display the Ten Commandments. (R. 17, Def. Opposition to Motion for Summary Judgment, EX. A, ¶ 5). He chose to include a short hand version of the Decalogue because — as the U.S. Supreme Court has recently reaffirmed — it is a well-recognized symbol of moral ideals and is frequently used for that same purpose in public buildings and courthouses throughout the Nation. (R. 17, Def. Opposition to Motion for Summary Judgment, EX. A, ¶ 8). He included it because it is a logical and appropriate symbol which, when contrasted with the Humanist Precepts, concretely illustrates his point about conflicting legal philosophies. *Id.* In short, DeWeese contends that his purpose in displaying this poster is secular. *Id.*

Finally, DeWeese disputes the factual basis for the declaration of the ACLU's Bernard Davis. In a nutshell, DeWeese asserts facts regarding his

personal observations of Mr. Davis's behavior in his courtroom, observations which would lead a reasonable person to conclude that, contrary to the boilerplate conclusory language of his declaration, Mr. Davis is not in fact a man demeaned, burdened with the sort of deep personal offense described therein, and, thus not injured in the Article III sense. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶¶ 9-13).

Summary of District Court Opinion

The district court began its analysis by addressing the issue of standing. In the face of DeWeese's sworn declaration which included specific observations made by DeWeese of the behavior of the ACLU's representative, Bernard Davis, which observations called into serious question the validity of the latter's claim of "injury," the court found that, indeed, Mr. Davis had suffered a constitutionally significant injury. (R.19, Memorandum Opinion and Order, p. 8). The court described the injury as Mr. Davis's "being personally offended" by DeWeese's display of the poster. *Id.* On this basis, the court held that the plaintiff had successfully demonstrated "injury" sufficient to invoke Article III standing.

On the merits of this case, applying the *Lemon* test, the district court held that DeWeese's actions violated the Establishment Clause of the First Amendment and Art. I, § 7 of the Ohio Constitution. The court found that DeWeese's purpose was an impermissibly religious one based on "the plain words of his declaration,

the poster, and the pamphlet." (R. 19, Memorandum Opinion and Order, p. 11). The court held that DeWeese's current purpose is "substantially similar" to the purpose found (likewise impermissible) by the *Ashbrook* court. *Id*.

The court rejected the testimony of DeWeese's expert to the effect that DeWeese's poster expresses a "recognizable viewpoint within the fields of the foundations of American law and jurisprudence," and should not, therefore, be deemed to be a display of a somehow impermissibly "religious" viewpoint. (R. 19, Memorandum Opinion and Order, p. 16). The court attempted to set up a conflict between DeWeese's statements and those of his expert before concluding that "by joining the Founders, defendant clearly intends to endorse the Judeo-Christian tradition," (R. 19, Memorandum Opinion and Order, p. 17), something the court apparently considered sufficient to place DeWeese (and the Founders themselves?) beyond the pale of constitutionally permissible thought and behavior.

The court further concluded that DeWeese's poster represented an impermissible endorsement of religion under *Lemon*'s second prong. Among other things considered by the court in its endorsement analysis was the history of DeWeese's previous display. The court also considered the contents of DeWeese's explanatory pamphlet in addition to the words of the poster itself. The court noted that DeWeese is a judge and displays the poster in a courtroom. Based on this, the court found that a reasonable observer would conclude "that the State of Ohio

and/or Richland County endorse the opinions set forth in the poster," the most constitutionally offensive of which appears to be DeWeese's alleged "preference for the Judeo-Christian faiths." (R. 19, Memorandum Opinion and Order, pp. 18-21).

The court found that, since Ohio courts have held that the Ohio Constitution provides no greater protection than the First Amendment, DeWeese was also in violation of Article I, §7 of the Ohio Constitution.

Finally, the court held that DeWeese himself enjoyed no protection under the Free Speech Clause for his attempt to express his viewpoint by way of the challenged poster. The district court then granted the ACLU's motion for summary judgment on all counts.

SUMMARY OF ARGUMENT

The ACLU lacks standing to sue in this matter because its "injury" — one of its members claims to be personally offended by a poster in Judge DeWeese's courtroom — consists of nothing more than the "psychological consequence presumably produced by observation of conduct with which one disagrees," something that the U.S. Supreme Court holds is not a cognizable Article III injury. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). At a minimum, the district court erred in

granting summary judgment to plaintiff ACLU in the face of genuine issues of material fact raised by DeWeese on the issue of standing.

The district court erred in holding that DeWeese's display in his courtroom of a poster entitled "Philosophies of Law in Conflict" violates the Establishment Clause of the First Amendment. Neither DeWeese's discussion of the contrast between legal philosophies based on moral absolutes as opposed to moral relativism, nor his use of the Decalogue as a means to illustrate that contrast bespeak a constitutionally problematic religious purpose. Moreover, a reasonable observer of the poster would view the poster as a statement about legal philosophy, morality, and ethics, not theology or religion. *Van Orden v. Perry*, 545 U.S. 677 (2005); also, *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005).

The district court erred in holding that DeWeese's display of the poster violates Article I, § 7 of the Ohio Constitution. It should go without saying that displaying a poster which, according to the district court, conveys the idea that religion and morality are essential to good government cannot be considered a violation of a constitutional provision which says that "religion, morality, and knowledge" are "essential to good government." *Id.*

Finally, the district court erred in holding that DeWeese's expression of his personal legal philosophy enjoys no protection under the First Amendment's Free Speech Clause. Judges not only have the right, but are positively encouraged by

the Code of Judicial Conduct, to write, speak, lecture, and teach concerning the law, the legal system, and the administration of justice. DeWeese's poster falls well within acceptable boundaries of judicial freedom of speech. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

STANDARD OF REVIEW

This is an appeal from the district court's granting of plaintiff ACLU's motion for summary judgment on all counts. This court's review is *de novo*. *Mt. Elliot Cemetery Association v. City of Troy,* 171 F.3d 398, 402-3 (6th Cir. 1999). The court must view the factual evidence in a light most favorable to DeWeese and enter judgment only if it finds that there are no disputed issues of material fact and that the ACLU is entitled to judgment as a matter of law. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF HAD STANDING TO SUE.

