IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION, INC., DOE 4, by Doe 4's next of friend and parent Doe 5, who also sues on Doe 5's own behalf,	:	Civil Action No. 2:12-cv-01406
Plaintiffs,	:	
vs.	:	
CONNELLSVILLE AREA SCHOOL DISTRICT,	:	
Defendant.	:	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Now comes the Defendant, the Connellsville Area School District, by and through its attorneys, John W. Smart, Esquire, Amie A. Thompson, Esquire and the law firm of Andrews & Price, LLC, and files the following Brief in Support of Motion for Summary Judgment.

I. STATEMENT OF FACTS[1]

Friedrich Nietzsche once wrote, "there are no facts, only interpretations." This is particularly true in this lawsuit, where a monument has stood unopposed on school grounds for more than five decades. (*See* A.405-A.406). The question for this Court to decide is whether this monument violates the United States Constitution's prohibition against the establishment, entanglement, or endorsement of a religion by the State. In making that determination, the interpretations are crucial. *See Van Orden v. Perry*, 545 U.S. 677 (2005).

Plaintiffs, the Freedom From Religion Foundation ("FFRF"), Doe 4 and Doe 5 commenced this action against the Defendant Connellsville Area School District. Plaintiffs filed their Complaint with this court on September 27, 2012. Alleging they have been deprived of their rights secured by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983. Plaintiffs also allege the future injury based on purported arrangement to move the Eagles Ten Commandment monument to private property where it may be viewed by students attending the Connellsville Area School District.

The Defendant Connellsville Area School District is entitled as a matter of law accordingly Connellsville Area School District has filed this Motion for Summary Judgment

[1] For the Court's convenience, copies of relevant documents and deposition transcripts have been included in the appendix to the Concise Statement of Material Facts in Support of Defendant's Motion for Summary Judgment and corresponding brief. The citations in the Concise Statement, Defendant's Motion for Summary Judgment and corresponding Brief will herein after be referred to as "A_:_". The first number following the "A" refers to the appendix page number "A" the second number following the quotation refers to the specific deposition page number, interrogatory number or paragraph number within the appendix page.

where by this matter comes before the Honorable Court.

The record establishes that there are not genuine issues of material fact and that the Defendant Connellsville Area School District is entitled to judgment as a matter of law. Accordingly Defendant Connellsville Area School District has filed a Motion for Summary Judgment where by this matter comes before this Honorable Court.

II. STANDARDS FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "In making this determination, this Court 'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor.'" *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 603 (3d Cir. 2009) (citations omitted).

III. ARGUMENT

A. PLAINTIFFS LACK STANDING

The requisite injury-in-fact to confer standing upon a plaintiff challenging an alleged religious public display is found in the U.S. Constitution's Article III, Section 2 "cases" or "controversies" language and the Establishment Clause of the First Amendment. Both these requirements, as well as certain judicially imposed obligations[2], control a litigant's access to the federal courts. The "irreducible constitutional minimum" of standing requires that a plaintiff

[2] These limitations have not been "exhaustively defined." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). They include, but are not limited to, "the bar against asserting a third party's rights, the requirement that a plaintiff's injury fall within the zone of interests protected by the law invoked, and the rule that prohibits the judiciary from adjudicating claims asserting generalized grievances that are more appropriately resolved by the political branches." Ashley C. Robson, *Measuring A "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 Fordham L. Rev. 2901, 2943 (2013) (citations omitted).

establish three elements in order to invoke federal jurisdiction: injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations omitted).

First, the plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent. *Id.* The injury "must 'affect the plaintiff in a personal and individual way.'" *Constitution Party of PA v. Aichele*, 757 F.3d 347, 361 (3d Cir. 2014) (citations omitted). Second, the plaintiff must establish a causal connection between the injury and the complained of conduct. *Lujan*, 504 U.S. at 560-561. A federal court may "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Third, the plaintiff must establish that it is likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561; s*ee also Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) (finding that redressability is "closely related to traceability [causation], and the two prongs often overlap").

"Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)). Due to this subjective harm, it is not exactly clear how courts should evaluate this injury-in-fact inquiry in these types of cases.

