THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION, INC., DOE 4, by DOE 4's next friend and parent, DOE 5, who also sues on DOE 5's own behalf, Plaintiffs, vs. CONNELLSVILLE AREA SCHOOL DISTRICT, Defendant.	: : : : : : : : : : :	Case 2:12-cv-01406

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

When the Ten Commandments Monument at the heart of this dispute was placed prominently on the grounds of what was then a senior high school, the Connellsville Area School District was statutorily obligated to begin each school day with readings from the Bible. While many in the Connellsville community longingly view this monolith as a beacon of the bygone era of school prayer, the Supreme Court's Establishment Clause jurisprudence defines it as an unconstitutional vestige from that time. Plaintiffs bring their challenge in accordance with that law and seek to have the Court remove this lingering endorsement of religion.

The District's purpose for continuing to display this striking religious symbol is tainted by the religious viewpoint of the Connellsville community and the Monument's original donors,

the Eagles. During the dedication ceremony, community leaders and Eagles representatives alike praised the value that the word of God would have upon the Connellsville students. When Plaintiffs recently demanded that the Monument be removed, the District initially intended to comply, stating that it could not overcome compelling case law. The Connellsville community, however, reacted quickly and passionately, demanding that the Monument's religious message be preserved. Ultimately, the District deferred to the majority of the Connellsville community and elected to keep the monument. In doing so, the District trampled the rights of the community's minority and entangled itself in the endorsement of religion.

As a result, the Court must now act to fulfill the Establishment Clause's promise of protection to the few. The need for definitive court action in this case is heightened because the Monument sits on public school grounds. Courts have long recognized the heightened concerns for protecting the freedom of conscience for young, impressionable students. Plaintiffs ask the Court to use this opporuntity to reaffirm these special concerns and restore the trust that families place in school districts by ensuring that this public school will no longer use its authority to advance a religious view.

FACTUAL BACKGROUND[1]

The Monument on display at Connellsville Area School District's (CASD) Junior High East school contains large text reading

the Ten Commandments

I AM the LORD thy God.
I. Thou shalt have no other gods before me.
II. Thou shalt not take the Name of the Lord thy God in vain.
III. Remember the Sabbath day, to keep it holy.
IV. Honor thy father and thy mother, that thy days may be long upon

[1] The facts material to this dispute are set forth more fully in Plaintiff's Concise Statement of Material Facts filed simultaneously with this Brief in Support. Plaintiff's Concise Statement of Material Facts will be referred to in this brief as "CSF."

the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor's house.
X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

CSF ¶ 3. The Monument is rectangular in shape and features contours at the top of the monument mimicking a book or a scroll. *See* Pl. App. Ex. D.[2] Two small tablets inscribed with unreadable script appear at the top of the Monument, with the all-seeing eye just below. CSF ¶ 4. An eagle clutching an American flag appears between the all-seeing eye and the text of the Ten Commandments. *Id.* Two Stars of David and the Chi-Rho symbol appear at the bottom of the Monument. *Id.* Below these symbols is a small scroll of text indicating that the Eagles presented the Monument to the Connellsville Joint High School. *Id.*

The Monument has stood in its present location since 1957, when it was donated to CASD[3] by the Connellsville Aerie No. 493, Fraternal Order of Eagles and accepted by Board vote. CSF ¶ 1-2, 5, 15. The nearly 5-foot stone monument stands in a grassy area near the auditorium of Junior High East and is visible from the nearby sidewalk. CSF ¶¶ 2, 18-20. Originally, the Junior High East building was used as a senior high school and the Monument faced what was the student parking lot. CSF ¶¶ 7, 16-17.

Plaintiff Doe 4 encountered the Monument on numerous occasions while a student at Junior High East. CSF ¶¶ 24-28. Plaintiff Doe 4 regularly came into contact with the Monument during physical education classes that were held outside of the Junior High East building. CSF ¶ 25. During those classes, Plaintiff Doe 4 and other students in the class were required to run

[2] Plaintiffs' Exhibits to the Appendix filed with Plaintiffs' Concise Statement of Material Facts are referred to as "Pl. App. Ex."
[3] At the time of the donation, the CASD was known as the Connellsville Joint School System.

around the Junior High East building past the Monument. *Id.* Plaintiff Doe 5 is a member of Freedom From Religion Foundation and has encountered the Monument when traveling to Junior High East for reasons associated with Plaintiff Doe 4's attendance at the school. CSF ¶¶ 29-35. Plaintiffs Doe 4 and Doe 5 find the presence of the Monument objectionable. CSF ¶¶ 28, 33-34.

A dedicatory service for the Monument was held on June 3, 1957 and was attended by Eagles representatives, clergy members, the student body, and the community. CSF ¶¶ 8-13. Reverend R. A. Nelson delivered an invocation and benediction at the service. CSF ¶ 11. The community leader, Mayor Abe I. Daniels, spoke to the need for "serious application" of the Ten Commandments in daily life. CSF ¶ 13. The local Eagles representative stated that the Monument was intended to "inspire all who pause to view the Ten Commandments with a renewed respect for the law of God which is our greatest strength against the forces that threaten our way of life." CSF ¶ 15. The national Eagles representative echoed this sentiment, stating

> Without a moral code; men fail to be good neighbors and nations do not live at peace with one another. Without a moral code, we are soon lost in personal or notional frustration. But, given a firm morality, peace inside men and among nations can become a reality. Such a code is the Commandments, written with the fingers of God.

CSF ¶ 14.

On August 29, 2012, Plaintiffs sent the District a letter requesting that the Monument be removed and threatening litigation if no steps were taken to do so (Plaintiffs' Letter). CSF ¶ 40. Plaintiff's Letter followed a more generic letter that had been received by the District from American's United in early August 2012 requesting the removal of the Monument without the threat of litigation. CSF ¶ 39.

Soon after receiving Plaintiffs' Letter, the District took steps to cover the Monument: first with plastic bags on September 3, 2012 and later in the same week with plywood. CSF ¶¶ 45-48.

On September 7, 2012 District Superintendent Dan Lujetic informed a number of media outlets and district residents that the District solicitor had advised him that the District would not prevail if it fought to keep the Monument, and Lujetic stated that the District was looking to relocate the Monument off of school property because even "if we wanted to fight [to keep the Monument], there's no way we would win." CSF ¶¶ 49-52, 58-60. On the same day, the District solicitor informed media outlets that the District intended to relocate the Monument to private property "instead of fighting [the Plaintiffs]," CSF ¶¶ 54-56, while Lujetic visited the Connellsville Church of God to see if the Monument could be placed on the church's property, "next to the high school." CSF ¶ 53. On a number of occasions, Lujetic informed people that the intended relocation of the Monument would make it more prominent and that he might celebrate the relocation with a large community ceremony to dedicate it. CSF ¶¶ 61-62.