A. Plaintiff's Allegations of Injury Are Insufficient to Establish an Article III Injury.

Even were one to accept the ACLU's factual allegations as true — DeWeese does not — they would still not arise to the level of the kind of personal injury sufficient to confer standing under Article III under controlling U.S. Supreme Court precedent. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). As Judge

Batchelder noted in her dissent in the *Ashbrook* case, "*Valley Forge* remains good law, and has been cited by the Supreme Court more than three dozen times without so much as a hint of disapproval." *Ashbrook*, 375 F.3d at 496 (Batchelder, J. dissenting).

In *Valley Forge*, the Court specifically rejected the idea that Establishment Clause plaintiffs who allege no more than the "psychological consequence presumably produced by observation of conduct with which one disagrees" have alleged an injury sufficient to give them standing under Article III to challenge that conduct. *Id.* at 485. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), the Court further explained that "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."

And yet, in spite of clear Supreme Court teaching in this area, the district court found standing based on nothing more than allegations by a member of the ACLU of Ohio that, as a frequent and routine visitor to Judge DeWeese's courtroom, he finds the judge's poster "personally offensive and demeaning," and sees it as, in his opinion, an "inappropriate expression of a religious viewpoint." (R. 19, Memorandum Opinion and Order, pp. 6-8). If this is not mere "psychic" offense," *Steel Co.*, or the "psychological consequence produced by observation of

conduct with which one disagrees," *Valley Forge*, it is hard to imagine what would be.

Of course, the district court could look to cases such as *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994) for support in finding standing here. But, even assuming that *Washegesic* itself can be reconciled with *Valley Forge*, or that this court is free to ignore *Washegesic* and other Sixth Circuit holdings on Establishment Clause standing (it presumably is not so free), this case can be distinguished even from those extremely "low threshold" cases.

The plaintiff in *Washegesic* claimed that he was frequently and routinely forced to look upon a portrait of Jesus Christ on school grounds. The plaintiff in *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), dreaded having to someday[1] gaze upon a gargantuan stone Decalogue bearing the words "I Am the Lord Thy God" in large letters on state property. The plaintiffs in *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985) were made sick at the thought of an unabashedly religious house of worship at the government-owned airport. In each of these three cases, the challenged object or behavior was plainly, inarguably religious: the face

[1] As noted by Judge Batchelder in *Adland*, the majority in that court ruled "on the constitutionality of a historical and cultural display that [was] still being planned and [had] yet to be erected." 307 F.3d at 490 (Batchelder, J., dissenting) (bracketed language supplied).

of the God-Man in *Washegesic*; the summation of the Mosaic Law in *Adland*; an actual church in *Hawley*.

DeWeese's poster, on the other hand, is not at all like those things. Once close enough to read any of it, one sees two equally prominent sets of precepts, only one of which even comes from a religious book. It is only by reading the "fine print," as it were, and supplementing that reading with additional knowledge gleaned from a pamphlet, that one can even arguably come to the (erroneous) conclusion that something "religious" is afoot here.

To find that Mr. Davis is in an analogous position to the plaintiffs in other Sixth Circuit cases, or that he alleged anything more than insufficient "psychic" offense is to ignore *Valley Forge*. To confer standing on the ACLU through the Davis "injury,"[2] is to adopt a philosophy that *Valley Forge* firmly rejected:

> The philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst become obstacles to that transcendent endeavor . . . has no place in our constitutional scheme. *It does not become more palatable when the underlying merits concern the Establishment Clause.*

Valley Forge, 454 U.S. at 489 (emphasis supplied).

[2] DeWeese acknowledges that the ACLU, as a theoretical matter, would have standing to sue on behalf of one of its members — Bernard Davis, for example — if it could be shown that the individual member had standing to sue in his own right. *Hunt v. Washington State Apple Adver. Comm.*, 432 U.S. 333, 343 (1977).

In addition, there is nothing in the record to tell us what Mr. Davis's own religious or nonreligious viewpoint might be. This is significant because it is possible that someone like Mr. Davis might have no objection to a religious object or expression as a *religious* matter, and yet still have a constitutional or philosophical objection to a governmental display of same. *See, e.g., Salazar v. Buono*, 129 S. Ct. 355, *cert. granted* (Feb. 23, 2009). In fact, based on *this* record, there is no evidence at all that Mr. Davis's objection is anything other than the latter — a philosophical objection that he doesn't like something some governmental official is doing. But, as has been shown, this is not enough. Mere philosophical offense or objection does not equal constitutional injury. Rather, allowing standing on grounds as weak as those presented here is to engage in what *Valley Forge* forbids: "the conversion of the courts of the United States into judicial versions of college debating forums." 454 U.S. at 473.

Nor can the ACLU take any support for its position from Supreme Court cases dealing with Establishment Clause challenges to allegedly religious displays where the issue of standing was not addressed. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *McCreary County v. ACLU*, 545 U.S. 844 (2005); and *Van Orden v. Perry*, 545 U.S. 677 (2005). That the Supreme Court may have decided on the merits cases that, in the lower courts,

rested upon "offended observer" standing, is irrelevant. The exercise of jurisdiction is not precedent for jurisdiction.

> The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions — even on jurisdictional issues — are not binding in future cases that directly raise the questions.

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 478-79 (2006) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (quotation marks omitted)).

It seems clear that the ACLU has a jurisprudential viewpoint that differs from Judge DeWeese's. Debate concerning those differing viewpoints is exactly what DeWeese wishes to foster through his display. But *Valley Forge* does not permit, much less require, that the United States courts be provided as the proper forum for this debate by means of a tortured construction of the requirements of Article III.

The ACLU lacked standing in the district court and continues to do so now.

B. At a Minimum, Questions of Fact Preclude a Finding of Article III Injury.

The district court, on the ACLU's motion for summary judgment, improperly resolved genuine issues of material fact against non-movant DeWeese. Perhaps atypically in the Establishment Clause context, DeWeese did not accept at face value the ACLU's Davis's conclusory allegations of "injury." DeWeese's refusal to credit the allegations was based, not on "speculation," as the district

court found, (R. 19, Memorandum Opinion and Order, p. 8), but on *observation.* People who are injured, even "psychically" injured, can be expected to behave in certain ways. When they do not behave in the manner expected by common sense and ordinary experience, it may be because they are *not in fact really injured*. Based on his *observation* of Mr. Davis's behavior, Judge DeWeese has drawn an inference that Mr. Davis is not in fact injured or that his injury, if any, is of a most trivial, if not contrived, nature. As a trial judge for nearly twenty years, it is DeWeese's business to make credibility determinations on a daily basis. To dismiss his testimony as "speculation" not worthy of serious consideration in evaluating plaintiff's standing seems entirely unwarranted.