Clarity on this topic became more distant when former U.S. Supreme Court Chief Justice William Rehnquist, with whom Justice Antonin Scalia and Justice Clarence Thomas joined, acknowledged a split among the circuit courts with regard to the injury-in-fact standards adopted

when evaluating standing in a religious display.[3] *City of Edmond v. Robinson*, 517 U.S. 1201, 1202 (1996) (Rehnquist, C.J., dissenting in the denial of certiorari) (discussing the split concerning "whether Valley Forge allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs"); *see also ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1028 (8th Cir. 2004) ("No governing precedent describes the injury in fact required to establish standing in a religious display case such as this."), *vacated on reh'g en banc*, 419 F.3d 772 (8th Cir. 2005).

While circuit courts appear to have taken a more liberal approach to standing, the U.S. Supreme Court's examination of this immutable constitutional requirement has been restrictive. For example, in *Valley Forge*, the U.S. Supreme Court found that there is no lower level of standing requirements in Establishment Clause cases. *Valley Forge*, 102 S.Ct. at 765. The Court provided, "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' This view would convert standing into a requirement that must be observed only when satisfied." *Valley Forge*, 102 S.Ct. at 767 (citation omitted). The court concluded that the plaintiffs in that case failed to allege an actual injury sufficient to confer standing, because:

> They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly

[3] The Fourth Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, and the Tenth Circuit have each expressly adopted a "direct and unwelcome contact" standard; however, in practice, these standards involve various factors. *See Suhre v. Haywood City*, 131 F.3d 1088, 1087 (4th Cir. 1997); *see also Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012); *see Vasquez*, 487 F.3d at 1253; *see also Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010). Alternatively, the Seventh Circuit requiring a showing of "altered behavior" to prove sufficiently concrete injury. *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988). Other circuits have made use of this altered behavior test although no other circuit has adopted it expressly. *See, e.g., Cooper v. U.S. Postal Serv.*, 577 F.3d 479 (2d Cir. 2009); *see also Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003).

> committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 102 S.Ct. at 765-766 (italics original).

The reasoning of the *Valley Forge* court was applied in *FFRF v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), a case involving an similar challenge to an Eagles' monument located in a state park in La Crosse, Wisconsin. In *Zielke*, Phyllis Grams was an individual plaintiff/appellant who lived in the city of La Crosse. Grams "testified that she was offended by [an Eagles' Monument] display because she viewed it as a message from the city about the religious beliefs that private citizens should hold. Grams was sufficiently offended by the Ten Commandments monument that she complained about it to the Common Council of La Crosse." *Zielke*, 845 F.2d at 1466. Despite the offense taken, the plaintiffs/appellants failed to allege any evidence that they had altered their behavior in anyway because of the presence of the monument.

Using the reasoning of *Valley Forge*, the *Zielke* court held that this evidence was not sufficient to confer standing upon the plaintiffs/appellants. The court stated:

> The injury that the appellants claim they have suffered as a result of the Cameron Park display is a non-economic injury. They allege that the display is a rebuke to their religious beliefs and that they are offended by its presence; but they admit that they have not altered their behavior as a result of the monument. The psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant.
> . . .
> The appellants concede that they did not alter their behavior in any manner as a result of the Ten Commandments monument; they allege only that they have suffered "a rebuke to [their] religious beliefs respecting religion by virtue of being subjected to a governmental endorsement of unequivocally religious precepts and confusions." Appellants' brief at 8. But this is exactly the type of psychological harm that the Supreme Court has held cannot confer standing on an aggrieved party.

Zielke, 845 F.2d at 1467, 1468.[4]

Demanding even the simplest requirements of Article III standing to the present case proves fatal to the requisite standing of Doe 4, Doe 5, and the FFRF to challenge the Eagles' Monument in this case.

1. Doe 4 Lacks Standing to Contest the Eagles' Monument

Doe 4 testified she saw the Monument numerous times during the course of her attendance at Junior High East. (A.67-69:20-22). However, when asked what appeared on the monument, Doe 4 could only state that it had the Ten Commandments on it and "like Roman numerals". (A.72:25). Besides the Roman numerals, Doe 4 only observed "something" engraved on top. (A.75:28). She did not describe the other features on the monument, such as the bald eagle and American flag inscriptions. (A.72:25). Doe 4 only testified that it "kind of" bothered her to see it at school, because she felt the school was encouraging her to like the Ten Commandments. (A.72-73:25-26).

