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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The ACLU's Response Brief contains a number of misleading and confusing statements, untenable arguments, and even some important concessions that call for reply and comment. As argued below, the Response actually strengthens DeWeese's arguments on a number of important points. At a minimum, the ACLU's Response underscores the weaknesses of the district court's decision in this matter and demonstrates the need for this court to reverse the decision below. Finally, the central argument of both the ACLU and its amici serves to bring into focus the issue that this court cannot avoid addressing: does a state actor who expresses the philosophy of the Framers of the First Amendment somehow violate that same First Amendment?

I. REPLY TO INCORRECT AND MISLEADING STATEMENTS IN ACLU'S STATEMENT OF FACTS.

First, throughout the Response, the ACLU jumps back and forth between Judge DeWeese's courtroom poster and the explanatory pamphlet he authored and makes available to those who request it. The former was on display in his courtroom; the latter was not. Moreover, the Response repeatedly quotes excerpts from the poster without giving the important context in which those excerpts appear. In addition, at page 6 of the Response, the ACLU adds its own editorial comments to quoted excerpts from the poster without making it entirely clear that the additional comments do not actually appear on the poster itself. In the hope of

clearing up any resulting confusion, DeWeese refers the court to the actual text of the poster which is part of the record on appeal at R. 17, Def. Opposition to Motion for Summary Judgment, Ex A – 3.

Second, the Response repeatedly refers to DeWeese's "deposition testimony" in support of its argument (and in defense of the district court's decision). (Brief of Appellee, pp. 4, 13, 31, and 35). Judge DeWeese was not deposed in this case. He has given no "deposition testimony" concerning the subject matter of this action. The impropriety of relying on deposition testimony given by DeWeese nine years ago in a *different case* to support the granting of summary judgment in the present case should be obvious but, in any event, is discussed below in Section V.

Third, the Response refers three times to a "Bernard Miller" as the individual ACLU member allegedly injured by DeWeese's display. (Brief of Appellee, p. 1, ¶¶ 2-3; also, p. 8.) At one point, the court is even directed to a "Miller Declaration, ¶ 5." (Brief of Appellee, p. 4). As far as this party is aware, there is no such person involved in this case, nor does the record contain a "Miller Declaration." This (presumably) mistaken identification of the individual upon whose "injury" the ACLU's standing rests in this case is telling, as discussed in Section VIII, below.

II. THE RESPONSE MAKES SIGNIFICANT CONCESSIONS.

The ACLU's Response makes two significant concessions. At pages 27–28, the Response appears to recognize that the second part of the district court's finding of improper religious purpose is simply untenable. As DeWeese argued in the principal Brief, at 29–30, fostering discussion and debate about legal philosophies can hardly be viewed as impermissible under the First Amendment. Yet, this is what the district court found, as part (2) of its two-part finding of improper religious purpose. (R. 19, Memorandum Opinion and Order, p. 11). It appears that the parties themselves, however, may be in agreement that this was error on the part of the district court.

In addition, in two places in its Response the ACLU describes the views expressed by DeWeese as his "personal philosophy" or "Judge DeWeese's judicial philosophy." (Brief of Appellee, pp. 5, 6). This is precisely the point DeWeese has been making since he created his poster with the title "Philosophies of Law in Conflict." That the ACLU recognizes that what DeWeese is expressing is a *philosophical viewpoint*, as opposed to a religious dogma, is a telling concession, one which undercuts the rest of the organization's and its amici's arguments, as well as, of course, the very foundation of the decision below.

III. THE ACLU FAILS TO REFUTE DEWEESE'S ARGUMENT THAT HIS VIEWPOINT NEED NOT BE SEEN AS "RELIGIOUS."

> *Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.*
>
> — George Washington, Farewell Address (Philadelphia) September 17, 1796.

The ACLU attempts to avoid the central point of DeWeese's Establishment Clause argument, i.e., that expressing the legal philosophy of the Framers of the First Amendment cannot be said to violate the First Amendment. The Response brushes off DeWeese's argument on this point as "a highly academic treatise on jurisprudence, philosophy, and natural law" which is "irrelevant" to what the ACLU calls the "essential question," namely, whether or not the poster passes muster under the *Lemon* test. (Brief of Appellee, p. 24).