DeWeese's contesting of the credibility of the ACLU's factual claims was not limited to the judge's observation of Mr. Davis's demeanor or behavior generally. The claim is further undermined by the inescapable, and entirely non-speculative, chronology of events here. Although Mr. Davis claims routine and frequent exposure to the injury-producing display, *nearly three years* passed between DeWeese's hanging of the current poster and the filing of the present lawsuit. *Three years.* Obviously, neither Mr. Davis nor the ACLU can, with a straight face, claim unfamiliarity with the legal process, or uncertainty about the basis of a potential claim, or a reluctance to litigate matters of a constitutional nature. The very suggestions are laughable. The three-year gap between the

injury-producing event (the hanging of the poster) and the Davis-supported ACLU federal lawsuit claiming "injury," is a significant fact on the question of the validity of plaintiff's claims of constitutional injury.

DeWeese proferred a sworn declaration contesting the factual basis of the ACLU's injury claim buttressed by the serious questions created by the chronology of events. The district court erred in deciding this factual issue against DeWeese. At a minimum, he was entitled to have the ACLU attempt to convince the court, following cross-examination, that its injury claim was something more than a mere recitation of boilerplate language from applicable case law used to make out a colorable claim for standing. *Ashbrook*, 375 F.3d at 499 (Batchelder, J., dissenting).

II. THE DISTRICT COURT ERRED IN HOLDING THAT DEWEESE'S DISPLAY VIOLATES THE ESTABLISHMENT CLAUSE.

> *There is a true law, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. It is not one thing at Rome and another at Athens; one thing today and another tomorrow. God himself is its author — its promulgator — its enforcer.*
>
> Cicero, *De Republica* III, c. 22, cited in *Swift v. Tyson*, 41 U.S. 1 (1842).

A. Jurisprudence is Not Theology.

The district court evaluated the case using the *Lemon* test.[3] In *ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005), this court, noting that the Supreme Court has failed to clear up the ongoing question of *Lemon*'s continued viability in a pair of "Ten Commandments cases" decided earlier that same year, lamented that "we remain in Establishment Clause purgatory" — but applied *Lemon* to the case before it. *See McCreary County v. ACLU*, 545 U.S. 844 (2005) (applying *Lemon* to courthouse "historical documents" display); *Van Orden v. Perry*, 545 U.S. 677 (2005) (declining to apply *Lemon* to case challenging Texas state capitol Ten Commandments monument). Assuming *Lemon* remains the proper test, the district court's application of it to the instant facts was in error.

The essential flaw of the district court's analysis — from which everything else flows — is the court's failure to recognize that a viewpoint about law which recognizes a divine origin, source or sanction of immutable, absolute laws is not, *ipso facto*, a *religious* view. Even less so is such a view necessarily a "Judeo-

[3] Under the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "government action does not run afoul of the Establishment Clause if it (1) has a secular purpose; (2) does not have the primary or principal effect of either advancing or inhibiting religion; and (3) does not foster an excessive governmental entanglement with religion." *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 635 (2005) (citing *Lemon*, 403 U.S. at 612-13). The first and second of these prongs have been reformulated to require that "the secular purpose 'predominate' over any purpose to advance religion," and that the government action not have the purpose or effect of endorsing religion. *Id.* (citations omitted).

Christian" view. Were it otherwise, then a pagan philosopher like Marcus Tullius Cicero, returned from Hades and installed as a judge in an American courtroom — should he wish to display on the wall the summary of his legal philosophy that appears at the head of this section — would, according to the district court, find himself in violation of the Establishment Clause for expressing a *religious* view of moral absolutism and demonstrating that he "clearly intends to endorse the Judeo-Christian tradition." (R. 19, Memorandum Opinion and Order, p. 17). And this in spite of his never having heard anything of Christ (Cicero, 106–43 B.C.), and probably very little of the Jews.

This simplistic approach, an approach that looks for "the G-word" and, upon discovering it, proclaims "Eureka! — Religion! — Unconstitutional!" has no place in sound Establishment Clause analysis as the U.S. Supreme Court and this circuit have made abundantly clear. *Van Orden v. Perry*, 545 U.S. at 690 ("promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause"); *also, Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Walz v. Tax Commission*, 397 U.S. 664, 676-78 (1970); *ACLU of Ky. v. Mercer County*, *supra*; and, *ACLU of Ohio v. Capitol Sq. Review and Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (*en banc*). And yet, the presence of this approach in the district court's *Lemon* analysis (not to mention its presence in the previous case

involving Judge DeWeese),[4] reveals a persistent and egregious jurisprudential error that this court should address and correct.

The idea that all law has its origin in and derives its ultimate authority from a source called "God" or the "Supreme Judge of the World,"[5] and is not relative as to times and places, is *not necessarily a religious idea*.[6] It is a philosophical idea that lies at the base of widely recognized schools of jurisprudential, not theological, thought. For one to espouse such a view does not indicate a religious purpose in any constitutionally meaningful or relevant sense. The idea in question is sometimes characterized as a tenet of Natural Law jurisprudence.[7] The study of Natural Law jurisprudence is a standard part of any respectable philosophy of law or jurisprudence course at any secular university. It is *not* taught in seminaries or schools of theology. It is taught by law professors and professors of philosophy.

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[4] In *ACLU of Ohio v. Ashbrook*, 375 F.3d at 492, a divided panel of this court affirmed the district court's enjoining of Judge DeWeese's prior display, quoting with approval the lower court's clearly erroneous statement that: "[A] state actor officially sanctioning a view of moral absolutism in his courtroom by *particularly referring to the Ten Commandments* espouses an innately religious view, and thus crosses the line created by the *Establishment Clause*" (quoting *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873, 889 (N.D. Ohio 2002) (emphasis in original)). The district court in the instant case relied in part on this passage in finding that DeWeese's purpose for the current display is impermissibly religious. (R. 19, Memorandum Opinion and Order, p. 11).