Doe 4 never complained to anyone at school about Monument. (A.71-72:24-25). She only discussed with her parents how it was "unfair" that the Eagles' Monument was at the school. (A.70-71:23-24). These discussions may have been initiated by her parents around the same time this lawsuit was filed. (A.71:24; A.76:29). Doe 4 did not know she was a Plaintiff in this lawsuit and had not heard about the FFRF until Doe 5 explained it to her when the lawsuit was filed. (A.76:29).

Doe 4 never testified that she was offended by the Eagles' Monument. Nor did she testify that she felt compelled to ascribe to a particular religion on account of its presence on school property. Doe 4 never claimed that she altered her behavior or changed her normal routine in any

[4] The court also rejected the argument that, because Grams lived in the city, she had standing because she lived in close proximity to the allegedly unconstitutional display. *Id.*

way because of the presence of the Eagles' Monument. Claiming the monument is "unfair" and "kind of bothered her" cannot be classified as even a de minimus psychological injury, nor is it sufficient to confer standing upon this young Establishment clause Plaintiff, who did not seem to realize she was a Plaintiff at all until the day of her deposition. (A.76:29).

2. Doe 5 Lacks Standing to Contest the Eagles' Monument

Doe 5's circumstances are more similar to that of Grams in *Zielke*. Her basis for standing is that she felt offended by what she perceived was a message from the Connellsville Area School District about favoring a Christian religion, because of the Monuments display of the Ten Commandments. (A.143:65).

As in *Valley Forge* and *Zielke*, however, that offense is simply insufficient to confer standing. If anything, Doe 5 has an even less substance to claim standing than Grams. Following contact with the Eagles' Monument in *Zielke*, Grams at least complained to the city. In the present case, Doe 5 allegedly attempted to reach a grounds crewmember once via phone, but never actually connected with this employee. (A.135-136:57-58). She never voiced complaints to the administration or school board. (A.137:59).

Further, Doe 5 admitted that she not find everything on the monument objectionable, as she conceded that some of the Ten Commandments have some ethical value and the American bald eagle is morally neutral. (A.144-145:66-67). Rather than a quest to establish a religion, Doe 5 knew the reason for the Eagles' donation of the Monument was a "campaign to sort of get kids on the straight and narrow, to decrease maybe the juvenile delinquency." (A.145:67). She testified that it was a way of saying "be good" boys and girls. (A.145:67).

The facts are inadequate to confer standing upon Doe 5 in this Establishment clause case. *See also ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3rdCir. 2001) at 266 (while court could assume that plaintiffs disagreed with holiday display for some reason, court could not assume

that they suffered the type of injury that would confer standing). There is simply no evidence to suggest that Plaintiffs contact with the monument was offensive, unwelcomed, or that Doe 5 changed her behavior to avoid contact with the Monument.

3. The Freedom From Religion Foundation Has No Standing

The FFRF has not suffered any injury as a result of the District's display of the Eagles' Monument on school property. Therefore, this organization must rely on the standing of its members. *Wall*, 246 F.3d at 261-262; *Zielke*, 845 F.2d at 1469. Here, only Doe 5 is a member of the foundation. However, because Doe 5 does not have proper standing to assert her claims, the FFRF cannot be conferred standing. *Zielke*, 845 F.2d at 1469.

Furthermore, Doe 5 admitted that she was recruited for the purposes of this lawsuit. (A.142:64). Doe 5 testified that she never paid for a membership to the FFRF, but rather, it was gifted to her by the foundation itself and "anonymous donor." Doe 4 only learned of the foundation around the time the lawsuit was filed. (A.76:29). The FFRF must be barred from giving membership gifts to citizens after they are recruited to participate in a lawsuit, simply to obtain standing to participate in federal lawsuits.

