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

FREEDOM FROM RELIGION FOUNDATION, INC.; DOE 1, by Doe 1's next friend and parent MARIE SCHAUB, who also sues on her own behalf,	:	C.A. No. 12-1319
	:	Judge Terrence F. McVerry
	:	Electronically Filed
Plaintiffs,	:	
vs.	:	
	:	JURY TRIAL DEMANDED
NEW KENSINGTON-ARNOLD SCHOOL DISTRICT,	:	
Defendant.	:	

DEFENDANT'S
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Defendant, NEW KENSINGTON-ARNOLD SCHOOL DISTRICT, by and through its attorneys, Anthony G. Sanchez, Esquire and the Sanchez Legal Group, LLC, files the following Brief in Support of Motion for Summary Judgment.

STATEMENT OF FACTS

From 1941 to 1947, while a juvenile court judge in Minnesota, E.J. Ruegemer came in frequent contact with youngsters who were in trouble with the law and who seemed to lack any code of conduct by which to govern their actions. (A.1 at ¶3)[1] He believed these troubled youths could benefit from exposure to one of mankind's oldest codes of conduct, the Ten Commandments. This exposure was not meant "to be a religious instruction of any kind, but to show these

[1] For the Court's convenience, copies of relevant documents and the relevant pages from depositions transcripts have been included in the Appendix to Defendant New Kensington-Arnold School District's Concise Statement of Material Facts and Corresponding Motion and Brief in Support of Motion for Summary Judgment. The Appendix will hereinafter be cited to as "A. ___".

youngsters that there were such recognized codes of behavior to guide and help them." (A.1-A.2 at ¶3).

Ruegemer, who from 1947 to 1967 was a Minnesota District Court judge, also happened to be chairman of the Youth Guidance Committee of the Fraternal Order of Eagles (hereinafter "FOE"). (A.1 at ¶2). Ruegemer sought funding from the FOE for a program to make copies of the Ten Commandments available in juvenile courtrooms. The FOE initially rejected the idea, concerned that it may appear coercive or sectarian. (A.2 at ¶4). The FOE eventually agreed to support the project, however, 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.2 at ¶4). This idea then developed into a program to place monuments in locations throughout the country. Ruegemer worked with a Minnesota granite company to produce granite monuments that included an inscription of the non-sectarian version of the Ten Commandments. The monuments were paid for and distributed by the FOE through its local chapters, known as Aeries, throughout the country. (A.2-A.3 at ¶¶4,5). Hundreds of these monuments have been donated by the FOE across the country. Card v. City of Everett, 520 F.3d 1009, 1013 (9th Cir. 2008).

In 1957, around the same time that Defendant New Kensington-Arnold School District (hereinafter "NKASD") was constructing Valley High School, the local Aerie of the FOE donated one of these monuments to NKASD. (A.15-A.16). The monument (hereinafter "the FOE monument") is of dark stone with engraving. There is no dispute as to what is on the monument. At the top of the FOE monument are engraved two tablets with what appears to be faux Hebrew or Phoenician letters. These tablets are surrounded by a floral motif. Between the tablets is the Masonic "all seeing eye," familiar from the back of the dollar bill. There is also an engraving of a bald eagle grasping an American Flag in its talons. Below that is the words "the Ten

Commandments" with the words "I am the Lord thy God" below. Below that, in smaller letters, is the text of the non-sectarian version of the Ten Commandments. Below the text of the Ten Commandments is what is known as the Chi-Rho symbol and two Stars of David. At the bottom of the FOE monument is an inscription stating that the monument was donated by the local FOE. (Complaint, Exhibits 1 and 2).

The FOE monument sits isolated, not by the main student entrance to the school, but on the lawn in the vicinity of a walkway leading to a side entrance. (A.7). The area where the FOE monument is located is not well lit. (A.27; A.51). The view from one side of the FOE monument is partially obscured by a shrub. (Complaint, Exhibits 1 and 2). The closest someone passing along the walkway could get to the FOE monument is about 15 feet. (A.27).

The FOE monument has sat inconspicuously on the lawn of Valley High School for approximately 55 years. Many people did not even notice the monument. (A.19). Some who have lived in the area all their lives and passed the FOE monument countless times never paid attention to it or rarely noticed it. (A.48-A.49; A.73 at ¶3). Some who have walked past the FOE monument for 50 years never saw or read what was on it and assumed it was a monument to war veterans, or didn't remember that it contained the Ten Commandments. (A.57 at p. 18; A.59-A.60 at pp.105-106; A.77 at ¶6). Those who did, at some point, stop and take the time to look at or read the monument were not offended by it and did not feel that it promoted religion. (A.74 at ¶3; A.75 at ¶3; A.76 at ¶3; A.77 at ¶¶3, 4; A.79 at ¶3; A.80 at ¶3; A.81 at ¶¶3,4).