[5] Declaration of Independence.

[6] *See* Expert Report of Gerard Bradley. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. B).

[7] *See id.*

None of them think that by teaching (or, in some cases, espousing) a legal theory that mentions God and moral absolutes that they are thereby transformed into Doctors of Divinity.

James Wilson was a signer of the Declaration of Independence, a member of the Philadelphia Convention of 1787, one of the principal draftsmen of its most celebrated product, i.e., the Constitution, and a justice of the first Supreme Court of the United States. When, on December 15, 1790, Wilson stood before "the President of the United States, with his lady — also the Vice President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen . . . a most brilliant and respectable audience,"[8] to present his lectures on American law, no one is reported to have felt they had stumbled into a church unawares upon hearing Wilson say things like, "What is the efficient cause of moral obligation? The will of God. This is the supreme law";[9] or, when Wilson spoke of "a solemn truth which ought to be examined with reverence and awe. It resolves the supreme right of prescribing laws for our conduct, and our indisputable duty of obeying those laws, into the omnipotence of the Divinity."[10] The section of Wilson's Law

[8] Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson*, 403 (2007).
[9] *Id.* at 508.
[10] *Id.* at 503.

Lectures from which these statements are taken is entitled "Of the Law of Nature."[11]

Sir William Blackstone was a judge, not a bishop. He wrote a famous series of commentaries on the *laws*, not the *religious doctrines* of England. Every lawyer of the founding generation, and later, learned the law from Blackstone.[12] He expressed his view of divinely ordained moral absolutism thus:

> This law of nature, which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original.

Blackstone, *Commentaries on the Laws of England*, Bk 1, sec. 2.

Neither Jefferson nor Madison, nor any other of the Founders, are reputed to have viewed Blackstone as operating from a "religious purpose" because of his view of the foundations and nature of law. On the contrary, they routinely echoed his approach in their political writings: Jefferson notably in the Declaration of Independence ("the laws of Nature and of Nature's God"), Madison in his

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[11] *Id.* at 500-25.

[12] "[A]ll of our formative documents — the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall — were drafted by attorneys steeped in [Blackstone's Commentaries]." Albert Altschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 2 (1996) (quoting Robert A. Ferguson, *Law and Letters in American Culture* 11 (1984)).

Memorial and Remonstrance (man, as subject of "the Governor of the Universe" owes allegiance to "the Universal Sovereign"). *See School District of Abington v. Schempp*, 374 U.S. 203, 213 (1963).

West is a well-known publisher of books about the law, not religion. Among its titles is *Christie and Morton's Jurisprudence, Text and Readings on the Philosophy of Law* (3d ed., 2008), intended, according to the publisher, "for courses in law schools and university departments of philosophy."[13] The book includes excerpts from, among others, Aquinas and John Locke, both evidently holders of the view that law and morality have a transcendent foundation to which human laws must conform.[14] Oxford University Press sells *McCoubrey & White's Textbook on Jurisprudence*, a tome that devotes one chapter to Classical Natural Law with sections about moral absolutists like Cicero, Augustine, and Aquinas, and a later chapter highlighting the late 20th century "Natural Law Revival" with

[13] http://west.thomson.com/productdetail/137521/22090220/productdetail.aspx (last visited, December 8, 2009)

[14] For Aquinas: ". . . it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws . . ." *Treatise on Law*, I-II q. 91, a. 3. For Locke: "Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature, i.e. to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it." *Two Treatises of Government*, Book II, Chapter XI, §135.

emphasis on the work of John Finnis.[15] And finally, even the venerable Nutshell Series (of fond memory to former law students everywhere) has a volume on jurisprudence featuring several sections on classical and modern natural law theories.[16]

The point of all this, of course, is that the viewpoint expressed by Judge DeWeese — that all law derives ultimately from a divine source and is not subject to change "at the whim of individuals or societies" — is a philosophical, not a religious, viewpoint. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A-3). That this view may be consistent with certain religious views or doctrines does not take it out of the realm of legal philosophy or jurisprudence, any more than a law that "happens to coincide or harmonize with the tenets of some or all religions" violates the Establishment Clause. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). There is, therefore, no principled basis for inferring an impermissible religious purpose merely from a state actor's expression of the divinely sanctioned moral absolutist viewpoint contained in DeWeese's poster. Yet, this is exactly what the district court did.

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[15] Finnis's work is discussed in detail in DeWeese's expert report. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. B, pp. 8-9).

[16] Surya Prakash Sinha, *Jurisprudence: Legal Philosophy* (Nutshell Series), Chapter Four ("Natural Law Theories") (1993).

B. The District Court's Flawed Analysis of DeWeese's Purpose.

As its first "evidence" of DeWeese's alleged religious purpose, the district court quoted a paragraph from DeWeese's sworn (and uncontroverted) declaration in which he says that his purpose for the display is to "express my views about two warring legal philosophies" and goes on to decry what he sees as a societal move to "a moral relativist philosophy and abandoning a moral absolutist legal philosophy." (R. 19, Memorandum Opinion and Order, p. 10). The court then quotes DeWeese's statement of his ancillary purpose — "fostering debate about the pragmatic consequences of our legal philosophies." *Id.* So far, so philosophical, one would think.

But next, the court zeros in on two of the "editorial comments" on the poster both of which make the traditional Natural Law point that only those laws are valid that conform to the unchangeable law "dictated by God himself" (as Blackstone[17] put it) or in the words of James Wilson (one of only six men who signed both the Declaration and the Constitution, incidentally): "Human law must rest its authority, ultimately, upon the authority of that law, which is divine."[18] *Id.* The court then notes that DeWeese displays two columns as "examples" of moral absolutes and moral relatives: the Ten Commandments for the former, a list of Humanist

[17] 1 *Commentaries* 41.
[18] *Collected Works of James Wilson*, 498.

Precepts for the latter. The court quotes DeWeese's conclusion about joining the Founders in acknowledging God's standards as a way of undoing some of what he sees as the consequences of moral relativism. *Id.* at 10-11.

The court then quotes the following from DeWeese's explanatory pamphlet and says that it "clarifies defendant's purpose in displaying the poster: 'We cannot teach that there is no truth and no fixed moral duty to others and then be surprised when we reap the consequences in crime and destruction of families.'" *Id*. at 11.