B. THE PLAINTIFFS HAVE NO STANDING TO CHALLENGE MOVEMENT OF THE MONUMENT TO A PRIVATE LANDOWNER

The Complaint describes an alleged agreement between Defendant and the Connellsville Church of God whereby the latter submitted an offer to accept the monument at issue and display it on its private property which sits next to Connellsville Area Senior High School and the District's athletic field, which is located on property owned by the Church. Based on those allegations, Plaintiffs submit that Doe 4 will still suffer a cognizable constitutional injury should the School District relocate the monument to private property.

With regard to the alleged arrangements to move the Ten Commandments monument to

the Connellsville Church of God, injury in fact is an obstacle to the justiciability of Plaintiffs' claim. This is so, because a plaintiff must allege some form of injury as a result of the defendant's conduct that is "distinct and palpable," not "abstract or conjectural or hypothetical." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005).

Plaintiffs can only speculate that Doe 4 will view the Eagles' Monument *if* it is moved to private church property and *if* it is placed adjacent to the District's athletic field. (A.7:¶45). The Plaintiffs have offered no evidence, whatsoever, to substantiate this speculative future injury. This is simply an abstract and hypothetical allegation of some possibility of harm. *See Danvers Motors Co.*, 432 F.3d at 291. This issue is not ripe for review, as there has been no injury or any certainty of a future injury. Therefore, all of Plaintiffs' allegations regarding an alleged arrangement to display the monument on the private property of the Connellsville Church of God, and any related claim under the First and Fourteenth Amendments to the U.S. Constitution must be dismissed.

C. THE EAGLES' MONUMENT ON SCHOOL PROPERTY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

1. The Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." Current Establishment Clause jurisprudence is composed of cases that have developed into two branches: one that attempts to govern the use of non-secular imagery and text in passive displays (*e.g.*, the Ten Commandments) and another that counsels what is, or is not, appropriate in an educational setting (*e.g.*, prayer in the public school system). *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3rd Cir. 2011) at 269; *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

2. Establishment Clause Tests

The U.S. Supreme Court has announced at least four "tests" to analyze whether governmental action violates the Establishment Clause: (1) the three-part "*Lemon* test" derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971); (2) the "endorsement test" first advanced by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), which was later interpreted as essentially the second *Lemon* prong; (3) the "coercion test" pronounced in *Lee v. Weisman*, 505 U.S. 577 (1992) and applied in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000); and (4) the "legal judgment test" formulated by Justice Breyer is his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 698-706 (2005) (plurality) (Breyer, J., concurring).

There is currently a split among the circuits over which test applies to passive displays, such as the Eagles' Monument, which are challenged under the Establishment Clause. *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 15-16 (2011) (Thomas, J., dissenting) ("This confusion has caused the Circuits to apply different tests to displays of religious imagery challenged under the Establishment Clause."). There is no clear test, whatsoever, governing a passive display of a Monument bearing the text of the Ten Commandments on school property.

The Connellsville Area School District avers that no matter what test is applied, however, the school has not violated the U.S. Constitution.

i. The *Lemon* Test

In *Lemon v. Kurtzman*, the U.S. Supreme Court articulated a three-part test for assessing alleged Establishment Clause violations. *Lemon*, 403 U.S. at 612-613. Under this test, a court must ask: "(1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion." *Indian River Sch. Dist.*, 653 F.3d at 271 (citing *Lemon*, 403 U.S. at 612-613).

First, the secular purpose prong questions "whether government's actual purpose is to endorse or disapprove of religion." *Id.* at 283 (quotation marks and citation omitted). A challenged action will survive this inquiry if there is some sincere secular purpose that is not a mere sham. *Id.* at 283-84 (citations omitted). *Lemon* only requires that at least one secular purpose exist. *Lynch*, 465 U.S. at 681 n. 6.

Second, the primary effect prong provides that "a state's practice can neither advance, nor inhibit religion." *Indian River Sch. Dist.*, 653 F.3d at 284. A court "must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion," which requires a court to "adopt the viewpoint of the reasonable observer." *Id.* at 284 (citations omitted). The "government acts neutrally if it acts for some purpose other than advancing religion." *Suhre v. Haywood Cnty., N.C.*, 55 F. Supp. 2d 384, 393 (W.D.N.C. 1999) (citing *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 279 (4th Cir. 1998)) (other citations omitted).