The District Board of School Directors (CASD Board) met the following week for its regularly scheduled monthly committee meeting on Monday, September 10, 2012 and board meeting on September 12, 2012. CSF ¶ 64. On September 10, 2012, prior to the committee meeting, CASD Board President Jon Detwiler reported to the media that the Church of God would receive the monument pending CASD Board approval. CSF ¶ 63. By that time, the Church of God had voted to accept the Monument if it was offered to them. CSF ¶ 81. A formal motion to relocate the Monument to the Church of God was discussed at the committee meeting. CSF ¶ 80.

Before the committee meeting, local religious leaders held a rally at 5 p.m. at the site of the Monument. CSF ¶ 70. The District decided not to oppose the planned rally, despite being aware of it before it occurred. CSF ¶ 71. Religious leaders spoke at the rally, which was attended by approximately 50 people, including Lujetic. CSF ¶¶ 72-73. Some of those in attendance at the

rally left to attend the committee meeting. CSF ¶ 74.

More than 100 residents attended the committee meeting, and the CASD Board heard two hours of public comment regarding the Monument. CSF ¶ 75. No one spoke in favor of removing the monument. CSF ¶ 77. Many commenters supported keeping the Monument based upon their agreement with the religious message of the Ten Commandments. CSF ¶ 76. According to news reports, one commenter stated, "The Lord said if we're not willing to acknowledge Him before man, then why should He acknowledge us before His heavenly father. The Lord Himself might as well be up there asking us to acknowledge Him before the community." CSF ¶ 103.

The CASD Board was swayed by these public comments to fight to keep the Monument. CSF ¶ 79. CASD Board President Detwiler explained his change-of-heart to the media, saying, "I guess when people tell you can't win, you just give up, but I say we're going to stick 'em and that's my personal opinion." CSF ¶ 78. He added, "I'm with these people." *Id.*

Prior to the CASD Board meeting on September 12, 2012, another gathering occurred at the site of the Monument. CSF ¶ 82. As with the September 10, 2012 rally, attendees at this gathering attended the board meeting after departing the Monument site. CSF ¶ 84. In all, some 250 citizens attended the board meeting to support keeping the Monument. CSF ¶ 85. Among the commenters was a student who stated that the Monument is very symbolic to the school and that it displays morals that everyone should follow. CSF ¶ 91. A number of other commenters expressed their religious beliefs and their contempt for the individual Plaintiffs. CSF ¶¶ 87-90.

Following the public comment, a vote was taken to retain the Monument "until further notice and pending further legal action." CSF ¶¶ 92-93. The vote passed unanimously. *Id.* After the vote took place, the crowd of citizens applauded and yelled in support of the decision for 30

seconds. CSF ¶ 94.

The District's rhetoric in response to inquiries by the media and private citizens changed following the vote. On September 13, 2012, Lujetic responded to an email expressing support for the decision to retain the Monument by stating, "[W]e will continue to fight this battle the best we can. I can assure that I have not and will not take this sitting down." CSF ¶¶ 95-96.

Following the CASD Board's vote to retain the Monument, the plywood covering the Monument was removed. CSF ¶ 98. Initially the plywood used to cover the monument was held in place by metal straps, but these metal straps had been cut by people in order to remove the plywood. CSF ¶ 99. Thereafter, a plywood "box" was built around the monument, but over a weekend, an unidentified person or group of persons removed the box and threw it over a hillside. CSF ¶ 100. According to news reports, at a candlelight vigil that was held at the Monument on October 21, 2012, attendees removed the screws from the plywood box and removed the boards. CSF ¶¶ 107-108, 110. One of the individuals involved in removing the wooden box reportedly said, "[I]t's the right of the people to have God in their society." CSF ¶ 109. Eventually a more permanent metal covering was constructed and installed over the monument. CSF ¶ 100.

Around the time of the CASD Board vote to retain the Monument, community members and businesses began to display the Ten Commandments on their property in support of CASD's decision to retain the Ten Commandments Monument. CSF ¶ 113. At the end of October 2012, a group of individuals who had been meeting to support keeping the Ten Commandments Monument officially took the name "Thou Shall Not Move" for their group. CSF ¶ 112. In addition to participating in other activities and gatherings supporting the retention of the Monument and the spreading of the Monument's message, the Thou Shall Not Move group sold

Ten Commandments signs to Connellsville residents and local businesses to be placed on their properties as a show of support. CSF ¶¶ 113-114, 118-123. By October 31, 2012, one of the leaders of the group estimated that 2,100 yard signs had been sold. CSF ¶ 115. The proceeds from the sale of the signs were put towards the purchase of granite Ten Commandments monuments for permanent placement in the community. CSF ¶ 117. Thou Shall Not Move has donated and dedicated at least 16 Ten Commandments monuments since 2012. CSF ¶ 122.

STANDARD OF REVIEW

A motion for summary judgment is governed by Federal Rule of Civil Procedure 56 and is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Foehl v. U.S.*, 238 F.3d 474, 477 (3d Cir. 2001) (citing Fed. R. Civ. P. 56(c)). Cross-motions for summary judgment are subject to the same standards as unilateral motions, and each is handled as a distinct, independent motion. *Doe v. Indian River School Dist.*, 685 F. Supp. 2d 524, 531 (D. Del. 2010) (citing *Rains v. Cascade Indus. Inc.*, 402 F.2d 241, 245 (3d Cir. 1968). A factual dispute is material if it bears upon an essential element of the claim. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002). An issue is genuine "if a reasonable jury could find in favor of the nonmoving party" based upon it. *Id.*

Building upon these basic principles, only "those facts 'that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *DeHart v. Horn*, 390 F.3d 262, 267 (3d Cir. 2004). In other words, "[a] motion for summary judgment will not be defeated by the mere existence of *some* disputed facts, but will be defeated when there is a *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986). If upon review the facts supporting a claim or defense are "merely colorable" or "not significantly probative," then a court must grant the summary judgment motion. *Equimark Commercial Fin. Co. v. C.I.T. Fin. Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987).

ARGUMENT

I. Legal Framework

As this Court observed in its Opinion on Defendant's Motion to Dismiss (Opinion), recent Establishment Clause jurisprudence lacks clarity. ECF No. 20, 7-9. The Supreme Court has inconsistently used no less than four different tests for analyzing government conduct for violations of the Establishment Clause: (1) the *Lemon* test, (2) the Endorsement test; (3) the Coercion Test; and (4) the Legal Judgment test. The inconsistent application of these tests stems largely from criticism of the long-standing, oft-used *Lemon* test. *See e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388-89 (1993) (Scalia, J. concurring). Despite this criticism, however, *Lemon* has not been retired by the Court. *McCreary Cnt. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859-66 (2005).