On the contrary, under *Lemon*, at least as applied by the district court in this case, what is *essential* is to resolve the question of whether or not DeWeese's viewpoint is *necessarily* a religious one, as opposed to a philosophical one or, perhaps, some mixture of the two. This is because the district court concluded that DeWeese's purpose *must be* impermissibly religious *because* the viewpoint he expresses is, in the court's mistaken view, religious. This was enough, as it was for the *Ashbrook* court, to prove the fatal "predominant" religious purpose. (R. 19, Memorandum Opinion and Order, pp. 10-12). But, if DeWeese's viewpoint is

shown to be something other than necessarily a religious one, then the basis of the district court's decision (and the ACLU's argument) is decisively undermined.

This mistake about the nature of DeWeese's viewpoint is the premise of the district court's opinion in this matter. It is a mistake that this court cannot readily ignore. (*See* Brief of Appellant, pp. 21-31). By pointing out that the district court was simply relying on language from the *Ashbrook* decision, the ACLU helpfully underscores the urgency for this court to correct what is an historically erroneous and legally untenable position. *See, ACLU of Ohio v. Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004).

It is in this sense, of course, that DeWeese maintains that *Ashbrook* has been "superseded." It never was correct, but is certainly not correct after *Van Orden*, to say 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*." *Ashbrook*, 375 F.3d at 492 (quoting *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873, 889 (N.D. Ohio 2002) (emphasis in original). After all, the Supreme Court, in *Van Orden*, declined to find an impermissible religious purpose in a state actor's [State of Texas] officially sanctioning a view of moral absolutism at the very seat of state government by particularly referring to the Ten Commandments in a far more imposing (literally monumental) fashion with no attempt whatsoever

to balance the Decalogue with any competing precepts as DeWeese has done. *See*, *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (purpose of 6 – foot tall Decalogue monument with prominent words "I Am the Lord Thy God" was to "highlight the Commandments' role in shaping civic morality").

The ACLU barely attempts to respond to DeWeese's marshalling of readily available historical evidence that a jurisprudential view embracing a transcendent foundation for law resulting in unchanging rules of moral conduct is *not* an innately religious view, but, rather, a philosophical opinion held by people from time immemorial. As DeWeese's expert on Constitutional Law opined in commenting on the one phrase in the poster that seemed all but conclusive to the district court (and the ACLU), "I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards . . .":

> The Display's author [DeWeese] here joins most other students of the founding, who assert too that the founders believed that adherence to the standards of right conduct established by the Supreme Being was essential to Americans' political and personal well-being. The Display here not only expresses *a* common viewpoint within the study of the moral foundations of American law. The Display here expresses the consensus view . . .

See Expert Report of Gerard Bradley. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. B, pp. 4, 5). And, as Professor Bradley goes on to point out, this view "has also been affirmed many times by the United States Supreme

Court." *Id*., at 5, citing *School District of Abington v. Schempp*, 374 U.S. 203, 213 (1963).

Bradley also effectively refuted any notion that the poster expresses an "innately religious" view:

> A view about law (or about any other subject, for that matter) which recognizes a causal relationship between law (or another subject) and religion is not, for that reason, an innately religious view. It remains a view about the foundations of law (or whatever). It is not in any important way a view about religion. It is not transformed into a view about religion by virtue of its religious component. Otherwise, a view about the causes of the Civil War or about the success of the modern civil rights movement which included a religious element (disagreement about whether the Bible sanctions slavery, and the political theology of the Rev. Martin Luther King, Jr., respectively) would be "innately religious."

(R. 17, Def. Opposition to Motion for Summary Judgment, Ex. B, p. 10).

In other words, the ACLU's belittling of DeWeese's poster as the equivalent of a "religious bumper sticker" is as unfortunate as it is historically ignorant. (Brief of Appellee, p. 26). Contrary to the ACLU's characterization of it, reduced to its essentials the message of DeWeese's poster — that human law rests on absolutes or fixed standards established by a transcendent Lawgiver and that departure from those standards leads to social ills — is not much different from what one finds in some of our Nation's most hallowed civic shrines.