Third, the excessive entanglement prong emphases "the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* at 288 (internal quotation marks and citations omitted). A court "must also bear in mind that 'excessive entanglement' requires more than mere interaction between church and state, for some level of interaction has always been tolerated." *Id.* (alterations, internal quotation marks and citations omitted).

The final inquiry collapses the remaining *Lemon* prongs of effect and entanglement into one, is "'in large part a legal question to be answered on the basis of judicial interpretation of social facts.'" *Elewski v. City of Syracuse*, 123 F.3d 51, 53 (2d Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) (citing *Lynch*, 465 U.S. at 694); *Agostini v. Felton*, 521 U.S. 203, 232 (1997). The question is: "would a reasonable observer of the display in its particular context perceive a

message of governmental endorsement or sponsorship of religion?" *See id.* Only if a government's action fails to satisfy one of the three prongs may the court must find the action violative of the Constitution. *See id.* at 283-84.

In *Stone v. Graham*, the Supreme Court applied *Lemon* to displays of the Ten Commandments and for the first time and held that a Kentucky statute mandating copies of Ten Commandments be hang on the walls public school classrooms violated the first prong of the *Lemon* test. 449 U.S. at 39-43. The Court found that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls [was] plainly religious in nature," rather than for a permissible secular purpose (i.e., integration into the study of "history, civilization, ethics, comparative religion, or the like."). *Id.* at 42 (citation omitted).

The Third Circuit has declared that "*Stone* is fairly limited to its facts". *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 262 (3d Cir. 2003). In fact, "*Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government." *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005) (citation omitted); *see also Freethought Soc. of Greater Philadelphia*, 334 F.3d at 262.

Since *Stone*, the *Lemon* test has been explicitly criticized by the U.S. Supreme Court. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-399 (1993) (Scalia, J., concurring) (collecting cases and comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"). Nevertheless, the Supreme Court has continued to use the test. *See McCreary Cnty.*, 545 U.S. at 859-866; *see also Am. Civil Liberties Union of Kentucky*, 432 F.3d at 635 ("After *McCreary County*, the first [prong] is now the predominant purpose test.").

In *McCreary*, the U.S. Supreme Court addressed whether the posting of the Ten Commandments at two county courthouses violated the Establishment Clause. *McCreary Cnty.*,

545 U.S. at 850-882. After no less than three various displays of the Ten Commandments were placed at the courthouses, the trial court ordered their removal. *Id.* The Court of Appeals for the Sixth Circuit affirmed. *Id.* at 856-858.

The U.S. Supreme Court granted certiorari and affirmed the grant of preliminary injunction. Analyzing the Counties' displays, the majority recognized *Stone* "as the initial legal benchmark, [its] only case dealing with the constitutionality of displaying the Commandments." *Id.* at 867. The Court first observed that the original display in the sequence shared similarities with the one rejected in *Stone*: "both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display." *Id.* at 868. The majority in *McCreary* did not "hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history." *McCreary* at 848-849.

In the case *sub judice*, the Eagles' Monument is undeniably part of a secular display. The inscription of the Ten Commandments is simply one element in a display with an overall secular message. *See Suhre v. Haywood Cnty., N.C.*, 55 F. Supp. 2d 384, 397-399 (W.D.N.C. 1999) ("the overall setting of the display, including Lady Justice's overwhelming presence, her scales of justice, her sword of justice, the columns, the clock, the arch and the flags, 'changes what viewers may fairly understand to be the purpose of the display' and 'negates any message of endorsement of [a religious] content.'); *see also Lynch*, 465 U.S. at 671 (The creche display also included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing . . .").

