IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

DOE 1, by Doe 1's next friend and parent DOE 2, who also sues on DOE 2's own behalf Plaintiffs, v. SCHOOL BOARD OF GILES COUNTY Defendant.	)	Civil No. 7:11-cv-00435-MFU

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW Defendant, by and through its counsel and pursuant to Fed. R. Civ. P. 12(b)(6), and files this memorandum of law in support of its motion to dismiss for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiffs, identified only as Doe 1 and Doe 2, term their claim as a challenge to the posting of the Ten Commandments in Giles County Public Schools. (Complaint, p.8). In fact, however, Plaintiffs are asking this Court to overturn the District's enactment of a resolution which *permits* county citizens to post *displays of historical documents* in district schools. (Exhibit 1 to Memorandum in Support of Motion to Dismiss[1], pp.1-2). Plaintiffs are attempting

[1] District's Exhibit 1 is a recitation of the text of documents that Plaintiffs incorporated into their Complaint. While generally the four corners of the complaint are the only basis for determining a motion to dismiss, there are exceptions to that rule. "In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as **documents attached or incorporated into the complaint.**" *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011) (emphasis added). Even in situations when Plaintiffs fail to attach or incorporate a document, "a court may consider it in determining whether to dismiss the complaint because it was integral to and explicitly relied on in the

to attribute a purported impermissible religious purpose on the part of a private citizen's offering of a historical display, and on the part of officials of the School District, despite the plain language of the documents, the individual's statements and official statements of the Board, and other evidence in the case. This allegation of an "impermissible religious purpose" is motivated by a desire to cleanse Giles County of any vestiges of the Ten Commandments, and does not comport with the evidence of the case. Plaintiffs have failed, however, to make the necessary connection between actions taken by public officials (as opposed to private citizens) and any purported constitutional injury. Consequently, their Complaint should be dismissed for failure to state a claim upon which relief can be granted.

STATEMENT OF FACTS

Beginning in 1999, Giles County schools featured donated displays that contained two equally sized historical documents, the United States Constitution and the Ten Commandments, within a single frame. (See Complaint, ¶ 6, Exhibit A). The displays remained in place without incident until December 8, 2010, when the Giles County school board received a letter from the Freedom from Religion Foundation alleging that the display was unconstitutional. (Complaint, ¶7). Shortly thereafter, the Ten Commandments portion was removed and replaced with the Declaration of Independence (Complaint, ¶ 9). The Ten Commandments were re-inserted into the displays and they were re-hung on on January 11, 2011 (Complaint, ¶ 12, Exhibit A). The School Board voted to remove the displays on February 22, 2011. (Complaint, ¶ 14).

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complaint and because the plaintiffs do not challenge its authenticity." *Phillips v. LCI Int'l., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999). By attaching a picture of the entire display and quoting the Resolution adopting the Foundations of Law display, Plaintiffs have incorporated it sufficiently in the Complaint to allow the District to reference it in a motion to dismiss.

On March 15, 2011, Giles County parent and attorney Bobby Lilly proposed making a donation of a display of historical documents to be placed in a Giles County school. (Complaint, ¶ 17). Mr. Lilly made a formal proposal for a historical documents display and presented a resolution adopting the same to the District Board of Education, and on May 19, 2011 the Board gave the first reading to Mr. Lilly's resolution, which established a policy for the display of historic documents in Giles County schools. (Complaint, Para. 18, Ex. 1 attached, pp. 1-2). The resolution was adopted on June 7, 2011. (Complaint, Paragraph 20). The Resolution provides:

> It is recognized by the Board that many documents and symbols, taken as a whole, have special historical significance to our community, our county, and our country's history. Some of these documents and symbols include, but are not limited to, the idea of equal justice under law as symbolized by Lady Justice; the Star-Spangled Banner; the Bill of Rights to the United States Constitution, the Virginia Statute for Religious Freedom, the Declaration of Independence, the Virginia Declaration of Rights, the Mayflower Compact, the Magna Carta and the Ten Commandments.
>
> A sense of historical context, civic duty and responsibility, and a general appreciation and understanding of the law of this land are all desirable components of the education of the youth of the county. We believe these above named documents positively contribute to the educational foundations and moral character of students in our schools.