Plaintiff Marie Schaub (hereinafter "Schaub") has been to the school only a handful of times. (A.23). Schaub has chanced upon the FOE monument on only three occasions, two of which involved dropping her sister off at the school. (A.22, A.25-A.26). When she dropped off her sister, Schaub didn't walk past the FOE monument, she parked her car and let her sister out. From where

she parked the car Schaub, because she is blessed with extraordinary eyesight, could possibly have read the larger letters on the FOE monument. (A.29-A.31).

The other occasion occurred in 2007 or 2008 ***[REDACTED]***. When Schaub walked past the FOE monument to enter the school, she didn't stop to read any of the monument. (A.32). She saw the words "Ten Commandments," felt offended and kept on walking. (A.33). She described her actions concerning the FOE monument in this way: "I kind of looked at it out of the corner of my eye, didn't really think too much about it and I just kept on walking." (A.36).

In late March, 2012, NKASD received a letter from Plaintiff, Freedom From Religion Foundation (hereinafter "FFRF"), dated March 20, 2012, demanding that the FOE monument be removed. (A.9-A.10). The FFRF letter was the first complaint or objection that NKASD ever received regarding the FOE monument in the 55 years that the monument sat on the lawn of the high school. (A.11; A.52). Many people had never paid any attention to the monument until news of the FFRF letter reached the local media. (A.12; A.49; A.57 at p. 18). Prior to FFRF raising this controversy, there is no record of anyone complaining about the FOE monument or even being aware of anyone raising any complaint about the FOE monument. (A.73 at ¶4; A.74 at ¶4; A.75 at ¶4; A.76 at ¶¶4,5; A.77 at ¶5; A.79 at ¶4; A.80 at ¶4; A.81 at ¶5).

Schaub was not a member of FFRF when the March 20, 2012 letter was sent to NKASD. Schaub claims that when she heard about the letter, she went to FFRF's website and filled out an online complaint type form about the FOE monument. (A.45-A.46). Schaub also was not a member of FFRF when this lawsuit was filed. Schaub has never joined FFRF. Rather, sometime in 2014, the co-president of FFRF gifted to Schaub a one year membership that will expire in 2015. (A.43-A.44).

Doe 1 is not a member of FFRF. (A.70-A.71). Doe 1 was not a student at the high school when this lawsuit was filed and has just started attending school at the high school this year. (A.71). She did, however, pass by the FOE monument on occasion to attend events that were not school functions, such as a karate tournament, that were held at the high school. Typical of many people, she never paid any attention to the FOE monument. She testified, "I just didn't really pay attention to it. I was just kind of ignoring it because I really didn't care about it." (A.67). She has never read the monument or paid any attention to it, so would have nothing to say about. (A.67). She only looked at a picture of the monument ***[REDACTED]***. She hasn't looked at the FOE monument itself, she only knows what is on it from looking at pictures. (A.69). She didn't feel anything in particular at the times when she saw the monument. (A.70). The monument does not make her feel like she has to believe in god. (A.71).

NKASD does not try to instill religious beliefs in its students, it only tries to educate students. (A.13). NKASD's position is that the FOE monument does not endorse religion, has become part of the front lawn of the high school, and that the FOE monument has historical significance. (A.13; A.15; A.53; A.62-A.65 at pp. 117, 122, 127-129). Accordingly, NKASD refused to remove the FOE monument. FFRF then filed this lawsuit, claiming that the FOE monument violates the Establishment Clause of the First Amendment.

ARGUMENTS

Summary judgment should be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is not required to provide evidence "negating the opponent's claim", but rather need only show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325, 106 S.Ct. 2548, 2553, 2554, 91 L.Ed.2d 265

(1986). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, a "scintilla of evidence" in support of non-movant's position is insufficient, instead "there must be evidence on which the jury could reasonably find" for the non-movant. Id., 106 S.Ct. at 2512. The non-moving party cannot avoid summary judgment by resting on mere allegations, allusions to facts or reference to the pleadings, or by replacing the conclusory allegations of a pleading with conclusory allegations in an affidavit. Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990). Where the moving party's motion is properly supported and its evidence, if not controverted, would entitle it to judgment as a matter of law, the nonmoving party must answer by setting forth "genuine factual issues that properly can be resolved only by a factfinder of fact because they may reasonably be resolved in favor of either party." Anderson, 106 S.Ct. at 2511. In the face of the moving party's evidence, the nonmoving party's mere allegations, general denials or vague statements will not create a genuine factual dispute. Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F. 3d. 1292, 1302 (3d Cir. 1993).

In the present case, there are no disputes over any material facts. As more fully set forth below, NKASD is entitled to summary judgment as a matter of law.