Fortunately, Plaintiffs need not delve into the tortured history of the Establishment Clause, as the Third Circuit Court of Appeals recently clarified the tests to be used in assessing alleged Establishment Clause violations. *Doe v. Indian River Sch. Dist.*, 653 F.3d 283-89 (3d Cir. 2011). In *Indian River*, the Third Circuit explained that courts should apply the *Lemon* test and the Endorsement test in assessing whether governmental conduct in the public school setting violates the Establishment Clause. *Id.* at 283. Because the Third Circuit has so recently done its part to provide clarity to the situation, dredging up the Establishment Clause's murky past would only serve to confuse matters. Besides, this Court thoroughly and adequately reviewed the relevant history of the Clause in its Opinion.

Under *Lemon*, "the challenged action is unconstitutional if (1) it lacks a secular purpose, (2) its primary effect is to either advance or inhibit religion, or (3) it fosters an excessive entanglement of government with religion." *Indian River*, 653 F.3d at 283 (internal quotations and citation omitted). Thus, a challenged action is unconstitutional if it is found to violate *any one* of the *Lemon* prongs. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). The Endorsement Test is "essentially the same as the second *Lemon* prong." *Indian River*, 653 F.3d at 290 (internal quotations and citation omitted).

The secular purpose prong asks "whether the government's actual purpose is to endorse or disapprove religion." *Id.* at 283 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). A display with *some* secular purpose will survive under this prong only if the stated secular purpose is "sincere and not a mere sham." *Id.*

The primary effect prong establishes that "a state's practice can neither advance, nor inhibit religion." *Id.* at 284 (internal quotations and citation omitted). Under this prong, courts evaluate whether "under a totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Id.* (internal quotations and citation omitted). In making such a determination, "[courts] adopt the viewpoint of the reasonable observer." *Id.* (internal quotations and citation omitted). The reasonable observer "may take into account the history and ubiquity of the practice, since it provides part of the context in which a reasonable observer evaluates whether a challenged government practice conveys a message of endorsement of religion." *Id.* (internal quotations and citation omitted). As a cognate of the primary effect prong, the endorsement test is essentially the same. *Id.* at 290 (citation omitted).

The excessive entanglement prong of *Lemon* "provides that government conduct may 'not foster an excessive government entanglement with religion.'" *Id.* at 288 (quoting *Lemon v.*

Kurtzman, 403 U.S. 602, 613 (1971)). In assessing entanglement, courts look to "the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* (internal quotations and citation omitted).

Before applying the facts of this case to the three prongs of *Lemon* and the Endorsement test, it is worthwhile to review two important trends that have emerged. First, at every level of the federal judicial system, courts have consistently observed that Establishment Clause cases involving public schools are significantly different than those in any other setting. As a result, no case has ever held that a Ten Commandments display at a public school is constitutional. Second, courts have frequently found comments of officials and community members—such as those made at school board meetings—in response to an Establishment Clause challenge to be significant in determining how a reasonable observer would view a particular display. Because these two issues feature so prominently in this case, they deserve significant attention.

A. Establishment Clause cases in the public school setting are different.

In its Opinion, this Court correctly observed that Establishment Clause cases addressing displays on public school grounds are unique cases that deserve special attention. ECF No. 20, 7. Prior cases that have recognized the key differences of the public school setting have done so based upon an understanding of the impressionability of schoolchildren and the fact that attendance at public schools is involuntary. *See e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). In *Stone v. Graham*, the case most similar to this case, the Supreme Court recognized the impressionability of students and held that display of the Ten Commandments in classrooms would likely have the effect of moving students to strive to abide by the Commandments. *Stone*, 449 U.S. at 42.

Stone addressed the constitutionality of a Kentucky statute requiring the placement of the Ten Commandments on the wall of each classroom in the public schools of the state. *Id.* at 39-40. In assessing the purpose of the statute under *Lemon*, the Court found that "[t]he pre-eminent purpose for posting the Ten Commandments on the schoolroom walls [was] plainly religious in nature." *Id.* at 41. The Court contrasted the standalone display of the Commandments on the wall with integration of the Decalogue into school curriculum, where it might be used in secular study. *Id.* at 42. The Court ultimately concluded that, with respect to the schoolchildren, if the Commandments were "to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps venerate and obey, the Commandments." *Id.*

Cases at all levels have followed in the footsteps of *Stone* by recognizing and perpetuating the distinction between religious displays on school grounds and those on other governmental property. Most recently, in deeming that a Ten Commandments display on the Texas capitol grounds was constitutional, a plurality of the Supreme Court stated that *Stone* stands "as an example of the fact that [the Court has] 'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.'" *Van Orden v. Perry*, 545 U.S. at 690-91. Justice Breyer's controlling opinion observed that the case was "distinguishable from instances where the Court has found Ten Commandments displays impermissible" and specifically noted that the display was "not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state." *Id.* at 690-91.

Following *Stone,* this important distinction has been consistently endorsed. In *Wallace*, Justice O'Connor observed that the Supreme Court has "recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are

required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." 472 U.S. at 81 (O'Connor, J., concurring). In *Edwards v. Aguillard*, the Supreme Court's majority opinion reiterated that students in public schools "are impressionable and their attendance is involuntary." 482 U.S. at 584. The Court also explained that "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.*

In *Lee v. Weisman*, the Supreme Court again drew a bright line between school and non-school cases. There, the Court found a public school's invitation of clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools to be unconstitutional. 505 U.S. 577 (1992). The Court reasoned, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.* at 592. The Court's ultimate decision was dictated by its recognition of the principles set forth in *Edwards*, that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* (citations omitted).

The Supreme Court reemphasized its adherence to this idea with its denial of certiorari in *Harlan County, Kentucky v. American Civil Liberties Union of Kentucky*, which dealt with the display of the Ten Commandments on public school grounds. 545 U.S. 1152 (2005). At the same time that the Supreme Court denied certiorari in *Harlan* County, the Court granted certiorari in the companion case *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (*McCreary II*), 545 U.S. 844 (2005). The cases presented by *McCreary II* and *Harlan County*

were originally decided together by the Court of Appeals for the Sixth Circuit in *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky* (*McCreary I*), 354 F.3d 438 (6th Cir. 2003). The denial of certiorari with regard to the school display portion of the case suggests that the Sixth Circuit's analysis of that case was proper.