From all of this the court made a two-part finding regarding DeWeese's purpose, which, it concluded, was unconstitutionally religious:

> (1) to teach that law comes from God and that people should follow the Ten Commandments to solve the problem of crime and other 'social ills' in society; and (2) to foster discussion and debate about the consequences of moral absolutism and moral relativism.

Id.

Part (2) of this conclusion is easily dealt with. It is difficult to conceive how "fostering discussion and debate" about any subject could be considered impermissible under the U.S. Constitution. The court cited no authority for this except the *Ashbrook* decision. *Id.* Even if one were to conclude that the subject matter in question was religious (it is not, as demonstrated previously), fostering debate and discussion has always been considered one of the core purposes of the Bill of Rights. That the court cited nothing beyond *Ashbrook* is telling: the rest of American history and jurisprudence recoils at the very notion that encouraging

citizens to debate and discuss philosophies of law (or anything else) could ever be seen as "unconstitutional."

Part (1) of the court's finding is actually in two parts. The first part, "to teach that law comes from God," has already been touched upon. That idea is, in fact, as American, as Jeffersonian if you will, as the Declaration of Independence. If that is what DeWeese is doing, it would be easily defensible.

The second part, that DeWeese intends to teach people to "follow the Ten Commandments," is simply not a fair inference from the poster, his declaration or his explanatory pamphlet. Using the Decalogue as an example of moral absolutism is hardly the same thing as teaching that "people should follow the Ten Commandments." (*See*, Section II.C, *infra*). DeWeese was careful in the poster and in the pamphlet to couch his discussion in terms of a conflict between moral absolutes and moral relativism and to present examples of each on equal visual terms. If presenting both sides of a debate and conveying which side one thinks has more merit can be said to constitute *teaching* something, then perhaps it could be said that DeWeese is, at most, teaching that society needs to choose which of the two philosophies it will follow and that, in his opinion, our nation would be better off if people would return to following moral absolutes in their ethical judgments.

The district court's analysis is, therefore, fatally deficient to the extent that the court inferred an impermissible religious purpose from DeWeese's expression of a jurisprudential philosophy embracing a transcendent foundation for law resulting in unchanging rules of moral conduct. Further, the court erred in finding that the mere encouraging of discussion about philosophical ideas and their consequences somehow bespeaks a religious purpose.

C. DeWeese's Use of The Decalogue Does Not Render His Purpose Impermissibly Religious.

Although it seems the district court was convinced of DeWeese's improper purpose simply from his expression of his God-given-moral-absolutes viewpoint, and that his use of the Decalogue was merely the icing on the unconstitutional cake, the court was clearly troubled by — and its reliance on *Ashbrook* shows this particularly — the inclusion of the Ten Commandments in the poster. One would have thought that the post-*Ashbrook* cases from the Supreme Court, *Van Orden* and *McCreary*, as well as this court's decision in *Mercer County* would have put to rest, once and for all, the Decalogueaphobia evident in *Ashbrook* and other pre-2005 decisions. Apparently not.

After *Van Orden* especially, it is no longer tenable to maintain that the expression of a Natural Law or moral absolutist view becomes impermissibly religious merely because the one expressing such a view uses the Decalogue to help illustrate the point. Even pushing to one side the abundant historical evidence

of an explicit connection between Western law and the Decalogue (a point not being argued here),[19] the use of the Commandments (alongside the Humanist Precepts) as emblems or symbols in DeWeese's broader theme of the conflict of legal philosophies makes perfect sense and certainly cannot be said to buttress, let alone clinch, a finding of religious purpose.

As Justice Breyer pointed out in his *Van Orden* concurrence, the Ten Commandments are, for believers and non-believers alike, symbolic of "ethics," "morals," and "morality," and their display can convey "a secular moral message (about proper standards of social conduct)." 545 U.S. at 701-3. Moreover, the Commandments can properly be used to "convey a historical message (about a historic relation between those standards and the law)," as demonstrated by their use as a symbol "in dozens of courthouses throughout the Nation, including the Supreme Court of the United States." *Id.* Simply put, after *Van Orden*, as well as this court's *Mercer County* decision, it is too late in the day for courts (as did the district court here) to approach any symbolic use of the Decalogue with a kind of presumption of unconstitutionality that smacks of a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."

[19] Justice Stevens noted in *Van Orden* that the claim that the "Ten Commandments played a significant role in the development of our Nation's foundational documents" is "a matter of intense scholarly debate." 545 U.S. at 712, n.9 (Stevens, J., dissenting) (citing amicus briefs of Legal Historians and Law Scholars and the American Center for Law & Justice).

Schempp, 374 U.S. at 306 (quoted in *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring)).

Beyond that important general principle, however, *Van Orden* makes an even more specific point that utterly undermines the district court's rationale. In *Van Orden*, the Court was dealing with, and approved of, a symbolic use of the Ten Commandments that was, in sharp contrast to DeWeese's use, *literally* one-sided. The Texas monument displayed no precepts other than the Decalogue and the use being made of it sounds similar to — but actually goes well beyond — DeWeese's more balanced approach. For, according to Justice Breyer, the monument at issue in *Van Orden* was created by a fraternal group that "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." 545 U.S. at 701.

That the Supreme Court, in *Van Orden*, did not consider this purpose a violation of the Establishment Clause should be persuasive on the issue of DeWeese's far less direct and more neutral use of the same symbol. For DeWeese, unlike Texas, the Commandments are merely employed as "examples" of a broader concept — moral absolutes — the most recognizable collection of which is surely the Decalogue. DeWeese does not go nearly as far as the originators of the Texas Monument whose purpose was, arguably, much closer to the "forbidden" purpose incorrectly attributed to DeWeese by the district court: "to teach . . . that

people should follow the Ten Commandments to solve the problem of crime [juvenile delinquency] and other 'social ills' in society." (R. 19, Memorandum Opinion and Order, p. 11).