For example, in the Jefferson Memorial in the Nation's capital, a place visited annually (one guesses) by even more people than Judge DeWeese's

courtroom, state actors (the National Park Service) continue to sanction the following view of the consequences of a society's failure to abide by "Almighty God's fixed moral standards":

> God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God? Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever. Commerce between master and slave is despotism.[1]

A bit further down the National Mall, a visitor to the Nation's capital may climb the steps of the Lincoln Memorial and be confronted by the following statement of state actors (National Park Service) sanctioning the view that the greatest social cataclysm in American history was a direct consequence ("the woe due") of the Nation's collective flouting of divine justice:

> The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him?[2]

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[1] *See* <<http://www.monticello.org/reports/quotes/memorial.html>> (last visited February 4, 2010).

[2] *See* <<http://www.nps.gov/linc/index.htm>> (last visited February 4, 2010).

"Religious bumper stickers?" One would think not.[3] And yet, reduced to their essentials, both Jefferson and Lincoln (and the state actors who are displaying these quotes daily) are expressing the same view as Judge DeWeese: societal departure from moral absolutes has negative social consequences.

Space precludes the piling on of the literally dozens of quotations to similar effect one finds from the Founders and other revered figures in American history. To quote but two more examples of iconic American figures expressing what the district court held to be an "innately religious" view warranting resort to the court's injunctive power, one can cite George Mason's argument in the *Robin v. Hardaway* case. *Robin, et al. v. Hardaway, et al.*, 1772 Va. LEXIS 1; Jeff. 109 (Supreme Court of Va.). There, arguing for freedom on behalf of enslaved descendents of Indians, Mason, known as the "Father of the Bill of Rights," said the following:

> The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are bound in conscience to disobey.

[3]The same could be said, of course, for the Washington quote that appears at the head of this Section, as well as for the John Adams quote that appears on DeWeese's poster: "We have no government armed with powers capable of contending with human passions unbridled by morality and religion. Our Constitution was made for a moral and religious people. It is wholly inadequate for the government of any other." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A-3).

Id.

Or perhaps, as suggested by Professor Bradley's example of the modern civil rights movement, reduced to its essentials, DeWeese's poster is more like Dr. Martin Luther King, Jr.'s argument in his *Letter from Birmingham City Jail* (April 16, 1963):

> How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God ... To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law.

Reprinted in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, 289, 293 (James M. Washington ed., 1986).

As these examples demonstrate, the district court's conclusion that the views expressed by DeWeese in the challenged poster (or even in the pamphlet which is *not* on display in the courtroom) are inherently, necessarily, or "innately" religious, such that his expression of them necessarily bespeaks a constitutionally forbidden religious purpose under *Lemon*, is not a tenable conclusion. The court made no attempt to articulate any rationally based constitutional principle that would permit one to distinguish between the public expression of such views in places like the National Mall as opposed to the Richland County Courthouse. Indeed, there is no such principle.

The decision of the district court should be reversed.

IV. A REASONABLE OBSERVER WOULD NOT ATTRIBUTE DEWEESE'S EXPRESSION OF HIS JUDICIAL PHILOSOPHY TO THE GOVERNMENT.

The ACLU's Response drastically oversimplifies the argument being advanced here about DeWeese's speech. Whether in the context of the endorsement test under *Lemon,* or as a distinct Free Speech defense, DeWeese's status as a government official, while obviously relevant, is not determinative.

No one can seriously contend that every verbal or written utterance of an individual who happens to be a public official constitutes an official statement of government policy or endorsement, even if such utterances happen to be made on public property and while that official is performing a public function. This rather obvious principle was acknowledged by Justice Stevens in his *Van Orden* dissent. *Van Orden*, 545 U.S. at 723 (Stevens, J. dissenting) (words spoken by public officials in public speeches not exclusively transmissions from the government but also may contain inherently personal views of the speaker as an individual). Thus, it is incorrect to maintain that DeWeese's poster *must be* viewed as government speech simply because Judge DeWeese is a government official.