The Sixth Circuit's analysis of the school display utilized *Stone* in many ways. Most significantly, the Sixth Circuit relied on *Stone*'s insights when it examined the location of the display in the Harlan County school. *Id.* at 460-461. The court pointed out that it was "noteworthy that the Supreme Court 'has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.'" *Id.* at 460 (citing *Aguillard*, 482 U.S. at 583-84). The court interpreted the rationale for this special treatment to be "because the public schools hold a position of trust that parents condition 'on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.'" *Id.* Pointing to the conclusion in *Stone* regarding the Commandments' coercive effect, the court ultimately concluded that "the presence of these displays in the schools enhances the underlying message of religious endorsement contained in the displays." *Id.*

Other decisions from the Courts of Appeals and District Courts emphasize that the underlying endorsement of religion in displays is enhanced when the display is on public school grounds. Prior to the *McCreary* and *Harlan* cases, the Sixth Circuit held that a portrait of Jesus Christ in the hallway of a public school violated the Establishment Clause. *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 684 (6th Cir. 1994). The court related the portrait to the display in *Stone* by emphasizing that the portrait was not integrated into any course of study. *Id.* at 683. Importantly, the court dismissed claims that any violation was "de minimis." *Id.* at

684. While the portrait may have seemed insignificant to many, "particularly those raised in the Christian faith and those who do not care about religion, a few see it as a government statement favoring one religious group and downplaying others[, and i]t is the rights of these few that the Establishment Clause protects." *Id.* at 684.

Many other courts have convincingly recognized the heightened sensitivity attendant to review of alleged Establishment Clause violations in the public school setting as well. *See, e.g.*, *Freedom From Religion Foundation v. Hanover School Dist.*, 626 F.3d 1, 8 (1st Cir. 2010) (holding that "[i]n the Establishment Clause context, public schools are different"); *Doe v. Beaumont*, 240 F.3d 462, 487 (5th Cir. 2001) (observing that the Establishment Clause should be applied with "special sensitivity" in a public school setting); *Ahlquist v. City of Ctranston ex rel. Strom*, 840 F. Supp. 2d 507, 524-25 (D.C.R.I. 2012) (observing that the high school setting invokes the "highest scrutiny employed by the Supreme Court in Establishment Clause cases" and holding that *Stone v. Graham* controlled the outcome of the case).

The Third Circuit also recognized the special treatment of school cases in *Indian River*. In *Indian River*, the court was tasked with determining the constitutionality of a school board prayer policy. *Indian River*, 653 F.3d at 259. The court discussed the heightened concerns regarding school cases, noting that "[t]he possibility of coercion is greater in schools because children are more 'susceptible to pressure from their peers.'" *Id.* at 275 (citing *Lee*, 505 U.S. at 587). With these special concerns in mind, the court ultimately chose to apply *Lemon* instead of the legislative prayer test because the legislative prayer standard did not "adequately capture" the special concerns of school cases. *Indian River*, 653 F.3d at 269-70.

While most cases have fallen directly in line with *Stone*, the Court identifies in its Opinion certain cases that were distinguished from *Stone*. As the Court's summary of those cases

suggests, these cases have generally been distinguished for two reasons. First, some cases involved displays at a location other than on school grounds. Second, other cases involved a Ten Commandments display that was part of a larger display that included secular items. Neither of these common distinguishing features is present here. This case is on all fours with *Stone*.

Given the similarity between this case and *Stone*, as will be more fully developed below, the Supreme Court's holding in *Stone* controls this case. Despite the often unpredictable meanderings of Establishment Clause jurisprudence, the Supreme Court has clearly signaled that *Stone* remains good law. Because the facts here do not differ from *Stone* in any meaningful way, the Court must grant Plaintiff's Motion for Summary Judgment.

Even if the Court finds that *Stone* does not control the outcome of this case, the fact that the challenged Ten Commandments Monument is on school grounds impacts the analysis under *Lemon* and the Endorsement test. The impressionability of the student audience, assured of coming into contact with the Monument, bears directly upon how a reasonable observer would understand the purpose and effect of the Monument. Likewise, the level of District conduct necessary to suggest an excessive entanglement between the school district and the promotion of religion must be measured against the ease with which schoolchildren may be influenced.

B. A Court's review of the history and context of a display includes consideration of the conduct and comments of public officials and local community members in response to complaints.

The judicially-created reasonable observer's examination of "all of the facts and circumstances surrounding a challenged display," includes the "history and context" of the display. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (stating that the reasonable observer is "aware of the history and context of the community and forum in which the religious display appears")). A display's history and context includes comments made by public officials and community members in

response to complaints regarding the challenged display or practice. *See Indian River*, 653 F.3d at 285-87; *see also Green v. Haskell Cnty. Bd. Of Comm'rs*, 568 F.3d 784, 800-03 (10th Cir. 2009); *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 734 (M.D. Pa. 2005); *Ahlquist*, 840 F. Supp. 2d at 521-23. This is true even where the responsive complaints and comments occur decades after the challenged practice began. *Indian River*, 653 F.3d at 285-87.

In *Indian River*, the Third Circuit reviewed the Indian River school board's practice of praying at regularly-scheduled school board meetings, which were routinely attended by students. *Id.* at 260. The practice began in 1969 and continued without any formal written policy regulating the practice for 35 years. *Id.* at 261. In 2004, debate occurred over the propriety of prayer at graduations and school board meetings within the district. *Id.* In response, the district adopted a written policy formalizing the district's "decades-long practice of praying at public meetings." *Id.* at 261-262.

The practice was eventually challenged in a federal lawsuit, and the district court ruled on the parties' cross-motions for summary judgment that the policy did not violate the Establishment Clause. *Doe v. Indian River School District*, 685 F. Supp. 2d 524 (D. Del. 2010). In reversing the district court's decision, the Third Circuit found that the policy violated the second prong of *Lemon* and the Endorsement Test. One of the court's two reasons for finding the policy unconstitutional was its consideration of the history and ubiquity of the practice.