I. THE FACTORS INVOLVE IN THE PRESENT CASE COMPEL THE CONCLUSION THAT THE FOE MONUMENT ON THE LAWN OF THE HIGH SCHOOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The present case does not involve a situation in which a school district has placed unadorned plaques or posters of the Ten Commandments in every classroom, forcing students to confront them on a daily basis. Also, contrary to what FFRF and Schaub apparently believe, a

display of the Ten Commandments does not automatically result in an endorsement of religion in violation of the Establishment Clause. Scholars have long noted the historical impact the Ten Commandments have had on Western society.

> It is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition. . . . Few people, if any, would dispute that the Ten Commandments – and its parallels from other cultures – as well as other directives contained in the Pentateuch of the Hebrew and Christian Scriptures, inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is a part.

Steven K. Green, The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law, 14 Journal of Law & Religion 525 (2000).

The Supreme Court has also recognized the role the Ten Commandments "plays in America's heritage" and that "the Ten Commandments have an undeniable historical meaning." Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 2863, 162 L.Ed.2d 607 (2005), (Rehnquist, C.J., plurality opinion). See also, Freethought Soc. of Greater Philadelphia v. Chester Cnty., 334 F.3d 247, 262-63 (3d Cir. 2003), (based on prior Supreme Court rulings, the Ten Commandments are not so overwhelmingly religious in nature that they will always be seen only as an endorsement of religion, and the Ten Commandments have not played an exclusively religious role in the history of Western Civilization). Also, "Simply having a religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Van Orden, 125 S.Ct. at 2863 (Rehnquist, C.J., plurality opinion).

As this Court noted when ruling on NKASD's Motion to Dismiss, the variety of Establishment Clause tests utilized by the Supreme Court has caused confusion for both the lower courts and litigants. This problem has been noted by other courts as well. See, Card v. City of Everett, 520 F.3d 1009, 1016 (9th Cir. 2008); and Twombly v, City of Fargo, 388 F. Supp. 2d 983, 986 (D.N.D. 2005). Recently, several courts have favored the analytical approach used by Justice

Breyer in his concurring opinion in Van Orden. See, e.g., Card, 520 F.3d at 1017-1020; ACLU Neb. Found. v, City of Plattsmouth, 419 F.3d 772, 776-778 (8th Cir. 2005); and Twombly, 388 F. Supp. 2d at 989-991. In ruling on the Motion to Dismiss in the present case, this Court also discussed at length Justice Breyer's approach. Freedom From Religion Found., Inc. v. New Kensington-Arnold Sch. Dist., 919 F.Supp.2d 648, 658-660 (W.D. Pa. 2013).

Several cases have involved constitutional challenges to FOE monuments nearly identical to the FOE monument at issue in the present case. The Supreme Court has twice ruled that these FOE monuments do not violate the constitution. See, Van Orden and Pleasant Grove City v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Several other courts have concluded that FOE monuments comport with the requirements of the Establishment Clause, including cases that involved challenges from the FFRF. See, e.g., Card; Plattsmouth, Twombly, State v. Freedom From Religion Found., Inc., 898 P.2d 1013, 1024 (Colo. 1995);[2] and Anderson v. Salt Lake City Corp., 475 F.2d 29 (5th Cir. 1973).

Consistent with Justice Breyer's concurrence in Van Orden, in most of the cases addressing Establishment Clause challenges to FOE monuments, two factors were of primary importance in the decisions of the courts. The first was the purpose of the monument. See, e.g., Card, 520 F.3d at 1019, ("Justice Breyer first looked to the purpose of the monument, finding that its history suggested a secular purpose.") In the present case, the purpose behind the FOE monument is undeniably secular. As explained by Judge Ruegemer, the former chairman of the FOE's Youth

[2] Although State v. FFRF predates Justice Breyer's concurring opinion in Van Orden, the analysis applied by the Colorado Supreme Court was much the same as that applied by Justice Breyer. See, State v. FFRF, 898 P.2d at 1023 ("[T]he constitutionality of the Ten Commandments monument in this case will depend upon whether the display has the purpose or effect of endorsing or disapproving of religion. Resolution of that issue will rest in large part on the particular content and physical setting of the monument.")

Guidance Committee who had the idea that eventually led to the FOE monuments, the purpose of the monuments was not religious instruction, but to address the problem of juvenile delinquency by providing the youth of America with a code of behavior to guide and help them. (A.1-A.2 at ¶3). Further, to avoid any appearance of coercion, the FOE monuments used a non-sectarian version of the Ten Commandments. (A.2 at ¶4). Based on this same evidence, other courts that have considered these FOE monuments have concluded that the purpose behind the monuments was to help the youth of America and not to promote religion. See, e.g., Van Orden, 125 S.Ct. at 2870 (Breyer, J., concurring); Card, 519 F.3d at 1019-1020; State v. FFRF, 898 P.2d at 1024.