The *Lemon*-endorsement test posits a hypothetical reasonable observer who is aware of the history and context of the forum in which the challenged governmental display or object appears. *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Moreover, in cases

involving government speech, it is at least arguable that the Court implicitly applies an analogous reasonable observer test in trying to ascertain the boundaries between government and private speech. *See, e.g., Pleasant Grove, et al. v. Summum*, 129 S. Ct. 1125 (2009), including Justice Souter's call for the Court to explicitly adopt a "reasonable observer" standard for determining whether or not speech is that of the government or a private citizen. *Id.* at 1142, ("the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech").

Because it mistakenly believes there to be no speech issue in this case, either under *Lemon* or as a separate defense, the ACLU's Response fails to account for several crucial — and undisputed — facts of which a reasonable observer would have imputed knowledge.

First, the reasonable observer knows that Judge DeWeese created the poster, hung the poster on the wall and is *the owner of the poster.* Second, the reasonable observer knows that it is the practice in Richland County to permit judges *to decide for themselves* what pictures, symbols, etc. they wish to put on the walls of their courtrooms. This fact, while perhaps not reflecting the common practice across the country, is *undisputed* in this case. (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A).

Third, since the reasonable observer is familiar with the history of the ACLU's lawsuits against Judge DeWeese, the reasonable observer knows that Judge DeWeese deliberately changed his original display *in order to avoid any ambiguity* about whether or not the poster was the speech of the State or of the judge individually. The original display included the complete texts of the Bill of Rights and the Decalogue without comment. The new display is a signed expression of Judge DeWeese's personal philosophical opinion about the benefits of fixed ethical standards. Fourth, the same reasonable observer is aware that from the beginning, in 2001, Judge DeWeese has never wavered from his assertion that his purpose for hanging either display was wholly educational, philosophical or jurisprudential. *See*, *Ashbrook*, 375 F. 3d at 501 (Batchelder, J., dissenting).

Finally, and most important of all, the reasonable observer can read the actual words of the poster itself: "**I** join the Founders in **personally** acknowledging . . ." This statement, along with everything else, and followed by the printed "signature" of DeWeese, would lead a reasonable observer to conclude that this poster is something Judge DeWeese — not the State of Ohio[4] — has created and

[4]The reasonable observer *does* know one thing the State of Ohio *is* saying in DeWeese's courtroom: "With God All Things Are Possible." (R. 17, Def. Opposition to Motion for Summary Judgment, Ex. A). It would be ironic indeed for this court to affirm a judgment enjoining display of a poster expressing what even the ACLU calls DeWeese's "personal judicial philosophy," when this court, *en banc* has upheld the display in every Ohio courtroom of a direct quote from the

displayed because he wants to express a viewpoint **he** considers important. The reasonable observer sees that Judge DeWeese is speaking in the first person about his own philosophical opinion and agreement with the Founders.

As this Court has said, "[t]he ACLU . . . does not embody the reasonable person." *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F. 3d 624, at 638 (6th Cir. 2005). No one (except apparently the ACLU) would reasonably conclude that Judge DeWeese is here making an official pronouncement for the State of Ohio or Richland County. The First Amendment does not prohibit the voicing of philosophical opinions by minor government officials. Nor does it prohibit only those expressions of philosophical opinion which the ACLU deems religiously offensive to its sensibilities.

V. THE USE OF *ASHBROOK'S* PURPOSE FINDING AND DEWEESE'S 2001 DEPOSITION IS CONTRARY TO *MCCREARY COUNTY*.

In its argument regarding purpose, the ACLU's Response highlights one of the district court's fundamental misapplications of both the *McCreary County* and *Ashbrook* decisions. *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004).

The ACLU (and the district court) places far too much weight on the fact that *Ashbrook* found that DeWeese had a predominantly religious purpose for his

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Gospel of St. Matthew. *ACLU of Ohio v. Capitol Sq. Review and Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (en banc).