In determining that the history of the practice revealed that it violated the Establishment Clause, the court focused on the actions and comments of the school board and community in response to the complaints that were made in 2004, 35 years after the practice began. *Id.* 284-86. The court noted the presence of religious leaders—and their faith-based supporting comments—at board meetings; the presence of more than 100 people who saw the complaints as a "move to

stifle [the community's] religious freedom and to degrade the moral fiber of the community;" and the discussion by board members at a special meeting regarding the fact that "their constituents did not want the [b]oard to change its practice of opening the meetings with a prayer." *Id.* at 286-87. Furthermore, the court discussed at length the attendance of 800 people at a meeting to discuss the policy where a number of religiously-charged actions took place, including attendees applauding after the reading of the prayer to open the meeting, attendees shouting 'Amen' or 'Praise Jesus' after scripture passages were read during public comment, and attendees bringing signs to the meeting reading "Jesus is the Light of the Word" and "Let us Pray, God is Listening." *Id.* at 287. Ultimately, the court concluded that "[t]hese events also show how the public viewed the prayer issue" and that "their conduct reveals that in the minds of many, the issue of prayer at the [s]chool [b]oard meetings and graduations was closely intertwined with religion." *Id.*

Other courts have similarly considered the effect of this kind of faith-based community reaction. The Tenth Circuit found public official and community reaction to complaints to be equally instructive in assessing a display under the effect prong of *Lemon*. *Green*, 568 F.3d at 801. In evaluating a Ten Commandments display's effect, the court found that the reasonable observer would be aware of the "community's response to the Monument" before discussing the comments of the public officials involved in approving the display. *Id.* at 800-801. Specifically, the court stated

> Numerous quotes from [the public officials] appear in news reports, ranging from statements reflecting their determination to keep the [m]onument . . . to statements of religious belief . . . We conclude in the unique factual setting of a small community like Haskell County, that the reasonable observer would find that these fats tended to strongly reflect a government endorsement of religion. In particular, we find support for this conclusion in the public statements of the Haskell County [public officials]. In none of their statements did the commissioners attempt to distinguish between the Board's position

> and their own beliefs. Several of the [public officials'] statements would naturally be construed as having been made on behalf of the Board, including "I won't say that *we* won't take it down, but it will be after a fight," and "*We're* definitely going to leave our monument there until the law tells *us* to take it down." By not distinguishing their personal opinions from their official views, the commissioners left the impression that a principal or primary reason for the erection and maintenance of the display was religious.

Id. at 801 (emphasis in original) (internal citations omitted).

The District Court for the Middle District of Pennsylvania reached a similar conclusion when it considered the constitutionality of a school's policy regarding the teaching of intelligent design (ID). *Kitzmiller*, 400 F. Supp. 2d at 733-34. In analyzing the school policy under the effect prong of *Lemon* and the Endorsement Test, the court closely examined letters to the editor which showed that "hundreds of individuals in th[e] small community felt it necessary to publish their views on the issues presented in the case for the community to see." *Id.* at 733. After reviewing the letters and observing that the letters consistently portrayed ID as a religious issue, the court concluded:

> These exhibits are thus probative of the fact that members of the Dover community perceived the Board as having acted to promote religion, with many citizens lined up as either for the curriculum change, on religious grounds, or against the curriculum change, on the ground that religion should not play a role in public school science class. Accordingly, the letters and editorials are relevant to, and provide evidence of, the Dover community's collective social judgment about the curriculum change because they demonstrate that '[r]egardless of the listeners support for, or objection to,' the curriculum change, the community and hence the objective observer who personifies it, cannot help but see that the ID policy implicates and thus endorses religion.

Id.

Similarly, in *Ahlquist,* the District Court of Rhode Island ascribed to a reasonable observer knowledge of the school committee's meetings, statements made by committee members concerning their religious beliefs, and comments from community members who supported the monument for religious reasons. 840 F. Supp. 2d 507, 521. In attempting to

determine the present purpose of a 46-year-old prayer mural, the court found the atmosphere of the school committee meetings, which "at times resembled a religious revival," and the committee members' stated reasons for voting to keep the monument critical in striking down the prayer mural. The court also observed that at open school district meetings held to consider the monument's fate, "a significantly lopsided majority of speakers spoke passionately, and in religious terms, in favor of retaining the Prayer Mural." *Id.* In light of the tenor at these meetings, the school district's decision to keep the mural was a nod to a time "when the community was sufficiently homogeneous that the religion of its majority could be practiced in public schools with impunity," which had the impermissible effect of advancing religion and excessively entangled the school committee with it. *Id.* at 522-23.

These cases demonstrate by what a broad measure the reasonable observer is deemed to be "more knowledgeable than the uninformed passerby." *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 259 (3d Cir. 2003). The heightened knowledge of the reasonable observer ensures that a government display cannot withstand an Establishment Clause challenge by creating a superficial façade of constitutionality. In this case, the reasonable observer—armed with only the basic facts of the content and location of the display or with intimate knowledge of the history and context of the Monument, including the response to Plaintiffs' complaints in 2012—would be compelled to conclude that the Monument violates *Lemon* and the Endorsement test.

C. The type of injury-in-fact necessary to grant standing to Establishment Clause plaintiffs can be established through direct unwelcome contact with the challenged display.

To demonstrate standing, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Serv. Employees Int'l Union,*

Local 3 v. Municipality of Mt. Lebanon, 446 F.3d 419, 422-23 (3d Cir. 2006). "While all three of these elements are constitutionally mandated, the injury-in-fact element is often determinative." *Toll Bros. v. Twp. Of Readington,* 555 F.3d 131, 138 (3d Cir. 2009). The injury necessary to confer standing can be widely shared, "but it must nonetheless be concrete enough to distinguish the interest of the plaintiff from the generalized and undifferentiated interest every citizen has in good government." *Id.* (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n.1 (1992)); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 220-21 (1974)).

Individual plaintiffs who have direct, unwelcome contact with religious displays on government property have suffered an injury in fact that warrants standing, and organizations of which those plaintiffs are members also have standing. In *Freethought,* the Third Circuit Court of Appeals found that atheist and agnostic plaintiffs challenging a Ten Commandments display on an historic courthouse had standing. 334 F.3d 247, 254-55, n.3. (3d Cir. 2003). One of the individual plaintiffs who was a member of the Freethought organization had standing because she was a resident in the county and had reason to go to the courthouse on many occasions for various reasons. *Id.* at 254. As to the issue of individual and organizational standing, the court wrote:

> We do not find convincing the defendants' argument that neither [the plaintiff] individually nor Freethought as an organization has standing to sue. We agree with the District Court that "[t]here seems to be little question that plaintiff [] has 'suffered an injury in fact' within the meaning of *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)," and that "[a]s an organization with members like [plaintiff] from Chester County, the Freethought Society also has associational standing under *Sierra Club v. Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)." *Freethought Soc'y,* 191 F. Supp. 2d at 593.

Id. at 255 n.3.

In *Suhre v. Haywood Cnty.*, a citizen had standing in an Establishment Clause case when

he had attended court hearings and public meetings in a courtroom that included a Ten Commandments display. 131 F.3d 1083 (4th Cir 1997). The Fourth Circuit Court of Appeals stated:

> These forms of contact are the sort that courts have routinely recognized as sufficient to establish standing in Establishment Clause cases. Suhre is a citizen of Haywood County. The display he challenges is in the main courtroom of Suhre's home community. This public facility lies at the center of local government, and Suhre must confront the religious symbolism whenever he enters the courtroom on either legal or municipal business.