(Exhibit B to Complaint, Ex. 1 , p. 1). The resolution continues:

> For all of these reasons, *BE IT THEREFORE RESOLVED AS FOLLOWS*:
>
> 1. The Giles County School Board will allow the posting of the above named documents together, in a display in any school in the district as set forth herein. This historical document display shall include initially a picture of Lady Justice, the Star-Spangled Banner; the Bill of Rights to the United States Constitution, the Virginia Statute for Religious Freedom, the Declaration of Independence, the Virginia Declaration of Rights, the Mayflower Compact, the Magna Carta and the Ten Commandments. The document display shall also include a brief explanatory document, suitably framed. These historical displays shall be financed by funds of private organizations, and no school funds shall be used for this purpose. No service of school personnel of the school district shall be utilized during any time such employee is employed by the school district and no school employee shall be

> required to assist in placing the above mentioned documents in any school. However, this Board does not prohibit any school employee from volunteering their time to assist in this project should any individual employee desire to do so.

(*Id.*). The resolution further sets out requirements for the displays and the procedure for obtaining permission to mount the displays. (*Id.*).

In accordance with the resolution, a "Foundations of American Law and Government" display ("Foundations Display") has been posted at Narrows High School. (Complaint, p. 22, Exhibit B). The display includes ten (10) documents in equally sized frames, plus a framed copy of the board's resolution. (Exhibit B to the Complaint). The text of the documents is reproduced in Exhibit 1 to this Memorandum. The resolution provides no school funds are to be used and no school personnel are to participate in the placing the documents. (Ex. 1). Plaintiffs do not allege that these provisions were violated in the placing of the display at Narrows High School, and, therefore, offer no allegations that any public funds or personnel were involved in the subject display. (Complaint, Paragraph 22). In fact, Plaintiffs offer no allegations that connect the subject display, which is the only display at issue, to any action by any employee or official of the District. (Complaint, pp. 1-6).

Instead, Plaintiffs offer a colloquy on a purported long-standing practice of posting the Ten Commandments in Giles County schools, implying but offering no allegations that the practice is somehow connected to the privately funded and placed Foundations of American Law and Government display at Narrows High School. (Complaint, pp. 1-6). Without making any allegations regarding any action taken by employees or officials of the District, Plaintiffs allege that they have been harmed by the presence of the Ten Commandments, one of eleven (11) equally sized documents in the Foundations Display. (Complaint, pp. 1-6). Plaintiff Doe 1 alleges that he or she is offended by having to see the display, including the Ten Commandments

every day. (Complaint, pp. 1-6). However, since there are no allegations that the Display was placed by or financed by the District, the fact that Doe 1 might be offended is not related to any action taken by the District. Similarly, the fact that other people visiting the school might be offended is not in any way connected to any action by District employees or officials. Similarly, Doe 2's claim that the display usurps his or her parental rights regarding religious upbringing (Complaint, ¶24) is in no way connected to any actions by District employees or officials, and therefore cannot support a claim that the District violated his or her constitutional rights.

In short, wholly absent from Plaintiffs' allegations are any facts connecting any action of District employees or officials to the placing of the Foundations Display to which Plaintiffs' object. Without such facts establishing state action violating constitutional rights, Plaintiffs cannot state a claim.

ARGUMENT

I. PLAINTIFFS HAVE NOT ALLEGED SUFFICIENT FACTS TO STATE A CLAIM UNDER FRCP 8, *TWOMBLY*, AND *IQBAL*.

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." "[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Nevertheless, the factual allegations raised in the complaint "must be enough to raise a right of relief above mere speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' showing of an entitlement to relief "requires more than labels and conclusions, **a formulaic recitation of the elements of a cause of action will not do**." *Id.* (emphasis added). "Rule 8(a) contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare averment that he

wants relief and is entitled to it." *Id.* at 556 n.3 (quoting 5 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1202 (3d ed. 1998)). "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950.

Plaintiffs are not subject to the "heightened fact pleading of specifics," formerly required under the Federal Rules, but must allege "enough facts to state a claim that is plausible on its face." *Twombly*, 550 U.S. at 570. This requires that Plaintiffs allege sufficient facts to "nudge[] their claims across the line from conceivable to plausible." *Id.* "The plausibility standard requires a plaintiff to demonstrate **more than a sheer possibility** that a defendant acted unlawfully." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (emphasis added). "Additionally, the complaint **must be dismissed** if it does not allege enough facts to state a claim to relief that is plausible on its face." *Giarranto v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (emphasis added).