Even Doe 5 testified that the Eagles' Monument has some secular symbols. Doe 5 did not find everything on the monument objectionable. (A.144-145:66-67). She thought some of the Ten Commandments have some ethical value and found the American bald eagle morally

neutral. (A.144-145:66-67). Furthermore, Doe 5 knew that the reason for the Eagles' donation was a "campaign to sort of get kids on the straight and narrow, to decrease maybe the juvenile delinquency." (A.145:67). She testified that it was a way of saying "be good" boys and girls. (A.145:67). Thus, Doe 5 recognizes that the Eagles' Monument has more than one message, involving religion, morality and ethics. Hence, the Connellsville Area School District was neutral in accepting and displaying the Eagles' Monument, because it had "some purpose other than advancing religion." *See Suhre v. Haywood Cnty., N.C.*, 55 F. Supp. 2d 384, 393 (W.D.N.C. 1999) (citing *Peck*, 155 F.3d at 279) (other citations omitted).

As the Eagles' Monument creator, Judge Ruegemer, attested, the Eagles only agreed to financially support the Monument project after representatives of religious communities came together to develop a version of the Ten Commandments that was not identified with any one religious group. (A.284:00319). This process took years. (A.279:00314). *See* also Amicus Brief of Fraternal Order of Eagles as Amicus Curiae in Support of Respondents (A.286-315). Judge Ruegemer specifically provided that exposure to the Monument was not meant "to be a religious instruction of any kind, but to show these youngsters that there were such recognized codes of behavior to guide and help them." (A.284:00319 at ¶3).

There is no evidence, whatsoever, to contest that the intent of the Connellsville Area School District was any different from that of the Eagles, the donor of Monument. *See State v. FFRF*, 898 P.2d at 1024 ("[A]bsent evidence to the contrary, we presume that the donative intent is also the basis of acceptance. We ascribe to the donee the intent of the donor - that is, acceptance of the gift by the State, without other evidence, indicates the State's assent to the Eagles' stated secular purpose."). Thus, this intent should be presumed of the Defendant. The evidence supports this finding.

For example, the Eagles' Monument plainly indicates that it was donated by the Eagles.

This evidences that the Connellsville Area School District sought to promote the Eagles' secular purpose, rather than religion. *See Van Orden*, 125 S.Ct. at 2870 (Breyer, J., concurring) (as the Eagles had a secular purpose in donating the monument, the prominent acknowledgment on the monument itself that it was donated by the Eagles further distances the State itself from the religious aspects of the Ten Commandments); *Card*, 520 F.3d at 1019-1020 (agreeing with Justice Breyer's analysis in *Van Orden*); and *Twombly*, 388 F.Supp.2d at 990 (same).

Finally, a reasonable observer of the Eagles' Monument in its current context would not perceive its message as one of governmental endorsement or sponsorship of religion. The reasonable observer would be aware of the motivation for seeking the erection of the Eagles' Monument, which was secular. (A.277-285:00312-320). The community appears to understand this purpose, as no one has complained about the monument for over fifty-five years (A.405-A.406). Therefore, it is clear that a reasonable observer's would not conclude that the monument stands for a religious purpose.

ii. The Endorsement Test

Without overruling *Lemon*, the U.S. Supreme Court also set forth the related endorsement test. *See Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 604 (3d Cir. 2009) (citing *Lynch*, 465 U.S. at 687-694 (O'Connor, J., concurring)). In *Doe v. Indian River Sch. Dist.*, the Third Circuit addressed both tests and determined that a school violated the Establishment Clause by opening school board meetings with prayer. 653 F.3d at 283-290 (relying mostly on prayer in public school cases, however).

The Court observed that "[i]n the public school context, the Supreme Court has been inclined to apply the *Lemon* test." *Id.* at 282 (citing *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383 (1985)). However, the court did not mandate the same in all situations involving challenges in the school context. *See id.* at 283. Ultimately, the court applied both the

endorsement test and the *Lemon* test. *Id.* at 283 (citing *Stratechuk*, 587 F.3d at 603; *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 406 (3d Cir. 2004) (recognizing that "[t]he endorsement test and the second *Lemon* test prong are essentially the same.")).

In accordance with the arguments raised above regarding the second prong of the *Lemon* test, the record cannot support Plaintiffs' claims that the Defendant's display of the Eagles' Monument runs afoul of the Establishment Clause. Rather than endorsing religion, the Connellsville Area School District clearly endorses the Eagles' secular purpose of promoting a moral and ethical code of conduct.

iii. The Coercion Test

Lee v. Weisman and *Santa Fe Independent School District v. Doe* set forth the coercion test, which "looks at whether the government is coerc[ing] anyone to support or participate in religion or its exercise." *Borden*, 523 F.3d at 175 n.18 (citations omitted). Third Circuit courts recognize that the test "focuses primarily on government action in public education and examines whether school-sponsored religious activity has a coercive effect on students." *See Modrovich*, 385 F.3d at 400-401 (citation omitted). The Supreme Court has "not applied its coercion test outside the public education context," *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 175 n. 37 (3d Cir. 2002).

Most recently, in a case challenging a prayer delivered during the ceremonial portion of the town's meeting, the U.S. Supreme Court held that "in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1827 (2014). The Court provided:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define

> and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Town of Greece, N.Y., 134 S. Ct. 1811, 1827-1828.

Here, Plaintiffs have offered no facts to support acts of coercion or involuntariness with regard to an observance of the Eagles' Monument, or more particularly the Ten Commandments, displayed on Defendant's property. There is absolutely no evidence to suggest that the Eagles' Monument was used by the Connellsville Area School District to coerce it students into ascribing to religious beliefs or any religion at all.

Doe 5 testified that she was not aware of anyone at the school using the monument as a teaching tool. (A.143-144:65-66). Furthermore, she was not aware of anyone in the administration or faculty who were promoting the Eagles' Monument or the tenets of the Ten Commandments outright. (A.143-144:65-66). Similarly, Doe 4 could not recall attending any classes outside near the monument. (A.70:23). She was unable to recall any celebrations, dedications, or presentations about the Monument at school. (A.70:23). Therefore, not since 1956-1957 have students, faculty, staff or the community publicly acknowledged the existence of Eagles' Monument or its inscription of the Ten Commandments. That is, not until this lawsuit was filed.

Thus, the record clearly supports that the Connellsville Area School District has not violated the Establishment Clause. The Eagles' Monument on its property does not coerce anyone to support any particular religion or religion at all. By no stretch of the imagination has the school district has engaged in an unconstitutional establishment of religion by displaying a fifty-five year old Monument donated by a civic organization with a secular purpose.

vi. <u>The Legal Judgment Test</u>

In *Van Orden v. Perry*, the U.S. Supreme Court addressed challenges to an Eagles' monument, nearly identical to the one in this case, which was located on the grounds of the Texas State Capitol. *See* 545 U.S. at 698-706 (Breyer, J., concurring).[5]

Two theories arose among the majority of the Justices who joined in the opinion that upheld the display. First, writing for the four Justice plurality, then-Chief Justice Rehnquist advanced the theory that the Establishment Clause analysis was "driven both by the nature of the monument and by our Nation's history." *Id.* at 686 (plurality). Second, Justice Breyer wrote that the message conveyed by a display must be "evaluated in light of its historic, temporal, and physical setting." *Card*, 386 F. Supp. 2d at 1173. Other courts have concluded that the concurring opinion of Justice Breyer ultimately controls under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977). *See Bronx Household of Faith v. Bd. of Educ. of City of New York*, 650 F.3d 30, 49 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011); *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009) (internal quotation marks and citation omitted); *Staley v. Harris Cnty*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (en banc).

According to Justice Breyer, "[i]f the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases" where there will be "no test-related substitute for the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (citations omitted). "That judgment is not a personal judgment," but rather, "it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.* (citation omitted). While the Court's other Establishment Clause tests provide "useful guideposts," this analytical framework recognizes that "no exact formula can dictate a

[5] *Van Orden* was decided the same day as *McCreary County*, where the Court applied yet another test and reached an opposite result. *See McCreary Cnty.*, 545 U.S. at 850-866 (plurality).

resolution to such fact-intensive cases." *Id.*

Justice Breyer explained that a court "must examine how the text is *used*" in order to determine the message conveyed. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (emphasis in original). This inquiry requires that the Court investigate the context of the display. *Id.* The Court identified several factual considerations which weighed in favor of its conclusion that the Eagles' Monument in that particular case withstood constitutional scrutiny. *Id.* at 701-705.