Although the district court cited *Van Orden*, it failed to apply its holding. After *Van Orden*, it is error to infer an invalid religious purpose from the use of the Ten Commandments in the symbolic manner for which they are used in DeWeese's poster. To the extent that this court's decision in *Ashbrook*[20] stands for a contrary position, it should be deemed to have been superceded by *Van Orden.*

Finally, this case is readily distinguishable from *McCreary County*. As Justice Breyer stated in *Van Orden*, the history of the *McCreary* display indicated a "governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document." 545 U.S. at 703 (Breyer, J., concurring). The latter effort described by Breyer — to reflect the secular impact of a religiously inspired document — is far closer to what DeWeese is doing with the Commandments in the poster than any alleged "effort substantially to promote religion." *Id.* The limited holding of *McCreary* is that "purpose needs to be taken seriously under the Establishment Clause." 545 U.S. at 874. The *McCreary* Court was persuaded that the government had a religious purpose largely because the display had begun as an

[20] *See* n. 4, *supra*.

effort to place the Commandments *alone* in public view. *Id.* at 869. That is not the case here.

D. DeWeese's Poster Is Not an Endorsement of Religion.

The district court also found that DeWeese's display failed the second, or "effect" prong of *Lemon*. The effect prong of *Lemon* is generally considered subsumed these days into the so-called "endorsement test." *Mercer County*, 432 F.3d at 636. The endorsement test asks "whether a reasonable observer would conclude that the government endorses religion," by allowing a challenged practice. *Id.* The standard is an objective one, akin to the "reasonable person" standard of tort law. *Id.*[21] Of particular importance in the present case is the fact that, under Justice O'Connor's explication of the endorsement test, the reasonable person is deemed to be aware of the history and context of the community and forum in which a challenged display appears. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Moreover, as the Supreme Court observed in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984): "[to] focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."

[21] In *Mercer County*, this court stated that the ACLU "does not embody the reasonable observer." 432 F.3d at 638.

The same arguments that undermine the district court's purpose prong analysis help to refute the notion that a reasonable observer would, *reasonably*, see DeWeese's poster as an impermissible endorsement of religion. Here again, recourse to Justice Breyer's decisive *Van Orden* concurrence helps resolve the question.

In resolving the issue of whether the Texas monument, bearing nothing other than the text of the Ten Commandments, conveyed an impermissibly religious message, given the undeniably religious provenance of the Decalogue, Justice Breyer observed that "the circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate." 545 U.S. at 702. He counted as a factor weighing *against* a finding of religious endorsement the fact that the purpose of the organization that donated the monument was to "highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.*[22] Justice Breyer stated that the "physical setting of the monument, moreover, suggests little or nothing of the sacred," and "does not readily lend itself to meditation or any other religious activity." *Id.* Instead, according to Justice Breyer, the setting did "provide a

[22] As noted previously, both the district court and the *Ashbrook* court found DeWeese's markedly less direct use of the Commandments to be a major factor weighing *in favor of* a finding of unconstitutionality.

context of history and moral ideals," communicating to visitors that "the State sought to reflect moral principles, illustrating a relation between ethics and law . . ." *Id.*

Each of the foregoing factors considered by Justice Breyer in *Van Orden* is present with respect to the display in DeWeese's courtroom. The physical setting is a busy courtroom in a county courthouse, not a chapel. It can hardly be seen as a place that lends itself easily to meditation or other religious activity. The "ethics-based motives," in Breyer's phrase, *id*., of the originator of the courtroom display (DeWeese) are plainly spelled out on the display itself. Even more than in the case of the Decalogue monument in Texas, the physical setting and the circumstances surrounding DeWeese's poster would suggest to any reasonable observer (more than "suggest," the poster comes right out and says so) that he is using the Commandments in his poster to make an ethical, a philosophical, a jurisprudential — not a religious — point.

Thus, the reasonable observer viewing DeWeese's poster sees it as an exposition of competing legal and ethical philosophies and recognizes that the Commandments are being used as a symbol or emblem of a particular legal and jurisprudential philosophy which was common at the Founding and remains part of the jurisprudential mainstream (if no longer the majority view) today. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. B). Further, the reasonable

observer knows that DeWeese's particular use of the Commandments, as an illustration of his philosophical point about conflicting legal philosophies, is being made in a physical setting where that conflict is likely to be relevant (a courtroom), by an individual who is likely to have an opinion on that topic (a judge).

Even assuming *arguendo* that the opinions expressed in the poster are impermissibly religious, the district court was also incorrect to conclude that a reasonable observer would conclude that the State of Ohio and/or Richland County endorse the opinions set forth in the poster for a number of reasons. To begin with, the reasonable observer is charged with knowledge of the history and context of the forum in which the challenged display appears. *Pinette, supra*. Thus, the reasonable observer knows that, in Richland County at least, judges themselves are free to decorate their courtrooms as they see fit. He or she also knows that this particular poster was made by and is owned by Judge DeWeese himself. It is not a permanent part of the architecture of the building. It can be easily removed (as the first poster was) or easily covered up by its owner (as the current poster has been). There is nothing official-looking about it.

More than that, however, the poster expressly states that it is the work of an individual and contains that individual's — not the state's or the county's — opinions. No reasonable person would think that by using the words "I" and "personally," the individual using those words meant to convey some sort of

impersonal, official governmental position. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A-3).

The court was correct, of course, in noting that Judge DeWeese is a judge and that a judge is a government official. But, unlike the State of Ohio or Richland County, which can never be anything but the government, a judge is also a citizen, an individual who is not always declaring official government policy. This dual status of judges and other government officials was not even considered by the district court, which, thus, missed an important distinction made by at least one sitting member of the Supreme Court. For, as Justice Stevens observed in his *Van Orden* dissent, "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." 545 U.S. at 723 (Stevens, J. dissenting) (emphasis in original).

The reasonable observer in DeWeese's courtroom, given all of the various factors discussed above — knowledge of the forum, the physical setting, the specific individualized words of the poster itself — is far more likely to see the display as what it is intended to be: a personal expression of a personal opinion of an individual who works for the government, rather than a statement of official policy being made by *the* government.

E. The District Court Improperly Resolved Fact Issues Against DeWeese on the Establishment Clause Claim.

The district court's analysis of both the purpose and effect prongs of the *Lemon* test was erroneous. On the record before the court, the plaintiff has failed to demonstrate a violation of the Establishment Clause. Beyond that, however, as it did with the issue of standing, the district court ignored the serious questions of fact presented in the record or, just as bad, resolved them against DeWeese, the non-movant.