Id. at 1090. Other circuit courts of appeals have likewise ruled that plaintiffs who have direct contact with governmental religious displays have standing. *See Adland v. Russ,* 307 F.3d 471, 478 (6th Cir. 2002) (allegation that plaintiffs travel to State Capitol and would endure direct unwelcome contact with the Ten Commandments monument satisfied the injury-in-fact requirement); *Books v. City of Elkhart,* 235 F.3d 292, 300-01 (7th Cir. 2000) (plaintiff who viewed Ten Commandments monument on the lawn of municipal building had standing to challenge monument); *Foremaster v. City of St. George,* 882 F.2d 1485, 1491 (10th Cir. 1989) (plaintiff's direct contact with religious city logo that offended, intimidated, and affected him conferred standing).

II. Application

The Ten Commandments Monument is unconstitutional under each prong of *Lemon* and under the Endorsement Test. The federal courts have never found a display of the Ten Commandments in a public school or on its grounds to be constitutional. The stand-alone, prominent nature of the display of the Ten Commandments on public school grounds compels this Court to continue that trend. Furthermore, the historical facts and circumstances surrounding the Monument, including both the facts surrounding the District's initial acceptance and erection of the Monument, to cause students to "view the Ten Commandments with a renewed respect for

the law of God which is our greatest strength against the forces that threaten our way of life," and the District's and community's fervent religious response to Plaintiffs' complaints provide further support for the conclusion that the display is unconstitutional.

A. The Ten Commandments Monument violates the Establishment Clause because its primary effect is to advance and endorse religion.

When the reasonable observer considers a display under the effect prong of *Lemon* and the Endorsement test, the observer must give consideration to the intended audience of the challenged display or practice when analyzing the effect. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000) (viewing the challenged practice from the standpoint of an "objective Santa Fe High School student"). In *Indian River*, the court instructed that when the reasonable observer is asking whether, from the perspective of the intended audience, the challenged practice conveys a message favoring or disfavoring religion, even a symbolic endorsement of religion by a school district violates the Establishment Clause. *Id.* at 284. A symbolic endorsement of religion can be conveyed where the challenged display indicates to those who view it that the religious message is favored by the community and that nonadherents to the endorsed message are outsiders in the community. *Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840, 853 (7th Cir. 2012) (citing *Texas Monthly Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

1. The content and location of the Ten Commandments Monument support a finding that the display advances and endorses religion.

The Ten Commandments Monument at Connellsville Junior High East is clearly recognizable as a display of the Ten Commandments. The nearly 5-foot stone Monument features contours at the top of the monument mimicking a book or a scroll. The Ten Commandments are set out in large text and cover most of the body of the Monument. Because of the shading of the surrounding area of the monument, the Ten Commandments appear more

prominently than any other feature and are readable from the nearby sidewalk.

The Supreme Court has recognized the clearly religious meaning of a straightforward display of the Ten Commandments on numerous occasions. First in *Stone*, the Court observed,

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths . . . The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousnesss. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Stone, 449 U.S. at 41-42. More recently, in *McCreary II*, the Supreme Court observed that

> the original text [of the Ten Commandments] viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement *alone* in public view, a religious object is unmistakable.

McCreary, 545 U.S. at 869. Even in *Van Orden*, where the Supreme Court found the Ten Commandments at issue there to be constitutional in the context of the larger display on the Texas capitol grounds, the plurality observed, "Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain." *Van Orden*, 545 U.S. at 691.

In explaining the importance of "integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message," the Supreme Court's majority opinion in *McCreary II* defined the Commandments as a "central point of reference in the religious and moral history of Jews and Christians" and explained that

> [the Commandments] proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction of the divinity proclaimed at the beginning of the text.

McCreary, 545 U.S. at 868. The Court went on to observe that "[w]here the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly

suggesting a message beyond an excuse to promote the religious view point." *Id.*

The location of this Monument does nothing to secularize it—nothing plausibly suggests a message beyond the fundamentally religious message of the Commandments. The Monument is displayed prominently in a grassy area with no other man-made displays in sight. Based upon the current configuration of the school and the parking lots, the Monument stands near the entrance to the auditorium, and students board school buses close by. When the Monument was first erected, the building was a senior high school, and the Monument faced the student parking lot. The sidewalk abutting the grassy area where the Monument is displayed is a mere 14 feet from the Monument. Students jog by the Monument on this sidewalk on each day that physical education classes are held outside.

Similarly, nothing about the text on the Monument suggests a message beyond that of the standalone Ten Commandments. The text outside of the Decalogue is strictly informational; it identifies the parties to the presentation and the date on which the presentation was made. If the text serves any purpose at all, it is to endorse the message and viewpoint of the Eagles—one that hoped to instill the word of God in the minds of District students.

The symbols on the Monument also fail to affect the message of the Commandments. Beginning with the symbols at the bottom of the Commandments, the two Stars of David and the Chi-Rho symbol are themselves religious in nature. *Adland v. Russ*, 307 F.3d 471, 486 (6th Cir. 2001) (describing the symbols as unambiguously religious) (citing *City of Elkhart v. Books*, 532 U.S. 1058, 1059 (2001) (Stevens, J., respecting the denial of the writ of certiorari) (stating "[t]he graphic emphasis on those first lines [I AM the LORD thy God] is rather hard to square with the proposition that the monument expresses no particular religious preference—particularly when considered in conjunction with those facts that the dissent does acknowledge—namely, that the

monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ")). The eagle clutching an American flag does nothing to secularize the Monument's message; if anything, its presence furthers the government endorsement of religion. *Id.* (holding that the combination of this revered secular symbol and the Ten Commandments "serves to link government and religion in an impermissible fashion"); *see also Books v. City of Elkhart, Indiana*, 235 F.3d 292, 307 (7th Cir. 2000) (holding that presence of eagle clutching flag on similar monument serves to link Christianity and Judaism with government). The final symbol, the all-seeing eye, has no effect on the religious message of the Ten Commandments because it is not obviously religious or secular, and the Monument does nothing to connect the Commandments with whatever message the all-seeing eye is designed to convey, if any.

In reviewing these contents of the Monument, it is also notable what is *not* included on the Monument in light of the decisions in *Stone* and *McCreary*. In *Stone*, the posted versions of the Ten Commandments contained a disclaimer indicating that the "secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 39 (internal quotations omitted). The Supreme Court found such a disclaimer to be insufficient to satisfactorily secularize the display to the point that it could be seen as a constitutional display. *Id.* at 41-42. Here, the Ten Commandments Monument is even more overtly religious than the display of the Commandments in *Stone*, as it does not include a disclaimer of any kind.