2000 display, even to the extent of using against him *in this case* deposition testimony he gave in 2001 about the earlier, wholly different display.[5] (Brief of Appellee, pp. 13, 31 and 35). The court purported to be applying *McCreary* by using *Ashbrook's* finding against DeWeese to prove the existence of an invalid religious purpose for the current display.

Even assuming, *arguendo*, that *Ashbrook* was correctly decided and remains good law, this is a simplistic application of *McCreary*. The *McCreary* Court itself noted the limited nature of its holding:

> In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. *We hold only that purpose needs to be taken seriously under the Establishment Clause ...*

McCreary, 545 U.S. at 843-44 (emphasis added).

Given the Court's refusal to find that the counties' past improper purposes "taint" future attempts to deal with the same subject matter, it was contrary to *McCreary* for the district court to use *Ashbrook's* holding of improper purpose as proof of a similar purpose in this case. In *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), this court quoted the above language from *McCreary* in rejecting the ACLU's attempt to impute the impermissible purpose of one county to another county: "the [*McCreary*] majority emphasized that the district

[5]Judge DeWeese was not deposed in the present case.

court should be willing to modify its judgment should the counties later demonstrate a predominantly secular purpose." *Mercer*, 432 F.3d at 632, n.6.

Given what *McCreary* said about lack of "taint," the resort to the *Ashbrook* court's findings on purpose, as well as the use of a deposition taken nine years ago about a completely different display is both legally incorrect and highly misleading.

VI. THIS COURT'S RECENT *GRAYSON COUNTY* DECISION REAFFIRMED THE IMPORTANCE OF DEFERRING TO A GOVERNMENT ACTOR'S STATED SECULAR PURPOSE.

The district court gave short shrift to the principle that courts are to defer to the government's stated purpose, except where the stated purpose is a sham. (R. 19, Memorandum Opinion and Order, p. 9). Yet this principle remains an important part of Establishment Clause analysis as demonstrated in this court's *Mercer County* decision ("a finding of impermissible purpose should be rare"), 432 F.3d at 630, as well as this court's recent decision in *ACLU of Kentucky v. Grayson County*, 2010 U.S. App. LEXIS 837 (decided January 14, 2010).

In *Grayson County*, the court found that the district court's inference of an illicit motive "misconceives the nature of the purpose inquiry and the judicial role." *Grayson County*, 2010 U.S. App. LEXIS at ** 37. Noting the reluctance of courts to attribute unconstitutional motives in this context, this court said "[O]ne form this reluctance takes is deference to the government's stated reasons." *Id.*

Moreover, the *Grayson* majority took issue with the dissent's analysis, asserting that it was based, in part, on a "suspicion that the secular purpose articulated by Grayson County during litigation is a sham." *Id.* And in words just as applicable to the district court's conclusion in this case, the *Grayson* majority wrote:

> the dissent appears to treat the inherent religious nature of the Ten Commandments as necessarily "trumping" their recognized secular and historical significance. As a consequence, the dissent, in effect, improperly transfers the burden of proof from challenger to the governmental entity, too casually dismisses manifest evidence of secular purpose as a sham, and indulges in speculation about Fiscal Court members' "heart of hearts," contrary to *McCreary County*, 545 U.S. at 862.

Grayson at ** 47.

In the instant case, the district court simply brushed aside Judge DeWeese's sworn Declaration that set forth his *exclusively* secular purpose for his poster. This is hardly the deference demanded by this court's and the Supreme Court's precedents, especially when the statements in Judge DeWeese's sworn Declaration were uncontroverted.

VII. THE ACLU'S ENDORSEMENT ANALYSIS IS FLAWED.

The ACLU's Response highlights an important flaw in the district court's opinion in this matter. The court (and the ACLU in its brief) relied on language in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989), to the effect that government may not do anything that suggests a preference or

endorsement — not only of one religion over another — but also of religion over non-religion. (R. 19, Memorandum Opinion and Order, p. 20).

This alleged principle was addressed by the late Chief Justice Rehnquist in his plurality opinion in *Van Orden*. His refutation of it is worth quoting in full:

> Despite *Justice Stevens'* recitation of occasional language to the contrary, *post*, at 4-5, and n. 7 (dissenting opinion), we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion. *See, e.g.*, *Cutter* v. *Wilkinson*, 544 U. S. __ (2005); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987); *Lynch* v. *Donnelly*, 465 U. S. 668 (1984); *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970). Even the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion. *See post*, at 6 (opinion of *Stevens, J.*) (recognizing that the Establishment Clause permits some "recognition" or "acknowledgment" of religion); *post*, at 5, and n. 4 (opinion of *Souter*, J.) (discussing a number of permissible displays with religious content).

Van Orden v. Perry, 545 U.S. 677, 684, n.3 (2005).

In other words, while the language about non-preference for "religion over non-religion" can, in fact, be pulled from a number of opinions, it is largely meaningless without consideration of the facts of the particular cases in which it appears, as the citations in Chief Justice Rehnquist's footnote plainly demonstrate. *Id. See also, McCreary*, 545 U.S. at 899-900 (Scalia, J., dissenting). Of course, the fact that a majority of the Court declined to apply the principle in the *Van Orden* case, a case in which a state actor (Texas) prominently displayed on state

capitol grounds a monumental version of the Decalogue, would appear to make the principle singularly inapplicable in the present context.

VIII. THE ACLU'S RESPONSE STRENGTHENS DEWEESE'S STANDING ARGUMENT

Perhaps nothing better illustrates the sham nature of this case than the fact that the ACLU repeatedly refers to its "injured" member/representative *by the wrong name*. Three times reference is made to "Bernard Miller" when, presumably, "Bernard Davis" is intended. (Brief of Appellee, p. 1, ¶¶ 2-3; p. 8.) At one point, the court is even directed to a "Miller Declaration, ¶ 5." (Brief of Appellee, p. 4). Appellant DeWeese is unaware of such a Declaration or such an individual's involvement in this matter. No matter. Miller, Davis, Smith, Jones, Whoever. Apparently, the ACLU is convinced that having a real person with a real injury is a mere formality, something akin to a "widget" in a law school exam question.

This cavalier attitude toward Article III jurisdiction is not the attitude of the U.S. Supreme Court. "The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible' and without exception." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (quoting *M. R. Co. v. Swan*, 111 U.S. 379, 382 (1984)). Moreover, "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisprudence, but also that of the

lower courts in a cause under review, even though the parties are prepared to concede it." *Steel Co.*, 523 U.S. at 95 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

As the Supreme Court admonishes, "[M]uch more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers . . . ." *Steel Co.*, 523 U.S. at 101. In other words, this is no mere academic exercise in which the identities of the parties and their representatives are mere hypotheticals with interchangeable names. It actually should matter whether or not the ACLU in this case has a *real* representative with a *real* injury.

DeWeese submitted a sworn statement in this case that, at a minimum, cast doubt on the genuineness of the claim of "injury" being advanced here. Neither the district court's dismissal of this sworn statement as "speculation" (R. 19, Memorandum Opinion and Order, p. 8), nor the ACLU's characterization of it as a "remarkable document," (Brief of Appellee, p. 20), do anything to address directly the issue raised by DeWeese's *personal observations* of the behavior of the ACLU's representative: is the ACLU's designated observer (whatever his name may be) *really* injured by his observation of DeWeese's poster, or is the ACLU's claim based on "mere recitation of the language from applicable case law, utilized

here to make out a colorable claim of standing?" *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004) (Batchelder, J., dissenting).

Of course, it matters not a whit that, according to the ACLU, litigants in these kinds of cases frequently "don't even bother to raise the issue of standing." (Brief of Appellee, p. 19); *see Steel Co.*, 523 U.S. at 95 (court must make jurisdictional determination even where parties concede it). Nor is there the slightest significance to the fact that DeWeese raised this issue in prior litigation brought by the ACLU. (Brief of Appellee, p.16). This is a different case with different facts and the court's obligation to examine the jurisdictional question must be decided anew.

The ACLU's Response further strengthens DeWeese's standing argument in the curious way that the ACLU attempts to explain away the three-year-gap between the presumed onset of the alleged injury and the filing of this lawsuit. Davis, they tell us, "is not the plaintiff and, presumably, does not set the litigation agenda for the ACLU, the actual plaintiff." (Brief of Appellee, p. 20). Davis may not be the plaintiff, but since he is the only ACLU member whose alleged contact with DeWeese's poster is anywhere described by the ACLU, his "injury" is the linchpin, the *sine qua non* of the ACLU's claim of standing in this case. *See Hunt v. Washington State Apple Adver. Comm.* 432 U.S. 333, 343 (1977). Without

Davis's "injury" the ACLU has no right to have this matter adjudicated in this court.

The passage of three years between Davis's alleged injury and the filing of this lawsuit is most certainly a significant, undeniable fact regardless of the ACLU's "litigation agenda." As argued previously, this gap should, at a minimum, have raised a question about the validity of the plaintiff's claim of injury. Sophisticated parties such as the ACLU do not ordinarily postpone litigation of serious matters for three years. That the ACLU now tries to distance itself from Davis lends even further credence to DeWeese's basic argument that this is not a real case with a real injury.

The plaintiffs disagree with DeWeese's jurisprudential viewpoint (they think it a religious viewpoint) and disagrees with his displaying that viewpoint in his courtroom (they think this violates the Establishment Clause). But this is nothing more than the sort of "abstract injury in non-observance of the Constitution asserted by . . . citizens," found to be insufficient in *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 223, n.13 (1974), or the so-called "right possessed by every citizen, to require that the Government be administered according to law. . . ," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-3 (1982) (quoting, *inter alia*, *Schlesinger, supra.* and *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

The district court erred in holding that the ACLU has standing in this matter.

IX. ARGUMENTS BASED ON CONSPIRACY THEORIES HAVE NO PLACE IN THIS CASE.

The ACLU's amici advance an extraordinary argument here. They devote at least eight pages of their brief to attempting to cast Judge DeWeese as part of what they appear to believe is a vast right-wing conspiracy — to coin a phrase — that seeks to "dress religious doctrine in secular clothing." (Brief of Amici Curiae Americans United for Separation of Church and State, et al., pp. 10-18). They want this court to infer an unconstitutional purpose on DeWeese's part from a review of cases about evolution, Bible classes and schools, as well as other cases in which DeWeese has had not the slightest involvement. According to the *amici*, DeWeese was present (in spirit at least) at the Scopes Trial and his poster is just another ploy to spread the dark cloud of religious fundamentalism.

Such nonsense could be easily laughed off were it not for the fact that a similar argument has been made — and appropriately rejected — in a case in this circuit. In *Mercer County*, this court decisively repudiated an argument by the ACLU of Kentucky that the court could, in trying to ascertain *Mercer County's* purpose, consider the fact that similar displays in other Kentucky counties had been enjoined in other cases. As this court wrote: "[T]he sins of one government should not be revisited on other governments. There is quite simply no basis in law or fact for such imputation." 432 F. 3d at 632.

And yet is precisely this sort of imputation argued by the amici here and the ACLU in *Mercer County* (and even here to some extent) that one fears skewed the analysis of the court below. This sort of guilt by association (even where evidence of such association is non-existent) is no substitute for proper analysis of evidence in accordance with established rules about burden of proof and the like. *Grayson County*, 2010 U.S. App. LEXIS 837, at 47-48. It smacks, rather, of that "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" described by Justice Breyer in *Van Orden*, 545 U.S. at 699 (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 206 (1963) (Goldberg, J., concurring). It has no place in a proper analysis of the claims and defenses in this case.

CONCLUSION

For the reasons set forth in this party's principal brief as well as this reply brief, Appellant DeWeese respectfully requests this court to reverse the judgment of the district court granting summary judgment in favor of plaintiff ACLU of Ohio.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,881 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.

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CERTIFICATE OF SERVICE

I certify that on this the 5th day of February, 2010, pursuant to 6 Cir. R. 25, I caused the foregoing to be served electronically on the following through the ECF System:

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