As stated, the Eagles' Monument at issue is nearly identical to the one upheld by the U.S. Supreme Court in *Van Orden*. Furthermore, development of the evidentiary record now proves that the factual aspects that swayed a majority of the Justices in *Van Orden* similarly exist in the present matter. First, the statute conveys a mixed religious and secular message. *See id.* at 701-705. The inscription of the Ten Commandments is simply one element in a display with an overall secular message. Even Plaintiff Doe 5 recognizes that the Eagles' Monument has more than one message, involving religion, morality and ethics. (A.143-144:65-66). Furthermore, Judge Ruegemer attested that Monuments were "intended ... to set forth a code of conduct, not an endorsement of any or one particular religion at all." (2003 Affidavit at 10; A.280:00315). Furthermore, there is an inscription on the Eagles' Monument indicating that a private civic and primarily secular group, the Eagles, donated it. (A.4:¶18). *See also Van Orden* 545 U.S. at 701-705.

The physical setting of the monument is on the grounds of the Connellsville Area School District, where least twenty-three (23) other monuments, dedications, and historical relics are displayed. (A.328-349:00287-00308; A.350-399:01209-01258). The most recent historical display on school property is a remnant of the World Trade Center. (A.400:00282). There is nothing about the location of the monument that lends itself to religious activity. *See id.* at 701-705. In fact, both Doe 4 and 5 testified that no one at the school district used the monument as a

way to promote religion on school property. (A.70:23; A.144:66). Only after this lawsuit was filed was there any attention paid to the Monument in roughly fifty-five years. (A.6-8:¶33-53). Thus, a substantial period of time passed without complaints about the Eagles' Monument's presence on Defendant's property. *See Van Orden*, 545 U.S. at 703-704. ("understand that as a practical matter of *degree* this display is unlikely to prove divisive," a critical factor for Justice Breyer's theory this case) (emphasis original).

It is anticipated that Plaintiffs will argue that the Eagles' Monument, (despite the fact that it is only a passive display), must receive a heightened standard of judicial review because it is on public school grounds. Nevertheless, the evidentiary record reveals that the particular facts of this case would satisfy even a heightened standard.

Doe 4, the student Plaintiff at Junior High East, is one of the "impressionable students" at the Connellsville Area School District. However, Doe 4 merely believes the monument encourages her to "like the Ten Commandments", which "kind of" bothers her. (A.72:25). There is simply no evidence of record that provides support for Plaintiffs claims that the School District encourages students to follow any particular religion, accept a particular god, or that student's would be ostracized for not doing so. (A.8-10:¶57-65). To the contrary, Doe 4 testified that there are no classes held by the monument and no one at the school district has celebrated its existence while she's attended the school (A.70:23). Doe 5 also testified that she knows of no one at the school district who supports the tenants of the Ten Commandments outright. (A.144:66).

Establishment Clause challenges are all unique and driven by the particular facts of the case. Here, the Connellsville Area School District's purpose for accepting and maintaining the Eagles' Monument was no different than the civic organization that donated the monument, the Eagles. A reasonable observer, with knowledge of that purpose, as well as the historical background of the Eagles' Monument as told by Judge Ruegemer, confirms that the claimed

nature of the content on the display is predominantly secular, and certainly not solely religious.

IV. CONCLUSION[6]

Defendant, the Connellsville Area School District, requests that this Court dismiss Plaintiffs case. The facts of this case are largely not in dispute, and the law as applied to those facts compels this Court to Order dismissal of Plaintiffs' sole cause of action.

Respectfully submitted,

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[6] The legal issues involved in this case are similar to another matter before this Court involving the display of a similar monument in the *New Kensington-Arnold Sch. Dist.*. *See FFRF, Inc. v. New Kensington-Arnold Sch. Dist.*, 919 F.Supp.2d 648, 2:12-CV-1319, 2013 WL 228331 (W.D. Pa. Jan. 22, 2013). Wherefore, Defendant incorporates by reference the legal arguments raised by the New-Kensington Arnold School District, to the extent they do not conflict with those raised herein.

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

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