In *McCreary I*, the Sixth Circuit found that the religious message of the Commandments was not softened simply by placing the Ten Commandments alongside American historical documents. 354 F.3d at 459. The court reasoned that the message conveyed in such a situation

would still be a religious one unless there was some sort of "analytical connection" between the Ten Commandments and the other patriotic documents and symbols. Through this lens as well, this Monument must be viewed as a more religious symbol, as it makes no attempt to analytically connect the Commandments with any secular portions of the Monument.

The fact that the Monument is displayed on school grounds further elucidates its religious effect. The combination of compulsory attendance—which requires junior high students in the Connellsville area to attend Junior High East—and the location of the Monument ensures that CASD students will necessarily be placed in the direct vicinity of the Monument while at school. In light of the special vigilance that must be exercised in the public school setting, such a plainly religious monument cannot be allowed to stand.

The plain display of the Ten Commandments—without anything to securalize or soften the religiosity of the display—on public school grounds where young, impressionable students encounter it regularly cannot survive the scrutiny of *Lemon*'s effect prong and the Endorsement test. On these facts alone, the reasonable observer would conclude that CASD's display of the Monument has the effect of endorsing religion. Unless the surrounding facts and circumstances—namely the history and context of the display—mitigate against a finding that the display of the Monument is unconstitutional, the Court must find that the Monument violates the Establishment clause under the effect prong of *Lemon* and the Endorsement Test. In reality, the history and context of the display provide further support for granting Plaintiff's motion for summary judgment.

2. The history and context of the Ten Commandments Monument support a finding that the display advances and endorses religion.

The meaningful historical records of the Ten Commandments Monument come from two periods: the time of its placement in 1957 and after Plaintiffs complained about the presence of

the Monument in 2012. In light of the fact that the Monument has stood unmodified, a reasonable observer would conclude that any religious effect or endorsement that attached to the monument at the time of its placement remains today.

The history surrounding the District's acceptance and placement of the Monument would lead a reasonable observer to believe that the Monument has the effect of endorsing religion. Importantly, the District voted to accept the donation of the Monument from the Eagles at a time when prayer was permitted in schools. The landmark decision in *Engel v. Vitale*, which struck down prayer in public schools, was not decided until 1962, six years after the Board's vote to accept the Monument. 370 U.S. 421 (1962). A year later, the Supreme Court found unconstitutional a Pennsylvania statute that required "at least ten verses from the Holy Bible [to be] read, without comment at the opening of each public school on each school day." *School Dist. of Abington Twp., Pennsylvania v. Schempp*, 374 U.S. 203, 205 (1963). Thus, when the Monument was accepted by the District in 1956, not only was prayer present in American schools, but this Pennsylvania school district was statutorily required to lead students in prayer at the start of each school day. Because the District was involved in direct endorsement of religion in the classroom at the time that the Monument was placed, the reasonable observer at that time would have likely seen the Monument as an extension of that more direct endorsement of religion. Similarly, a reasonable observer from today, aware of this same history, would likely see the Monument as a vestige from a time when public schools were directly involved in the promotion and endorsement of religion.

The other facts and history surrounding the acceptance and placement of the Monument further support this view. The dedicatory service for the Monument involved an invocation and benediction by Reverend R. A. Nelson. The community leader present, Mayor Abe I. Daniels,

spoke to the need for "serious application" of the Ten Commandments in daily life. The local Eagles representative stated that the Monument was intended to "inspire all who pause to view the Ten Commandments with a renewed respect for the law of God which is our greatest strength against the forces that threaten our way of life." Finally, the national Eagles representative echoed this sentiment, stating

> Without a moral code; men fail to be good neighbors and nations do not live at peace with one another. Without a moral code, we are soon lost in personal or notional frustration. But, given a firm morality, peace inside men and among nations can become a reality. Such a code is the Commandments, written with the fingers of God.

CSF ¶ 13. A reasonable observer aware of these historical comments would view the Monument as having the effect of endorsing religion—just like the individuals speaking on behalf of the organization who donated the Monument.

The response of the Connellsville community to Plaintiffs' requests that the Monument be removed shows that the original religious effect of the Monument has remained unchanged over the past five decades. A large number of community members turned out at every opportunity presented by the District to convey their support for retaining the Monument, and they repeatedly asserted their collective belief that this decision was one of religion and faith. Some of the commenters at the gatherings of the CASD Board suggested that anyone holding a different point of view did not belong in the community, while others warned the CASD Board members that the decision they faced would be one of eternal significance for the individual members. *See* CSF ¶ 86-90 (for example, commenter stating to Board, "Someday you'll stand before God the Creator, Jesus Christ. He'll, he'll judge you. And he might say, 'you're apart from me because I don't know you.' Or he might say, 'Well done my loyal and faithful servant.'").

This undeniably religious response of the Connellsville community spread well beyond official school board gatherings. Vigils and rallies occurred at the Monument and led to vandalism of the District's efforts to cover the Monument. The organization and formation of the Thou Shall Not Move group, which still actively seeks to promote awareness of the Ten Commandments today, shows that the community members viewed the Plaintiffs' complaints as a rallying cry for promotion of the religious message of the Ten Commandments. The community's financial support for Thou Shall Not Move has given the group the means to buy and place no less than 16 granite monuments containing the Ten Commandments.

This overwhelming community response illustrates the religious effect of the Monument. As in *Indian River*, the community reaction showed "broad support among community members" for the Monument and reveals that "in the minds of many," the display of the Monument "was closely intertwined with religion." *Indian River*, 653 F.3d at 287. Put differently, the community reaction provides evidence of the Connellsville "community's collective social judgment" about the Monument "because [it] demonstrate[s] that . . . the community and hence the objective observer who personifies it, cannot help but see that" the Monument "implicates and thus endorses religion." *See Kitzmiller*, 400 F. Supp. 2d at 733. Here, the reasonable observer would be compelled to reach the same conclusion.

The community response is also important to the reasonable observer in that it suggests that nonadherents to the Ten Commandments' religious message are outsiders at Junior High East and within the Connellsville community. Indeed, some of the conduct and comments at the September board meeting would send this message in a very direct way. *See* CSF ¶ 86, 89. The same conduct at the September board meeting had the reciprocal effect of conveying to adherents of the Ten Commandments that they are insiders and favored members of the political

community. That the CASD Board—the insiders and favored members of the community—voted to side with the majority has the added effect of imputing the strongly held views of the Connellsville community to the community's government.