This was the ACLU's motion for summary judgment. The ACLU bore the burden of proof and, thus, on a motion for summary judgment, had the burden of showing that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In this case, the only direct evidence before the court on the issue of DeWeese's purpose was the sworn declaration of DeWeese himself, a constitutional officer of the State of Ohio. That declaration set forth an eminently secular purpose for the conduct being challenged by the ACLU. DeWeese specifically disclaimed a religious purpose. And yet the district court, without ever having laid eyes on him or listening to him testify in open court, apparently and quite improperly concluded that DeWeese's uncontradicted testimony was not to be credited. *See Hanover Ins. Co. v. American Eng. Co.*, 33 F.3d 727, 731-32 (6th Cir. 1994) (if nonmovant presents

more than a scintilla of evidence in its favor, credibility determinations are for trier of fact at trial and not for court at summary judgment stage of litigation).

III. THE DISTRICT COURT ERRED IN HOLDING THAT DEWEESE'S DISPLAY VIOLATES ARTICLE I, § 7 OF THE OHIO CONSTITUTION.

The district court conducted a rather perfunctory analysis of the state constitutional claim after noting, correctly, that the Supreme Court of Ohio has held that Article I, §7 of the state constitution is "approximately equivalent" to the Establishment Clause. (R. 19, Memorandum Opinion and Order, p. 21). But, if ever there were a case where this type of customary short-changing of the language of an analogous state constitutional provision was inappropriate, this is it.

The district court found that DeWeese's poster violates Article I, § 7 of the Ohio constitution. That article contains the following language (not quoted by the court):

> Religion, morality, and knowledge, however, being essential to good government . . .

Article I, § 7, Ohio Constitution.

This constitutional language, modeled on language found in the Northwest Ordinance and probably authored by Jefferson,[23] would seem to undermine the

[23] As noted by the *en banc* Sixth Circuit, the Northwest Ordinance, 1 Stat. 50 (1789), which refers to "religion, morality and knowledge" as "necessary to good government" was adopted by the First Congress on the very day it approved the

(Text of footnote continued on following page.)

ACLU's entire argument in this and other Establishment Clause cases. If "religion" and "morality" are, as the Ohio Constitution proclaims, "essential to good government," how can DeWeese be held to have violated that same constitution by displaying a poster which the district court finds to be his attempt to proclaim that "religion" and "morality" are "essential to good government"?

The logical mind reels at this excursion through the constitutional looking glass. Can it really be thought that the Ohio Supreme Court, applying this same constitutional provision, would go along with this self-refuting proposition, that an Ohio state official violates the Ohio constitution by publicly quoting or paraphrasing the very words of that constitution? Given the plain language of the provision in question, the fact that the Ohio Supreme Court has not had occasion to address the specific question presented, the uncertainty (or "purgatory") still remaining regarding *Lemon*'s applicability to the analogous federal constitutional provision, the district court, at a minimum, should not have entered summary judgment in the ACLU's favor on the state claim.

The district court clearly erred in holding that DeWeese's display violates Article I, §7 of the Ohio constitution.

Establishment Clause. *ACLU of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 296 (6th Cir. 2001) (*en banc*).

IV. DEWEESE'S DISPLAY IS PROTECTED BY THE FREE SPEECH CLAUSE.

The district court rejected DeWeese's separate defense that his actions in displaying the poster at issue are protected by the Free Speech Clause of the First Amendment. (R. 11, Def. Answer). This was error.

As noted above, the court was convinced that it was enough to observe that DeWeese is a state judge; hence, a state official; *ergo*, *the* state, for purposes of analyzing the challenged display. But this is too superficial an approach because it ignores the fact that an individual who works for the government is not considered *the* government for all purposes and under all circumstances. Further, with particular regard to judges, the U.S. Supreme Court has recognized the free speech rights of members of the judiciary.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court struck down, as violative of the Free Speech Clause, the Minnesota Supreme Court's rule prohibiting judicial candidates from announcing their views on disputed legal and political issues. This was so even though the lower courts had placed a limiting construction on the so-called "announce clause" as reaching only disputed issues likely to come before candidates once elected, and allowing general discussions of case law and judicial philosophy. *Id.* at 770-73.

Republican Party confirms that judges are not First Amendment orphans. What is more, the opinion drastically undercuts the district court's superficial

approach to the question of DeWeese's right to express his viewpoint in the present context. After *Republican Party*, it is no longer so simple a matter as saying that DeWeese is a government official therefore, *ipso facto*, his poster *must be* looked at as an official position being taken by Richland County or the State of Ohio. In fact, such an approach ignores completely several facts that are crucial to a proper analysis of this defense, some of which were previously noted in the argument on the endorsement test.

First, unlike objects such as the state seal and motto, the portrait of Lincoln, and the other posters in DeWeese's courtroom, the challenged poster bears the printed signature of the individual who created it and whose opinions are expressed therein. Second, the content of the poster itself clearly indicates that what is written there is the personal opinion of the author rather than an official statement by a governmental entity. The difference in appearance and content between the Commandments and Precepts on the one hand, and Judge DeWeese's personal gloss (smaller type, marginal editorial comments) on the other, underscores this point. Third, the fact that Richland County judges have the right to decorate their courtrooms as they see fit, such that DeWeese could replace Abraham Lincoln with Stephen A. Douglas and Alexander Hamilton with Aaron Burr should he so choose, further demonstrates that his poster represents a personal choice, not a governmental statement. Fourth, the note on the poster which invites the interested

reader to obtain an explanatory pamphlet, written by Judge DeWeese himself, provides additional factual support that the poster is DeWeese's design, constitutes his personal expression, and is displayed pursuant to his educational purpose.

The view accepted by the district court ignores the fact that, as a judicial officer, unlike any other government official such as a county commissioner or mayor, DeWeese has not merely a right to speak publicly about his legal philosophy. He is, in fact, specifically *encouraged* to do so by the Ohio Code of Judicial Conduct:

> A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.

Canon 2(A)(1).

As the commentary to this provision reads, in pertinent part:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice . . . To the extent the time permits, a judge is encouraged to do so . . . .