In the present case, there is no direct evidence of the purpose NKASD had in accepting the FOE monument and placing it on the lawn of the high school. NKASD, however, does not try to instill religious beliefs in its students, it only tries to educate students. (A.13). In such a situation, courts will often ascribe the intent of the donee to the donor. 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.") Further, the fact that the FOE monument prominently states at the bottom that it was the gift of the local FOE Aerie is more evidence that, in accepting the FOE monument, NKASD was not promoting religion but was promoting the FOE's secular purpose. See, Van Orden, 125 S.Ct. at 2870 (Breyrer, J., concurring), (as the FOE had a secular purpose in donating the monument, the prominent acknowledgment on the monument itself that it was donated by the FOE 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 (also agreeing with Justice Breyer's analysis in Van Orden).

Even though FFRF is in the business of challenging what it believes to be violations of the Establishment Clause, and even though the FFRF has previously challenged FOE monuments that are essentially the same as the FOE monument in the present case, neither FFRF nor any of the other Plaintiffs have come forward with any evidence that, in creating and donating the monuments, the FOE's purpose was to promote religion. Nor has FFRF or any of the Plaintiffs in the present case come forward with any evidence that NKASD's purpose in accepting the FOE monument and placing it on the lawn of the High School was to proselytize or promote religion or coerce students into believing in God.

The other primary factor considered by the courts was the passage of time since the placement of the FOE monument. For Justice Breyer, this factor was "determinative." Van Orden, 125 S.Ct. at 2870 (Breyer, J., concurring). In Van Orden, the FOE monument had stood on the state's Capitol grounds for 40 years, and for 6 years after the plaintiff began encountering it, before a challenge was raised. Van Orden, 125 S.Ct. at 2858 (Rehnquist, C.J., plurality opinion). For Justice Breyer, that 40 year period was the most significant factor in determining that the FOE monument did not violate the Establishment Clause.

> Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. . . . [I]n reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

Van Orden, 125 S.Ct. at 2870, 2871 (Breyer, J., concurring), (citation omitted).

Other courts have also found that the passage of time between the placement of the FOE monument and when complaints or challenges to the monument were first made is dispositive. See, Card, 520 F.3d at 1021 (when two citizens and one organization wrote seven complaints about the FOE monument, but those complaints did not surface until the monument had been in place for over 30 years, "Justice Breyer's longevity analysis applies" and that factor was determinative); Plattsmouth, 419 F.3d at 774, 778 (35 years passed in which the FOE monument stood in the city park without objection); and Twombly, 388 F.Supp.2d at 993 (no reasonable observer could perceive the city as adopting or endorsing a religious message given "the extreme dearth of community complaints and the complete absence of legal challenges over the monuments near fifty year history").

In the present case, the FOE monument was donated to NKASD in 1957 and has been in place since the high school was constructed. (A.15-A.16). Therefore, in the present case, approximately 55 years have passed between the time the FOE monument was placed and the time when the first complaint or objection was made. Additionally, approximately five or six years passed between the time Schaub and Doe 1 first saw the FOE monument and when the first objection was made. In the fifty-five (55) year period that the FOE monument sat on the lawn of the high school, there is no record of anyone complaining about the FOE monument or even being aware of anyone raising any complaint about the FOE monument. (A.73 at ¶4; A.74 at ¶4; A.75 at ¶4; A.76 at ¶¶4,5; A.77 at ¶5; A.79 at ¶4; A.80 at ¶4; A. 81 at ¶5).

In the fifty-five (55) years since the FOE monument has been in place, apparently the only person who had any type of negative reaction to it has been Schaub. Schaub, however, believes the Ten Commandments are purely religious and she disagrees with all the scholars who claim that

the Ten Commandments have any historical significance in the development of the law. (A.37-A.42). Schaub also never read the entire monument and paid no attention to the secular symbols such as the Masonic "all seeing eye", the American flag or the eagle. (A.34-A.35). A few isolated negative reactions, however, is not sufficient to create a violation of the Establishment clause.

> "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." For the court to do otherwise would be to excessively cater to one private viewpoint at the expense of another, in essence inflicting the same injury the Court is now asked to remedy.

Twombly, 388 F.Supp.2d at 993 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 115 S.Ct. 2440, 2455, 132 L.Ed.2d 650 (1995), (O'Connor, J., concurring)).

George Batterson, who was superintendent of NKASD when this controversy first arose, is a practicing Christian of such strong religious convictions that he prays all the time and would say a silent prayer whenever he passed by the FOE monument. (A.5-A.7). Even this man of such strong religious convictions, however, saw the FOE monument, not as an endorsement of religion, but as a monument of historical significance. (A.15-A.16). The people who discussed the matter with Batterson, including teachers and students, believed the FOE monument was historical and supported NKASD's stance that the FOE monument should not be removed because it was historical, not an endorsement of religion, and had become part of the landscape of the high school. (A.14-A.15; A.17-A.18).

The FOE monument was been on the lawn of Valley High School for over 55 years since the high school was constructed before any complaint or objection was raised. As in Van Orden, Card, Plattsmouth, and Twombly, this passage of time is determinative that the FOE monument is not perceived as endorsing religion and does not violate the Establishment Clause.

Plaintiffs may attempt to distinguish the present case from Van Orden on the basis that, in Van Orden, the FOE monument was in an area that had other secular monuments. Unlike the passage of time factor, the presence of other monuments in Van Orden was not determinative.

> In addressing the monument's proximity to governmental structures, an examination of Establishment Clause jurisprudence shows that this factor is not by itself dispositive. *Van Orden,* 125 S.Ct. 2854; *Lynch,* 465 U.S. 668, 104 S.Ct. 1355 *Allegheny,* 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *Freethought Soc'y of Greater Philadelphia v. Chester County,* 334 F.3d 247 (3d Cir.2003). Nor must a display on public land that is adjudged to have a religious message be surrounded by secular messages in order to escape constitutional infirmity. *Capitol Square,* 515 U.S. 753, 115 S.Ct. 2440; *Plattsmouth,* 419 F.3d 772; *Freethought Society,* 334 F.3d 247; *Anderson,* 475 F.2d 29.

Twombly, 388 F.Supp.2d at 991.

Thus, in Twombly, even though the FOE monument in that case was located close to a government building, and even though there were no other monuments in the area, the court, "given the necessity of analyzing the Fargo monument in a holistic context" in accordance with Van Orden and Plattsmouth, still found that the monument did not violate the Establishment Clause. Twombly, 388 F.Supp.2d at 991.

Similarly, in Card, the FOE monument had originally been located on the front lawn of city hall, but was relocated 29 years later to a more inconspicuous location with few other memorials around it. Card, 520 F.3d at 1011-1012. Despite this more isolated location, the Court in Card still found that the FOE monument did not violate the Establishment Clause. The Court stated that Van Orden does not establish a quota system or a density requirement for monuments and that the lack of additional monuments may only reflect a disparity in the resources between the City of Everett and the State of Texas. Card, 520 F.3d at 1020.

Additionally, in Plattsmouth, the FOE monument was isolated in the corner of a 45 acre city park. Except for a plaque listing donors to the park, there were no other monuments around,

only picnic benches and shelters and baseball diamonds. Plattsmouth, 419 F.3d at 774. Despite its isolation, the court in Plattsmouth still concluded that the FOE monument did not violate the Establishment Clause. Plattsmouth, 419 F.3d at 778.

Thus, in the present case, as in Twombly, Card and Plattsmouth, that the FOE monument sits in an isolated area without other monuments around it does not compel the conclusion that it violates the Establishment Clause. Also, what must not be overlooked is that the FOE monument is not simply an unadorned engraving of the Ten Commandments. Although the Ten Commandments is the most prominent feature, the FOE monument is actually a medley of symbols. These symbols include the Masonic "all seeing eye", familiar from the back of the dollar bill, the American flag and an eagle. See, State v. FFRF, 898 P.2d at 1018 (the monument itself is a mélange of civil, political, cultural and religious meanings).[3]

Further, the FOE monument's isolation suggests nothing of the sacred and confirms that it is not an attempt to proselytize or promote religion or coerce students into believing in God. Robert Pallone, the current president of NKASD's school board, is also employed by Unilever as national sales manager. (A.55-A.56 at pp. 9-10, 12). Part of his job is to make customers in grocery stores notice his company's products and buy them. As Mr. Pallone explained, sales marketers like him operate under a system known as "Ten, Five, One." (A.58 at p. 98). "At ten feet we hope to grab your attention to see a product. At five feet we hope to get your interest. At one foot, we want you to do the investigation and make the purchase." (A.58 at p. 98). As Schaub has admitted, a person passing on the walkway can't get closer than approximately 15 feet to the monument. (A.27). As

[3] Even the other partially religious symbols on the FOE monument, the Chi-Rho and the Star of David, can combined be perceived to have a non-religious meaning. In State v. FFRF, the court concluded that "the juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflects an acknowledgement of reconciliation and diversity more than any sentiment of intolerance." State v. FFRF, 898 P.2d at 1023.

Mr. Pallone explained, given the location of the FOE monument and the contrast between the color of the monument and its lettering, people just won't notice it, and the claim that the FOE monument is having the effect of promoting or endorsing religion simply isn't realistic. (A.58 at pp. 99-100).

Mr. Pallone's analysis is borne out by the facts. Most people who have walked by the monument simply haven't noticed it. Prior to the start of this controversy, Mr. Pallone himself has walked past the FOE monument for fifty (50) years and never saw what was on the monument and never noticed that it had the Ten Commandments. (A.59-A.61 at pp. 105-106, 112). John Pallone, the current superintendent of NKASD, has lived in the area his whole, but in all the times he walked past the FOE monument, he never noticed it until the current controversy arose. (A.48-A.50). Others who have lived in the area for decades and passed the FOE monument several times rarely noticed it was there. (A.73 at ¶3). Prior to FFRF starting this controversy, some who had previously passed the monument didn't even remember that it contained the Ten Commandments. (A.77 at ¶6). Schaub admitted that she has never stopped to actually look at and read the monument, but only "kind of looked at it out of the corner of my eye." (A.36). Doe 1 has also walked past the FOE monument and paid no attention to it. (A.67).

In the present case, there is a complete dearth of any evidence that the FOE monument has, or has even been perceived to have, or had the effect of promoting religion, or requiring people to believe in God, in the 55 years that it has sat on the lawn of the high school. Even Doe 1, ***[REDACTED]*** stated that the monument does not make her feel like she has to believe in God. (A.71). There is no testimony from Doe 1 or anyone else that the FOE monument made them feel that if they did not believe in God or religion, that they would feel somehow isolated.

The nature of the FOE monument and its location, its presence on the high school lawn for 55 years before any objection or complaint was raised, and the lack of any evidence that it has had

any proselytizing effect on anyone, demonstrate conclusively that the FOE monument does not violate the Establishment Clause. Therefore, NKASD is entitled to summary judgment as a matter of law.

II. THE EVIDENCE ESTABLISHES THAT PLAINTIFFS LACK STANDING IN THE PRESENT CASE.

The standing requirement is an integral part of the governmental charter for the Federal court system established by Article III of the Constitution. ACLU-NJ v. Township of Wall, 246 F.3d 258, 261 (3d Cir. 2001). If the plaintiff does not possess standing, the court will lack subject matter jurisdiction. Id. Plaintiff has the burden of proving standing. Id. At an irreducible minimum, Article III standing requires that the plaintiff show that he has personally suffered some actual or threatened injury as a result of the alleged conduct of the defendant, and that the injury can be fairly traced to the challenged action. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

Some courts still seem to operate under the premise that standing requirements are not as stringent in Establishment Clause cases and that a plaintiff can have standing merely by being offended by the challenged display, as otherwise few people would have standing. Such a notion was explicitly rejected by the Supreme Court in Valley Forge. In Valley Forge, the Court stated that there is no "sliding scale," there is no lower level of standing requirements in Establishment Clause cases as the requirement of standing focuses on the party seeking to get his complaint before a federal court and not the issues he wishes to have adjudicated. Valley Forge, 102 S.Ct. at 765. The Court reasoned that the notion that standing in an Establishment Clause case can be established merely by being offended by the challenged conduct "rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the 'traditional' view of Art. III. But '[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.

> 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 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 765-66, (Court's italics).

The reasoning in Valley Forge was applied in Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988), a case that involved another FFRF challenge to an FOE monument, this one located in a city park known as Cameron Park, in La Crosse, Wisconsin. Phyllis Grams was an individual plaintiff /appellant in that case and a resident of La Crosse. She became aware of the FOE monument when a friend brought it to her attention. Grams went to view the monument. Grams "testified that she was offended by the 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. There was no evidence, however, that any of the plaintiffs/appellants had altered their behavior in anyway, such as changing their normal routine to avoid the monument.

Applying Valley Forge, the court held that this evidence was not sufficient to confer standing.

> 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.

The court also rejected the argument that, because Grams lived in La Crosse, she had standing because she lived in close proximity to the allegedly unconstitutional display.

> Although Grams lives in the City of La Crosse, the appellants did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park. The appellants also failed to establish that Grams suffered any injury simply because of her close proximity to the monument.

Zielke, 845 F.2d at 1469.

Applying these requirements of Article III standing to the present case demonstrates that neither Schaub, Doe 1, nor FFRF have standing to challenge the FOE monument on the lawn at Valley High School.

A. Schaub lacks standing.

Schaub has encountered the FOE monument on only three occasions. (A.22, A.25-A.26). She has never actually looked at or read the entire monument. (A.32). Although she claims that she felt offended when she saw the monument, she stated that "I kind of looked at it out of the corner of my eye, didn't really think too much about it and I just kept on walking." (A.36). Schaub did not claim that she goes to the high school on a regular basis or as part of her normal routine, the three encounters she had with the FOE monument are apparently the only occasions that she

has been at the high school. In fact, she testified that she hasn't been to the high school in years. (A.28). Schaub never claimed that she altered her behavior or changed her normal routine in any way because of the presence of the FOE monument.

Thus, Schaub's situation in the present case is similar to that of Grams in Zielke. Her basis for standing is that she felt offended by what she perceived was a message from NKASD about the religious beliefs people should hold. As in Valley Forge and Zielke, however, that offense is insufficient to confer standing. If anything, Schaub has an even lesser basis to claim standing than Grams. After Grams saw the FOE monument in Zielke, she at least went to the city and complained. In the present case, after Schaub saw the monument, she "didn't think too much about it" and "just kept on walking." That is not nearly sufficient to confer standing. See also, Wall, 246 F.3d 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).

Based on allegation in the Complaint that Schaub is a taxpayer (Complaint, ¶9), and that NKASD maintenance employees trim the bushes and maintain the area around the FOE monument (Complaint, ¶19), Schaub may also be trying to claim standing based on her status as a taxpayer. To establish taxpayer standing, a plaintiff must show that she pays taxes to the relevant entity, and that tax revenues are expended on the disputed practice. Wall, 246 F.3d at 262. A plaintiff's status as a taxpayer, however, is irrelevant if no tax money is spent on the alleged unconstitutional activity. Id., at 263. For example, in Zielke, while La Crosse had spent money in 1899 to purchase the property where the challenged monument was now located, there was no dispute that the monument was donated and no evidence that the city spent funds maintaining the monument, and, therefore, Grams' status as a municipal taxpayer was irrelevant and did not confer standing. Zielke, 845 F.2d at 1465-66, 1470.

Also, where any costs involved in the challenged activity would have been incurred anyway, then the challenged activity did not add to the costs of operating the school or municipal entity, and the plaintiffs will have failed to show direct monetary injury as the challenged activity did not increase the taxes the plaintiffs did or will have to pay. Wall, 246 F.3d at 262 (citing Doremes v. Board of Educ., 342 U.S. 429, 433, 72 S.Ct. 394, 96 L.Ed. 475 (1952)). In such a situation, plaintiffs have showed nothing more than a potential *de minimus* drain on tax revenues that does not confer standing. Id. In Wall, the plaintiffs were challenging a city holiday display that contained, in part, a Nativity scene and other religious items that plaintiffs contended violated the Establishment Clause. There was some dispute as to whether display was erected by volunteers or by paid city employees. The court stated that, even assuming that the challenged items were erected by paid city employees, there was no indication that the portion of the expenditure attributable to the challenged elements of the display would have been more than *de minimus*. Wall, 246 F.2d at 264. Regarding any costs involved in lighting the display, the court stated, "Similarly, we cannot simply assume that the Township expends more than a de minimis amount in lighting the religious elements of the display." Id.

In the present case, there is no dispute that the FOE monument on the lawn at the high school was donated. Plaintiffs have not come forward with any proof that any tax revenues were expended to purchase or erect the FOE monument. Further, there is no evidence that NKASD has incurred any expenses regarding the FOE monument. Although Plaintiffs claim that maintenance personnel trim the shrubs and maintain the area around the FOE monument, there is no evidence that the maintenance personnel would not engage in such activities any way. Nor is there any evidence that NKASD has been required, for example, to hire additional maintenance personnel because of the presence of the FOE monument. Thus, any expense regarding maintenance of the

area around the FOE monument is an expense that would have been incurred anyway and, therefore, is *de minimus* and not sufficient to confer taxpayer standing. Plaintiffs in the present case have failed to come forward with any proof that the FOE monument has increased the taxes that Schaub has paid or will pay. Therefore, Schaub's status as a taxpayer is irrelevant and does not confer standing in the present case.

B. Doe 1 lacks standing.

There is no evidence in the present case that Doe 1 has sustained any personal injury as a result of the presence of the FOE monument on the high school lawn. Doe 1 has not confronted the FOE monument in the past and will not have to confront it in the future. Although Doe 1 started attending the high school this year, the FOE monument is not located at the main student entrance. (A.7-A.8). As set forth above, the FOE monument is in an isolated location approximately 15 feet from a side entrance. Doe testified that she has passed by this area before and paid no attention to the FOE monument. (A.67). Thus, even if Doe 1 is required to use this side entrance for some reason, the location of the FOE monument will not force her to confront the monument.

In addition, Doe 1 admitted that the FOE monument does not make her feel like she has to believe in God. (A.71). Doe 1 never testified that the FOE monument made her feel excluded in any way, or that she was in any way offended by the monument. There is no evidence that Doe 1 has, or will be required to, alter her conduct or her normal routine so as to avoid confronting the FOE monument.

Also of note, the only reason Doe 1 has paid any attention to the FOE monument is because of this controversy. Doe 1 ***[REDACTED]*** Such an action is not sufficient to confer standing. See, Wall, 246 F.3d at 266, (where plaintiff testified that he went to municipal building and observed township's 1999 holiday display, but the record was unclear as to whether he did so in order to

describe the display for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building, plaintiff's evidence failed to establish standing).