Taken together, the history and context of the Monument—like the content and location—reveal that the Monument cannot survive scrutiny under the effect prong of *Lemon* and the Endorsement test. The intended effect of the Monument is clear from a review of the history surrounding its donation and placement. There are no record facts to suggest that this original effect has dissipated over time. In fact, the community reaction to Plaintiffs' complaints some 55 years after the placement of the Monument provide clear evidence that the religious effect of the Monument is as strong as it has ever been. Coupled with the conduct of the CASD Board in response to Plaintiffs' complaints, which will be reviewed in detail under the purpose prong of *Lemon*, the overall response to this dispute would convince any reasonable observer that the Monument has the effect of endorsing religion.

B. The Ten Commandments Monument violates the Establishment Clause because the purpose of the display is to endorse religion.

The purpose of this Monument is to convey a religious message. In light of the religious content of the Monument, it is difficult to imagine how the District's initial acceptance and recent retention of the Monument could ever be imbued with having a non-religious purpose. A close review of the District's conduct at both points in time establishes its religious intent.

After voting to accept the Eagles' donation of the Ten Commandments Monument, the District took steps to publicize and celebrate its unveiling. The District invited leaders and members of the community and arranged for student attendance by allowing students to leave school early. The comments of everyone who spoke publicly at the dedication of the Monument pointed to the religious nature of the Monument and underscored the special need for the

Commandments in daily life at the time. No conduct of the District at the time of the dedication or in the years that followed suggests that the District accepted and displayed the Monument with any other purpose in mind.

Fast-forwarding to 2012, the District's immediate response to Plaintiffs' complaints and demand that the Monument be removed showed that, at first glance, the District Board and solicitor may have viewed the Monument as a remnant from an era of religiosity in schools. The District informed the local press that it had made the responsible decision to relocate the Monument off of school property. At the same time, however, the District informed individuals that its plans were also motivated by a desire to make the display of the Monument "even more prominent." Soon thereafter—once the District had the opportunity to observe how important the religious symbol is to the Connellsville community—the District reversed course in definitive fashion. As discussed above, this response from the Connellsville community, which motivated the District's change of course, was firmly grounded in religious belief.

Superintendent Lujetic testified that the Board was swayed to change its position by the strong community reaction and public comments at the committee meeting. Board President Jon Detwiler confirmed to the press that this was the case for him too. Ultimately, the Board's vote to retain the Monument was a unanimous one. Following the Board vote, the rhetoric from the District changed, and the Board's expressed resolve in fighting to retain the Monument began to mirror that of the local community. Seemingly buoyed by the community response and the District's change of position, Superintendent Lujetic's responses to the inquiries of private citizens changed from one of reluctant acceptance of the Monument's removal to emboldened pride in fighting to keep the unconstitutional display. *See* CSF ¶ 96. These comments by the CASD Board suggest that the reason for the change of course was to attempt to promote and

embrace the religious message that the community identified in the Monument.

The Establishment Clause "proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Board of Ed. of Westside Community Schools, Dist. 66 v. Mergens*, 496 U.S. 226, 262 (1990) (Kennedy, J. concurring in part and concurring in judgment) (citations omitted). Based upon the facts and circumstances surrounding the Monument, it is clear that the Connellsville community and its school district favor Christianity. This favoritism motivated the District's decision to accept the Monument and place it in the path of students, and in the fall of 2012, it led the District to change course and retain the Monument despite Plaintiff's legally-supported challenge. A reasonable observer would view these District actions as actions taken to perpetuate the message that a particular religious belief is favored and preferred in Connellsville. This conclusion of the reasonable observer renders the display of the Monument unconstitutional under the purpose prong of *Lemon.*

C. The Ten Commandments Monument violates the Establishment Clause because the display fosters excessive government entanglement in religion.

The entanglement analysis considers factors similar to those used under the effect prong of *Lemon*. *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Tp. School Dist.*, 386 F.3d 514, 534 (3d Cir. 2004). Among those factors is a review of the nature of the aid provided by the state. *Id.* Considering this factor, the District's decision to accept and retain the Monument excessively entangled the District with religion.

When the District accepted the Monument from the Eagles, as well as when it acted on behalf of the community in voting to retain the Monument, the District gave state assistance to the religiously-motivated aims of private citizens. The comments of the Eagles representatives present at the dedication of the Monument establish that the Eagles' purpose in donating the

Monument was to spread a religious message—the word of God—to students of the CASD. Similarly, the community's majority opposition to the District's plan to relocate the Monument was motivated by what many who publicly commented viewed as a duty owed to God. By not taking any steps to disavow the religious messages behind these efforts of the two groups to place and retain the Monument, the District's conduct can only be viewed as providing aid to the religious wants of private citizens by offering a public forum for the display of a religious symbol. That the Board reversed its original decision to relocate the religious Monument only highlights its motivation to aid the community's religious viewpoint. The Board's actions constituted improper government sanction of a religious agenda and excessively entangled the District and the Christian religious view set forth by the Monument.

D. Plaintiffs have standing by virtue of the direct unwelcome contact the individual Plaintiffs have had with the Monument.

Both Plaintiffs Doe 4 and Doe 5 have had direct contact with the Monument. Plaintiff Doe 4 regularly came into contact with the Monument during her physical education class and on other more limited occasions as well. Plaintiff Doe 5 came into direct contact with the Monument while frequenting Junior High East for necessary business in relation to Plaintiff Doe 4's attendance there. The contact that both Doe Plaintiffs had with the Monument was unwelcome in that they do not subscribe to the religious message conveyed by the Ten Commandments and find the District's endorsement of this message through its placement and retention of the Monument to be offensive. This direct unwelcome contact with the Monument satisfies any standing burden that the Doe Plaintiffs have, and Plaintiff Freedom From Religion Foundation possesses standing by virtue of Plaintiff Doe 5's membership in the organization.

CONCLUSION

Under the two applicable tests—*Lemon* and the Endorsement test—the Ten Commandments Monument is unconstitutional. Even without the religious history of the Monument, the placement of such a plainly religious message on public school grounds has the clear effect of endorsing religion in the minds of the intended audience. Adding in the religious history surrounding the display, the endorsement becomes even more undeniable. Just as the history of the monument reveals the religious endorsement, a review of the same facts demonstrates that the continued display of the Monument furthers the religious purpose of both the community and the District acting on its behalf. The District's conduct in serving the majority of its predominantly Christian community creates an unconstitutional entanglement between the District and the Christian religion. For these reasons, the Court must grant Plaintiffs' motion for summary judgment and grant the relief requested in the complaint.

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire
PA I.D. No. 208421
STEELE SCHNEIDER
428 Forbes Avenue, Suite 900
Pittsburgh, PA 15219
(412) 235-7682
(412) 235-7693/facsimile
mschneider@steeleschneider.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, the foregoing **PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** 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.

John Smart, Esquire
Amie A. Thompson, Esquire
ANDREWS & PRICE
1500 Ardmore Boulevard
Pittsburgh, PA 15221

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire