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, DOE 2, by Doe 2's next friend and parent DOE 3, who also sues on Doe 3's own behalf. Plaintiffs, vs. NEW KENSINGTON-ARNOLD SCHOOL DISTRICT, Defendant.	Case 2:12-cv-01319-TFM

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

INTRODUCTION

As New Kensington-Arnold School District students approach the Valley High School doors each morning, they are confronted by a six-foot-tall, granite monument displaying the Ten Commandments. Plaintiff Doe 1 and Doe 1's mother, Marie Schaub, object to the prospect of Doe 1 beginning each day in the shadow of this imposing monolith that proclaims: *I AM the LORD thy God*. After the District declined to remove the Monument from the path of its students, Plaintiff Schaub was forced to withdraw Doe 1 from the District to prevent the daily indoctrination threatened by the Monument. Thankfully, the Supreme Court, unlike the New Kensington-Arnold School District, has been particularly vigilant in monitoring compliance with the Establishment Clause in the public school setting.

The District's purpose for continuing to display this striking religious symbol is colored by the religious viewpoint of its leaders, the local community, and the Monument's original donors, the Fraternal Order of Eagles. The Monument was given to the District in 1957—at a time when daily prayer still occurred in schools—as part of a widespread Eagles initiative designed to provide the nation's youth with the word of God. When Plaintiffs demanded that the Monument be removed, the District moved swiftly to retain the Monument, acting with the full support of the New Kensington-Arnold community. In an attempt to mask the true religious intent of its leaders and the community, the District scripted a purportedly secular purpose for keeping the display.

This case presents the Court with an opportunity to uphold two important Establishment Clause precepts. First, the Court must reject the District's stated purpose for displaying the Monument because it is merely a sham. Second, and more importantly, the Court must send the clear message that a public school district has no right to instruct an audience of impressionable students on which god to have, how many gods to have, or whether to have any gods at all by affirming those prior decisions that have found the display of the Ten Commandments on public school grounds to be unconstitutional.

FACTUAL BACKGROUND[1]

The Monument on display at New Kensington-Arnold School District's Valley High School contains this large text:

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.

[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."

III. Remember the Sabbath day, to keep it holy.
IV. Honor thy father and thy mother, that thy days may be long upon 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 ¶4 . The Monument is rectangular in shape and features contours at its top that mimick a book or a scroll. *See* Pl. App. Ex. E.[2] The granite Monument was designed to represent the kind of stone the first commandment was written on and given to Moses. CSF ¶ 6. Two small tablets inscribed with unreadable script appear at the top of the Monument, with the all-seeing eye just below. CSF ¶ 5. 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 NKASD[3] by the New Kensington Fraternal Order of Eagles, Aerie 533 and accepted by Board vote. CSF ¶¶ 1-3. A dedicatory service and unveiling ceremony for the Monument was held on September 20, 1957. CSF ¶ 8. The ceremony was attended by Eagles representatives, clergy members, school officials, the student body, and the community. CSF ¶¶ 8-13. The ceremony included a short service by Rabbi Herbert Panitch, an invocation by Reverend R. Vincent Hartman, and a benediction by Father Joseph Sullivan. CSF ¶¶ 8-9. The local Eagles representative stated that the Monument was intended to "give something to youth that they can

[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 NKASD was known as the New Kensington School District.

remember through life." CSF ¶ 12. At the dedication of an identical monument in a nearby school district earlier in the year, a national Eagles represented participated in the ceremony and stated,

> 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 ¶¶ 14-15. The dedication of the high school building itself, which occurred in November 1957, included a prayer, a benediction, and an invocation given by Rabbi Panitch. CSF ¶¶ 16-17.

The 6-foot tall, 1 ton granite monument stands in a central location between two parallel concrete footpaths and is centered in front of the main entrance of the gymnasium of Valley High School. CSF ¶¶ 19-20. The footpaths pass over a small creek and extend from the parking lot area to the gymnasium entrance. *Id.* The Monument sits in a grassy area between the concrete footpaths. CSF ¶ 20. The front of the Monument is visible from both concrete footpaths, while the side and rear of the Monument are visible from the surrounding sidewalks. CSF ¶¶ 21-23. Students enter the Valley High School in the morning by using the concrete footpaths to access the school building. CSF ¶ 24. The concrete footpaths are also used as the primary means of entrance when individuals attend athletic events. CSF ¶ 25. The parking lot area adjacent to where the footpaths begin is used for student parking. CSF ¶ 26.

On February 19, 2012, Plaintiff Freedom From Religion Foundation received a complaint regarding the Monument from a non-district student who visited the Valley High School. CSF ¶ 30. In response, on March 20, 2012, an FFRF staff attorney sent a letter to the District requesting that the Monument be removed (FFRF letter). CSF ¶ 31. Upon receiving the FFRF letter, then Superintendent George Batterson read the letter to the NKASD Board of Directors (NKASD

Board) at its regularly scheduled board meeting on March 22, 2012. CSF ¶ 32. The NKASD Board unanimously informed Batterson that it wanted to keep the Monument. CSF ¶¶ 33-35. All of the administrators that then Board President Robert Pallone had spoken with at the time sided with keeping the Monument. CSF ¶ 36.

The next day, the local media began running stories regarding the FFRF letter and the NKASD's decision to not move the Ten Commandments Monument. CSF ¶¶ 37-41. Batterson made a statement to the media that day and indicated that the District was "not happy" about the request that the Monument be removed. CSF ¶ 39. The same day, in response to an email that he received, Batterson stated, "If we pray about [this issue] God will help our children to win out over the atheist organization that wants to impose their will on us." CSF ¶ 40.

In subsequent statements to various media outlets, including a Christian radio program, Batterson "stuck to the script . . . about how this is a historic monument" and stated that the District wanted to keep the Monument for historical and not religious reasons." CSF ¶¶ 41-42, 66. Yet, while making public remarks regarding the historical value of the Monument, Batterson frequently expressed strongly religious views in his private emails. CSF ¶¶ 57-62, 65. For example, in one such email, Batterson stated,

> I was wondering why God had me go [to New Kensington-Arnold]. Now my career is ending in three months but I am doing a good job defending the Ten Commandments. I have influenced my board and community to stand up to the atheists. May God had this plan for me here. I know he is helping me. I have had thousands of emails and letters of support from all over the country. It has been quite an awesome experience and I know I am doing God's work.

CSF ¶ 59. Batterson himself testified that he said a prayer every time he walked by the Monument. CSF ¶ 27. Batterson also scheduled a "clergy luncheon" at the Valley High School with local religious leaders on May 2, 2012 and included on the agenda a topic referred to as "historical monument (Ten Commandments). CSF ¶¶ 68-70.

Board President Robert Pallone made similar comments regarding the support of the community. Robert Pallone posted the following on a Facebook group page called "KEEP THE TEN COMMANDMENTS AT VALLEY HIGH SCHOOL":

> To the community of the NKASD - I am writing this to all of you that are concerned about the Ten Commandments Monument at the high school.
>
> Clearly, we are under attack from an outside group from the state of Wisconsin - Our community, the administration, the board and our staff are outraged by the request to remove a monument that has been part of our district and community for decades. We WILL NOT remove this monument without a fight !!!!! We will litigate this issue at the highest level (US Supreme Court) if necessary. All of us in the district appreciate the overwhelming support from the community and as the current President of the board I want to assure all of you that we won't remove this monument without a battle. We are one of the most diverse school populations and communities in the Commonwealth, and we are extremely sensitive and accepting to everyone in the community. The claims of this organization are ridiculous and a complete travesty when you consider all the facts surrounding this situation.
>
> This entire situation is ludicrous and a frivolous lawsuit and request by a radical group. Let's all attempt to remain professional and mannerly as we show our support on both sides of this emotionally charged issue. Please do not allow your emotions to denigrate your support by lowering our arguments to obscenities and radical responses. Please be assured that we will fight this and litigate this in a professional manner and continue to challenge until we get a decision that is acceptable to all of us!!! We will use our current legal team and the support of outside legal scholars and organizations that have contacted the district and offered free services…
>
> Sincerely,
> Robert M. Pallone

CSF ¶ 45. Robert Pallone echoed this same sentiment in an April 10, 2012 email. CSF ¶ 67. Also, Robert Pallone and two other NKASD Board members participated on the Facebook group page by liking comments expressing anger towards the requests of FFRF that the Monument be removed. CSF ¶¶ 46-49. Both Robert Pallone and John Pallone have lived in the New

Kensington-Arnold community for most of their lives, and neither ever knew what the Monument was until the FFRF letter was received by the District. CSF ¶ 27.

Around the same time, an online petition was created on change.org, which sent the electronically signed petitions to the email address petition@nkasd.com. CSF ¶¶ 50, 56. The @nkasd portion of the email address is an official NKASD email suffix, and official NKASD email addresses can only be created by the District Technology Director. CSF ¶¶ 51-52. The petition aligned with the District's "script." CSF ¶¶ 53-54. The District received 469 signed online petitions over a period of less than one week, some including comments in addition to signatures. CSF ¶¶ 55-56.

During the March and April 2012 time period, the community responded supportively to the District's position on retaining the Monument. CSF ¶¶ 71-80. Batterson received more than 1,500 calls and emails supporting the District decision. CSF ¶ 64. Local religious leaders commented on the importance of the Ten Commandments in the local community. CSF ¶¶ 72-73. A gathering occurred at the Monument on March 29, 2012 and the religious leaders in the community, parents and Christains "prayed on [the] front lawn by the Ten Commandments." CSF ¶¶ 78-80.

The individual Plaintiffs—Schaub and Doe 1—along with FFRF, of which Plaintiff Schaub was a member, sent a second letter to NKASD on August 29, 2012 requesting that the Monument be removed and threatening litigation on behalf of the Plaintiffs if the District refused their request. CSF ¶¶ 106, 108. Plaintiff Schaub, who lives within the District, and Plaintiff Doe 1, Plaintiff Schaub's child, had encountered the Monument on prior occasions. CSF ¶¶ 81-82, 98-105. The individual Plaintiffs do not believe in God and find the Monument objectionable. CSF ¶¶ 83, 87. Both of the individual Plaintiffs perceive the display of the Monument as

suggesting that NKASD wants them to believe in the message conveyed by it. CSF ¶¶ 84, 88. This pressure makes Plaintiff Schaub feel like an outsider within the community. CSF ¶ 85.

Plaintiff Doe 1 was a student in the NKASD until the current school year. CSF ¶ 89 Though Plaintiff Doe 1 was to attend Valley High School for the current school year, Plaintiff Schaub made the decision to withdraw Doe 1 from the NKASD because she does not want Doe 1 to be influenced by the Monument. CSF ¶ 90, 93-94. As a result, Doe 1 attends school in a different district with new classmates. CSF ¶ 92. Busing of Doe 1 from Plaintiff Schaub's house to the new school district is unavailable. *Id.* Because of these burdens and because the Valley High School would be the most convenient school for Doe 1 to attend, Plaintiff Schaub would allow Doe 1 to attned Valley High School if the Ten Commandments Monument is removed. CSF ¶ 95. Nonetheless, Plaintiff Schaub remains concerned that Plaintiff Doe 1 will encounter the Monument. CSF ¶ 96.

In response to Plaintiffs' Letter, the District chose not to remove the Monument and to defend the eventual Complaint that was filed without any public discussion or public vote on the subject. CSF ¶¶ 110-111. Robert Pallone commented publicly that, "My personal position is to fight them all the way, but that will need to be a board decision." CSF ¶ 112. The community expressed support for the District's formal opposition to Plaintiffs' lawsuit and expressed hostility towards Plaintiffs. CSF ¶¶ 117-126. For example, commenters on the KEEP THE TEN COMMANDMENTS AT VALLEY HIGH SCHOOL Facebook group page have discussed attempting to locate and harass Plaintiffs and to "send [FFRF] back to Wisconsin with several black eyes." CSF ¶118-119.

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

The fundamental purpose of the Establishment Clause has been expreassed as follows:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activites of religious ibnstitutions; (b) employ the organs of government for essentially

> religious purposes; or (c) *use essentially religious means to serve governmental ends, where secular means would suffice*. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.

Lemon v. Kurtzman, 403 U.S. 602, 643 (1971) (Brennan, J. concurring) (emphasis added).

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.* (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)).

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*, 403 U.S. at 613). 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*, 482 U.S. at 584. 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 703 (Breyer, J., concurring).

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 Cranston 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.

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 or by altered conduct to avoid the 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. The court found that the Freethought organization had associational standing because the plaintiff was a member. *Id.* at 255 n.3 (citing *Sierra Club v. Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)."

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).

Alternatively, the altered conduct of a plaintiff to avoid a challenged display suffices to establish the type of injury-in-fact necessary to confer standing. *See Buono v. Norton,* 371 F.3d 543, 547 (9th Cir. 2004) (holding that plaintiffs avoidance of federal preserve containing Latin cross provided standing and observing "[w]e have repeatedly held that inability to unreservedly

use public land suffices as injury-in-fact."); *Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412, 1417 (7th Cir. 1993) (finding an injury-in-fact where plaintiffs use and enjoyment of the park had been curtailed because of display of crucifix); *ACLU of Georgia v. Rabun Cnty. Chamber of Commerce, Inc.,* 698 F.2d 1098, 1108 (11th Cir. 1983) (holding that plaintiffs' testimony on their unwillingness to camp in a park because of a cross conferred standing); *ACLU of New Jersey v. City of Long Branch*, 670 F. Supp. 1293, 1294 (D.N.J. 1987) (recognizing standing where plaintiff made aesthetic objections and allegations were made that access to park and/or particular parts of the park were being impeded).

Similarly, the Supreme Court acknowledged in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc*., that standing exists where schoolchildren "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. 464, 487 n.22 (1982) (comparing *Sch Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) with *Doremus v. Bd. of Ed. of Borough of Hawthorne,* 342 U.S. 429 (1952)). In *Schempp,* the Supreme Court found standing because "[t]he parties [were] school children and their parents, who [were] directly affected by the laws and practices against which their complaints are directed," stating, "These interests surely suffice to give the parties standing to complain." 374 U.S. at 224 n.9. The court in *Suhre* explained the harshness of this injury:

> Compelling plaintiffs to avoid public schools or buildings is to impose on them a burden that no citizen should have to shoulder. A public school or county courthouse exists to serve *all* citizens of a community, whatever their faith may be. Rules of standing that require plaintiffs to avoid public places would make religious minorities into outcasts. Forcing an Establishment Clause plaintiff to avoid the display of which he complains in order to gain standing to challenge it only imposes an extra penalty on individuals already alleged to be suffering a violation of their constitutional rights.

Suhre, 131 F.3d at 1088.

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 the facts surrounding the District's initial acceptance and erection of the Monument, the religious motivations of the District's actors who were involved in the decision to retain the Monument, and the community's religious response to Plaintiffs' complaints provide further support for the conclusion that the display is unconstitutional.

A. Plaintiffs have standing by virtue of their altered conduct and direct unwelcome contact with the Monument.

The individual Plaintiffs' direct unwelcome contact with the Monument confers standing without anything more. Plaintiff Doe 1 and Plaintiff Schaub both encountered the Monument when using the footpaths during a karate event, and Plaintiff Doe 1 also came into contact with the Monument by way of the nearby footpaths when she used the swimming pool at the Valley High School with her daycare program. Familiar with the fact that the Monument portrays the Ten Commandments, both individuals Plaintiffs have had experiences where they have seen the Monument from areas of the Valley High School other than footpaths. Plaintiff Schaub saw the Monument on one or two occasions when she dropped her sister off at the school for necessary business, and Plaintiff Doe 1 sees it when traveling to a friend's house. 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.

Even if Plaitniffs' direct, unwelcome contact with the Monument falls short of constituting a sufficient injury to confer standing, both individual Plaintiffs have standing to bring their claims based upon their altered conduct. The Plaintiffs object to the religious message of the Monument in that they do not believe in God and they feel that the Ten Commandments *command* that students and visitors worship *thy God*. Due to this message, Plaintiff Schaub feels like an outsider in the community. To avoid having Doe 1 feel this ostracization and to ensure that Plaintiff Schaub retains the exclusive right to raise her daughter as she feels is proper, Plaintiff Schaub was forced to take the significant step of withdrawing Plaintiff Doe 1 from the NKASD.

The withdrawal of Doe 1 from NKASD imposes a significant burden on Plaintiff Schaub and Plaintiff Doe 1. Doe 1 is unable to attend a school in Doe 1's community and with classmates that Doe 1 had known for years. Doe 1 now cannot ride a bus to school from Plaintiff Schaub's residence, forcing Plaintiff Schaub to make other arrangements. If the Monument was not placed in front of the school, Plaintiff Schaub would allow Doe 1 to attend Valley High School, and these burdens would be avoided. As the Court in *Suhre* observed, "[c]ompelling plaintiffs to avoid public schools or buildings is to impose on them a burden that no citizen should have to shoulder[—a] public school or county courthouse exists to serve *all* citizens of a community, whatever their faith may be." *Suhre*, 131 F.3d at 1088. Unless the Monument is removed, Plaintiffs will continue to endure this burden that cuts so sharply against the

fundamental idea of public education. This injury-in-fact supports a finding that Plaintiffs have standing.