There is no evidence that Doe 1 has been injured in any way by observing the FOE monument. Therefore, Doe 1 lacks standing in the present case.

C. FFRF lacks standing in the present case.

There have been no allegations and no evidence in the present case that FFRF as an organization has suffered any injury as a result of the FOE monument on the lawn of the high school. Therefore, any standing FFRF has must be based on the standing that its members have. Wall, 246 F.3d at 261-62; and Zielke, 845 F.2d at 1469.

In the present case, the only FFRF member who has been identified is Schaub. As set forth above, Schaub does not have standing in the present case. Therefore, FFRF also lacks standing. Zielke, 845 F.2d at 1469.

Of note, even if Schaub were somehow considered to have standing, whether FFRF would also have standing is doubtful. Although Plaintiffs deny it, the evidence establishes that Schaub was recruited for the purposes of this lawsuit. Schaub was not a member of FFRF when this lawsuit was filed. At her deposition on April 18, 2014, Schaub testified that she was only an FFRF member for this year and that her one year membership would expire in 2015. (A.43). Additionally, Schaub never actually joined FFRF. Rather, Dan Barker, co-president of FFRF, "gifted" Schaub a membership. (A.44). An organization should not be permitted to recruit individuals who live in the relevant area by giving them memberships in the organization as a gift, and then use those gifted memberships as a basis for standing.

As FFRF is not claiming any injury to FFRF as an organization, and as no member of FFRF has standing in the present case, FFRF does not itself have standing.

CONCLUSION

The evidence in the present case establishes that the purpose of the FOE monument was to reduce juvenile delinquency by providing the youth of America with a code of behavior to guide and help them. There is no evidence that NKASD placed the FOE monument on the lawn of the high school to proselytize or promote or endorse religion. The FOE monument, which contains non-religious symbols as well as the Ten Commandments, is located in an isolated area, 15 feet from a walkway leading to a side entrance that is not the main student entrance. The FOE monument has been there since the high school was constructed over 55 years ago. There were no complaints or objections raised about the FOE monument in those 55 years until the FFRF started the present controversy. Most people walking past the monument paid no attention to it, and some didn't even know that it contained the Ten Commandments. Although Plaintiff Schaub was offended by the monument because she believes the Ten Commandments are solely religious and have no historical value, she testified that when she walked past the monument, she looked at it out of the corner of her eye, didn't really pay attention to it and kept on walking. ***[REDACTED]*** Even then, she testified that the FOE monument did not make her feel like she had to believe in God. Doe 1 never even testified that she was offended by the monument. Thus, the history of the FOE monument in the present case compels the conclusion that it does not violate the Establishment Clause.

In addition, none of the Plaintiffs in the present case have standing in this matter. Schaub's testimony was that she saw the FOE monument, was offended, but then didn't pay attention to it and kept on walking. Schaub has failed to identify the type of personal injury needed to meet the

Article III standing requirements. Further, the FOE monument was donated. There is no evidence that NKASD used any tax revenues to acquire or erect the monument. Nor is there any evidence that NKASD incurs any costs or expenses to maintain the monument. There is no evidence that Schaub has incurred increased taxes as a result of the monument. Therefore, Schaub's status as a taxpayer in the district is irrelevant and does not confer standing.

There is also no evidence that Doe 1 has or will sustain any injury as a result of the FOE monument. As the monument is not located at the main student entrance, but 15 feet away from a walkway leading to a side entrance, students are not forced to confront the FOE monument. Doe 1 testified herself that she had previously walked past the monument's location and paid no attention to it. ***[REDACTED]***. Doe 1 testified, however, that even after looking at pictures of the FOE monument, she did not feel that the monument required her to believe in God. Doe 1 has simply not sustained any injury in the present case.

FFRF is not claiming and has produced no evidence that it has suffered any injury as an organization as a result of the FOE monument. Any standing FFRF has in the present case must be based on that of Schaub, the only person who has been identified as an FFRF member. As Schaub does not have standing, FFRF also does not have standing, and FFRF's attempt to create standing by gifting Schaub a membership fails.

For these reasons, NKASD is entitled to judgment as a matter of law. Therefore, NKASD's Motion for Summary Judgment should be granted and judgment should be entered in favor of NKASD and against Plaintiffs.

Respectfully submitted,

SANCHEZ LEGAL GROUP, LLC

By: /s/ Anthony G. Sanchez, Esquire

PA ID#55945
2403 Sidney Street, Suite 242
River Park Commons
Pittsburgh, PA 15203
(412) 904-3200
asanchez@sanchezlegalgroup.com

Attorneys for Defendant,
New Kensington-Arnold School District