Plaintiffs here have failed to meet even these minimal pleading requirements. Plaintiffs' Complaint is filled with nothing more than bare legal conclusions couched as factual allegations. Specifically, Plaintiffs' "Cause of Action" section is a bare recitation of the elements of an unspecified cause of action. *See* Plaintiffs' Complaint ¶¶ 26-31. Plaintiffs offer no factual allegations describing actions taken by District officials or employees in relation to the Foundations Display to support assertions that the **District** has violated their constitutional rights. (Complaint ¶¶ 26-31). .Plaintiffs allude to purported past actions by school board officials regarding prior displays and present allegations regarding actions taken by community members and the private donor of the Foundations Display. (Complaint ¶¶ 15-25). Plaintiffs have not even

reached the line of a conceivable claim that the District acted unlawfully, let alone nudged beyond that line to plausibility, as required in *Giacomelli* Instead, Plaintiffs merely recite the elements of the "*Lemon* test" for Establishment Clause violations, *see Lemon v. Kurtzman*, 403 U.S. 602 (1973), with vague generalizations instead of factual allegations to connect the elements to the District.

Plaintiffs allege a "longstanding custom, policy, and practice of displaying the Ten Commandments . . . [that] lacks any secular purpose." (Complaint ¶ 26). Plaintiffs allege that there were displays of the Constitution and Ten Commandments present in District schools for more than ten (10) years without incident, but no facts connecting those prior displays to the private donated display presently mounted at Narrows High School. (Complaint ¶¶ 6-12, 22). In a futile attempt to attribute a religious purpose to the District, Plaintiffs describe actions taken by and statements from the citizens of Giles County who expressed their personal beliefs and desires that the Ten Commandments be displayed. (Complaint ¶¶ 10, 15, 16, 19). Plaintiffs do not explain how private citizens exercising their First Amendment rights at public meetings equate to official state action endorsing a religion. (Complaint ¶¶ 10, 15, 16, 19). However, the desires and motivations of citizens in the community are irrelevant to the determination of whether District officials violated the Establishment Clause when they adopted a resolution permitting private displays of historical documents. The only official action taken by District officials was the adoption of a resolution granting permission and setting standards for donated private displays of historical documents in county schools. It is that action that led to the placement of the Foundations Display which Plaintiffs are challenging. Allegations regarding actions previously taken by District officials regarding prior displays not at issue in this case cannot be boot-strapped to create liability for the actions of a private donor over which District

officials exerted no control. Additionally, Plaintiffs continue their mere recitation of the elements of the cause of action by asserting that such a display has the primary effect of advancing religion, *i.e.*, the second prong of the *Lemon* test. (Complaint ¶ 29). Plaintiffs offer no factual allegations that support this assertion. Indeed, there cannot be any since the District did nothing but approve a resolution permitting private donations of displays. As the resolution adopted by the Board reveals, the primary purpose is to post those documents that provided positive influence on the development of student character and instill desirable qualities, as selected by private donors and merely permitted by District officials. The proper inquiry in the second prong of the *Lemon* test is "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval of religion." *Id.* at 272. A resolution permitting private citizens to donate historical displays to the District does not convey a message of religious endorsement.

Plaintiffs' allegations are merely "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," which the Supreme Court has determined "do not suffice" to state a valid cause of action. *Iqbal*, 129 S. Ct. at 1949. Consequently, the Complaint should be dismissed

Plaintiffs' argument is further diminished by the fact that the Board of Education made its intentions for enacting the resolution clear. Courts will not strike down a resolution or action under the secular purpose prong unless "the action is **entirely motivated** by a purpose to advance religion." *Lambeth v. Bd. of Comm'rs of Davidson Cnty., N.C.*, 407 F.3d 266, 270 (4th Cir. 2005). Plaintiffs conveniently ignore the very language of one of the documents they have incorporated in their Complaint. This language includes the District's stated purpose, reveals exactly why the documents were displayed, and provides substantial evidence that such a display

is not entirely motivated by religion as the Fourth Circuit has required. (See Ex. 1, pp. 1-2). District officials explicitly stated that the purpose for the resolution permitting private donations such as the Foundations Display was **to "positively contribute to the educational foundations and moral character of students**," and "**instill qualities desirable in the students**." (See Ex. 1, pp. 1-2) (emphasis added).

Plaintiffs have utterly failed to connect the District's adoption of a resolution providing for the erection of private historical displays to an impermissible endorsement of religion. Because they have failed to raise even a probable claim for relief, their Complaint must be dismissed.

II. PLAINTIFFS CANNOT RELY UPON A FACTUALLY DISTINCTIVE TEN COMMANDMENTS CASE TO SUPPORT THEIR CLAIMS.

Plaintiffs are relying upon the Supreme Court's decision in *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868 (2005) to support their claim that the Foundations Display at Narrows High School violates the Establishment Clause. While the contents of the Foundations Display at Narrows High School and in McCreary County are virtually identical, the comparison ends there. The significant different factual predicate in *McCreary County* makes it inapposite to this case. Instead, the similar factual predicate between this case and cases upholding Foundations Displays, *e.g., ACLU of Ky. v. Grayson County*,591 F.3d 837 (6th Cir. 2010); *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *Books v. County of Elkhart*, 401 F.3d 857 (7th Cir. 2005) make those cases more apropos precedents.

The Foundations of Law display here contains nine documents relevant to the history of American Law and government in Virginia: Lady Justice; the Star-Spangled Banner; the Bill of Rights to the United States Constitution, the Virginia Statute for Religious Freedom, the Declaration of Independence, the Virginia Declaration of Rights, the Mayflower Compact, the

Magna Carta and the Ten Commandments, plus an explanatory document and a copy of the Resolution adopted by the Board. (Exhibit 1 to Memoandum in Support). The Foundations Display in McCreary County also contained an explanatory document, plus the Ten Commandments, Magna Carta (in two frames), Declaration of Independence, National Motto, Mayflower Compact, Preamble to the Kentucky Constitution, the Bill of Rights, lyrics to the national anthem, and a picture of Lady Justice. *McCreary County*, 545 U.S. at 857. The Supreme Court struck down the McCreary County display as violative of the Establishment Clause on the grounds that it exhibited an impermissible religious purpose under *Lemon*. *Id.* at 874. That impermissible religious purpose arose from the county's prior actions in displaying a large framed stand-alone copy of the Ten Commandments following a religiously themed ceremony attended by county officials and one of the official's pastors who said a prayer at the event, and then displaying the large framed copy of the Decalogue with other documents that emphasized religious statements and events. *Id.* at 851-854. The displays immediately succeeded each other and were quickly followed by the Foundations Display, which was displayed after a preliminary injunction had been issued against the prior displays. *Id.* at 854-856. Based upon that history, the Supreme Court found that the Foundations Display was "tainted" by the predominant religious purpose in the prior displays, and therefore was an unconstitutional establishment of religion. *Id.* at 874. The Court was careful to point out however, that its holding should not be read to prohibit similar displays in other public arenas or even an eventual display in McCreary County. *Id.* "[W]e 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 and needs to be understood in light of context. . . ." *Id.* at 873-874.

Plaintiffs here present conclusory allegations aimed at trying to establish a history in Giles County similar to the history in McCreary County, but the allegations are not factually supported. (Complaint, pp. 2-6). In an obvious attempt to link this case to McCreary County, Plaintiffs claim that the District has exhibited a "longstanding custom, policy and practice of displaying the Ten Commandments" in Giles County schools, so that "any alleged secular purpose for the current displays are, and will be perceived as, a sham." (Complaint, ¶¶ 26, 28). However, unlike in *McCreary County*, here there are no factual allegations linking Board members or District employees to religious statements or events in prior displays. (Complaint, pp. 2-6). Instead, the only allegations regarding the prior displays are that they contained the Ten Commandments **and** the Constitution, that they were donated by a local pastor and posted in the schools since 1999. (Complaint, ¶¶ 26, 28). Unlike in *McCreary County*, in this case, there are no allegations that any District officials or employees were present when the original display was posted, that the pastor was related to any of the members, or that there was any kind of prayer or other ceremony when they were displayed. Plaintiffs try to manufacture such facts by alluding to actions taken by Giles County private citizens. (Complaint, ¶¶ 10, 15, 16, 19). However, as discussed above, the actions taken by private citizens do not equate to actions by public officials. Therefore, Plaintiffs' attempt to construct a factual history similar to McCreary County's is unavailing, and *McCreary County* cannot be used to validate Plaintiffs' challenge.

The history in Giles County more resembles the histories in *Grayson County* and *Mercer County*, in which the Sixth Circuit upheld identical Foundations Displays against similar challenges mounted by the ACLU. *Grayson County*, 591 F.3d 837 (6th Cir. 2010); *Mercer County*, 432 F.3d 624 (6th Cir. 2005). As is true here, in *Grayson County*, the ACLU and its clients attempted to ascribe a purported religious purpose on the part of the donor of the

Foundations Display to county officials. 591 F.3d at 850. In *Grayson County*, the donor was a local minister who made comments regarding the religious significance of the Ten Commandments as well as comments reflecting a secular purpose. *Id.* The Sixth Circuit noted that courts "may look to the 'public comments of an enactment's sponsor,' *see, e.g., McCreary County*, 545 U.S. at 862, 125 S.Ct. 2722; *American Civil Liberties Union of Kentucky v. Garrard County, Kentucky*, 517 F.Supp.2d 925, 942 (E.D.Ky.2007), ultimately it is the purpose of the government decision-makers that is most important.." *Id.* "[O]ur focus is on the motivations of the current County officials who have power over the decision." *Id.* "'[T]he thoughts or sentiments expressed by a government entity that accepts and displays [a privately donated monument] may be quite different from those of either its creator or its donor.'" *Id.*, (citing *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1136 (2009)). "Indeed, even when there is evidence of a private individual's religious motivation in promoting a display, the installation of the display will not be deemed to run afoul of the Establishment Clause unless there are 'factual findings that would enable this Court to conclude that [government] has endorsed [that individual]'s particular proselytizing message.'" *Id.* (citing *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 621 n. 70 (1989) (O'Connor, J., concurring)). AS was true in *Grayson County*, there are no such factual allegations here, so there is no connection between any statements or actions by private citizens and statements or actions by District officials.

In *Mercer County*, a private party donated the Foundations Display to the county, and it was the only display that had been placed in the courthouse. *Id.* at 631-632. That lack of evidence of a prior religious purpose on the part of county officials meant that, unlike the display in *McCreary County*, the display in Mercer County did not have an impermissible religious purpose. *Id.* The same is true in this case.

The Seventh Circuit also found that a nearly identical Foundations Display satisfied *Lemon*'s purpose prong. *Books v. County of Elkhart*, 401 F.3d 857, 866 (7th Cir. 2005). As is true here, in *County of Elkhart*, the board adopted a resolution approving the private donation and placement of a Foundations Display. *Id.* at 859. The resolution provided, as does the Resolution here, that "a sense of historical context, civic duty, and responsibility, and the general application and understanding of the law of this land, are all desirable components of the education of the citizens of this county," and that the document included in the Display "positively contribute to the educational foundation and moral character of the citizens of this county." *Id.* The court noted that the "display is a collection of texts and images from English and American history." *Id.* at 866. "The County does not claim that they are the only or the most important sources of American law and politics, merely that they are among the most important. That a religious text has been included in a display of documents that have influenced American history and government does not take the display outside the realm of the secular: It is true that religion has been closely identified with our history and government." *Id.* (citations omitted). The same is true in this case.

Plaintiffs' attempt to paint Giles County's Foundations Display with the "religious taint" brush from *McCreary County* is unavailing. Plaintiffs' allegations regarding private conduct by Giles County citizens had no effect on the secular purpose announced by the District Board., and does not offer a legal basis for Plaintiffs' claims.

CONCLUSION

To prevail on a motion to dismiss, the Plaintiffs must demonstrate that the opposing party stands in a position entitling them to relief. The mere conclusion that such relief is warranted is insufficient to survive dismissal. The Fourth Circuit has held that a motion to dismiss **must be**

granted when the factual support does not rise to the level of being plausible. *See Giarranto v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). Plaintiffs have simply failed to establish a record of wrongdoing on the part of the District. Their allegations are merely legal conclusions cloaked in factual garb. Plaintiffs' complaint has not nudged its claims across the required plausibility guideline and must be dismissed. The Supreme Court's holding in *McCreary County* does not provide a basis for Plaintiffs' claims in this factually different case.

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the District's motion to dismiss for failure to state a claim upon which relief can be granted.

Dated: October 18, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On October 18, 2011, I electronically filed this document through the ECF system, which will send a notice of electronic filing to the following:

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