This is not to say that Judge DeWeese (or any judge for that matter) is permitted to say whatever he likes, whenever he likes. A line of demarcation must be drawn between speech and personal opinion which takes place *outside* the judicial process, and speech and personal opinion which is used *within* the judicial process. Judge DeWeese and the poster at issue respects this line. Neither the ACLU's complaint nor Mr. Davis' declaration allege that Judge DeWeese's poster — which

conveys his viewpoint regarding law, morality, and the relationship between the two — has ever found its way into proceedings, hearings, or rulings of Judge DeWeese. DeWeese states in his declaration that he does not use or refer to the poster in judicial proceedings. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A, ¶ 10).

Though the specific issue being presented here is perhaps one of first impression, it merits a more careful analysis than that performed by the district court. It is by no means unusual, it is rather common in fact, for sitting members of the judiciary to speak and publish their views on the law and legal philosophy.[24] Are such speeches and publications *not* protected by the Free Speech Clause, despite the possibility that someone, somewhere might read into the views therein expressed a prejudicial commitment to a particular jurisprudential viewpoint?

Similarly, as noted above, at least one member of the current Supreme Court has made the important distinction between statements of government officials that reflect their personal opinions and statements that embody official government policy: "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those

[24] *See, e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1998) and Stephen Breyer, *Active Liberty* (2006). The U.S. Supreme Court's own website has collected a number of speeches by Justices of the Supreme Court, http://www.supremecourtus.gov/publicinfo/speeches/speeches.html, and other speeches by various Justices can be found elsewhere on the internet.

orations have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J. dissenting) (emphasis in original). It can only be that, because even government officials enjoy at least some measure of freedom of expression, that the expression of such personal views — even when of a religious nature — has never been the subject of a successful constitutional challenge.

Because of concerns surrounding the Establishment Clause and, perhaps, other constitutional provisions, resolution of a government official's assertion of a free speech defense would seem to be especially fact-sensitive. Because it failed to recognize, in DeWeese's case, the slightest shred of a free speech defense, the district court did not conduct a full analysis of the factual circumstances of DeWeese's expression and how those circumstances could, or could not, impact the viability of his defense.

CONCLUSION

For the foregoing reasons, this court should reverse the judgment of the district court granting summary judgment in favor of plaintiff ACLU of Ohio.

Respectfully submitted,

AMERICAN CENTER
FOR LAW & JUSTICE

/s/ Francis J. Manion
Francis J. Manion*
Geoffrey R. Surtees*
American Center for Law & Justice
6375 New Hope Road
New Hope, Kentucky 40052
Tel: 502-549-7020
fmanion@aol.com
grsurtees@gmail.com
Co-Counsel for Appellant

Edward L. White III*
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
Tel: 734-662-2984
ewhite@aclj.org
Co-Counsel for Appellant

* Admitted to Sixth Circuit Bar

December 17, 2009

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,276 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

/s/ Francis J. Manion
Francis J. Manion
Attorney for Defendant/Appellant

December 17, 2009
Date

CERTIFICATE OF SERVICE

I certify that on this the 17th day of December, 2009, pursuant to 6 Cir. R. 25, I caused the foregoing to be served electronically on the following through the ECF System:

Michael T. Honohan
Law Office
19425 Frazier Drive
Rocky River, OH 44116
440-331-0628

Carrie L. Davis
American Civil Liberties Union of Ohio
4506 Chester Avenue
Cleveland, OH 44103
216-472-2220

/s/ Francis J. Manion
Francis J. Manion

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
Pursuant to Sixth Circuit Rule 30(b)

The following filings from the district court's record are relevant documents:

Date	Record Entry No.	Description of Entry
10/07/2008	1	Complaint against James DeWeese. Filing fee $ 350, receipt number 06470000000003238310, filed by American Civil Liberties Union of Ohio Foundation, Inc.. (Attachments: # 1 Civil Cover Sheet, # 2 Summons Waiver of Service of Summons form) (Davis, Carrie) (Entered: 10/07/2008)
12/05/2008	11	Answer to 1 Complaint, filed by James DeWeese. (Manion, Francis) (Entered: 12/05/2008)
06/05/2009	16	Motion for summary judgment filed by Plaintiff American Civil Liberties Union of Ohio Foundation, Inc.. (Attachments: # 1 Brief in Support, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9)(Davis, Carrie) (Entered: 06/05/2009)
07/03/2009	17	Opposition to 16 Motion for summary judgment filed by James DeWeese. (Attachments: # 1 Affidavit Declaration of James DeWeese, # 2 Affidavit Declaration of Gerard Bradley)(Manion, Francis) (Entered: 07/03/2009)
10/08/2009	19	Memorandum Opinion and Order: Plaintiff's Motion for Summary Judgment is GRANTED as to all counts in the complaint. Defendant is enjoined from displaying the poster. Judge Patricia A. Gaughan on 10/6/09. (LC,S) (Entered: 10/08/2009)

Date	Record Entry No.	Description of Entry
10/08/2009	20	Judgment Entry: This Court, having issued its Memorandum of Opinion and Order granting plaintiff American Civil Liberties Union of Ohio Foundation, Inc.'s Motion for Summary Judgment (Doc. 16), hereby enters judgment for plaintiff. Judge Patricia A. Gaughan on 10/6/09. (LC,S) re 19 (Entered: 10/08/2009)
10/09/2009	21	NOTICE OF APPEAL to the 6th Circuit Court of Appeals from the 19 Memorandum of Opinion and Order and 20 Judgment Entry of 10/6/09, filed by Hon. James DeWeese. (Filing fee of $455 paid, receipt number 0647-3775494) (Manion, Francis). Modified text on 10/13/2009 (H,SP). (Entered: 10/09/2009)
10/09/2009	22	Motion to stay of judgment pending appeal filed by Defendant James DeWeese. Related document(s) 19 . (Attachments: # 1 Brief in Support)(Manion, Francis) (Entered: 10/09/2009)
10/23/2009	25	Opposition to 22 Motion to stay of judgment pending appeal filed by American Civil Liberties Union of Ohio Foundation, Inc.. (Attachments: # 1 Exhibit A)(Davis, Carrie) (Entered: 10/23/2009)
11/04/2009	27	Memorandum Opinion and Order: Defendant's Motion for Stay of Judgment Pending Appeal is DENIED. Judge Patricia A. Gaughan on 11/4/09. (LC,S) (Entered: 11/04/2009)