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

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 Valley High School is clearly recognizable as a display of the Ten Commandments. The countours at thet top of the 6-foot stone Monument mimick 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 front of the main gymnasium entrance, where it stands alone centered between the two concrete paths that lead from the parking lot to that entrance. Based upon the current configuration of the school, students park near the Monument, and more importantly, students walk by the Monument each day in order to enter the school. Additionally, NKASD students and parents, as well as out-of-town students and parents, walk directly past the Monument to enter the gymnasium for sporting events. The Monument stands alone, unaccompanied by any other displays, as these individuals pass it.

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 high school students in the NKASD to attend Valley High School—and the location of the Monument—directly in the middle of everyday student traffic—ensures that NKASD students will necessarily be placed in the vicinity of the Monument nearly 200 days each year. 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 NKASD'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 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 seen the Monument as an extension of that direct sponsorship 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, with students, school officials, and community members present. The local Eagles representative stated that the Monument was intended to "give something to youth that they can remember through life." The dedication of an identical monument at a nearby school, donated as part of the same Eagles program, featured a national Eagles representative who stated:

> 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.

A reasonable observer aware of the history surrounding this Eagles initiative and the District's celebration of the unveiling of the Monument would view the Monument as endorsing religion—just like the individuals speaking on behalf of the organization who donated the Monument.

The perception of the Monument as a religious symbol by both the New Kensington-Arnold community and the District decisionmakers reflects the endurance of the religious effect of the Monument over the past five decades. The District received over 1,500 calls and emails supporting the District's decision to keep the Monument in the weeks that followed the announcement of that decision. A petition set up to forward signatures to a district-created email address garnered 469 signatures in less than a week, and many of those signing the petition felt obligated to state their religious reasons for doing so.

Religious leaders within the community spoke of the importance that the Commandments

has to the small local community. Those same leaders organized a formal gathering at the site of the Monument where those clergymen prayed with "parents and Christians," in the words of Batterson. Batterson himself, the District's own former superintendent, said a prayer every time he walked by the Monument and described himself as "doing God's work" in standing up to "the atheists."

After FFRF sent its initial letter, many community members expressed hostility towards FFRF. Once the community became aware that individual plaintiffs had become involved, the focus of community hostitlity shifted from FFRF to the Plaintiffs. By the time that the lawsuit was filed, this hostile message ranged from suggestions that the Plaintiffs do not belong in the New Kensington-Arnold community to outright threats against the Plaintiffs.

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 New Kensington-Arnold "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 because it suggests that nonadherents to the Ten Commandments' religious message are outsiders at Valley High School and within the New Kensington-Arnold community. 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). The community's response in this case sends this message to Plaintiffs and everyone else who does not subscribe to the Monument's tenets.

Taken together, the history and context of the Monument—like its content and location—reveal that the Monument cannot survive scrutiny under the effect prong of *Lemon* and the Endorsement test. The original effect of the Monument is clear from the circumstances surrounding its 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 provides clear evidence that the religious effect of the Monument is as strong as it has ever been. Coupled with the conduct of the NKASD 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.

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

The recitation of a supposed secular purpose underlying a challenged display is not sufficient to avoid an Establishment Clause violation where the manifest purpose of the display is a religious one. *Stone*, 449 U.S. at 41 (holding "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faths, and no legislative recitation of a supposed secular purpose can blind us to that fact"); *see also Edwards*, 482 U.S. at 587-89 (invalidating law requiring instruction in the theory of creation science and noting that a law must *manifest* a secular purpose invalidating). Here, the unscripted comments of the NKASD decisionmakers

contained in the emails and Facebook posts obtained in discovery bely the District's scripted "historical" reasons for retaining the Monument.

When speaking with various media outlets, Batterson frequently cited the District's interest in preserving the Monument for "historical" reasons. Yet, in his private comments to supporters of the District's opposition, Batterson highlighted a decidedly religious purpose in doing so. Batterson stated:

- "If we pray about [the Ten Commandments issue] God will help our children to win out over the atheist organization that wants to impose their will on us." CSF ¶ 40.
- "It has been a lot of fun for me[, and] I know we are doing the right thing in God's eyes." CSF ¶ 57.
- "The atheist group from Wisconsin are suing us but I think God prevails in issues like this in the end. I am happy I am in a position to do what is right for all of the Christians and my students." CSF ¶ 58.
- "I have influenced my board and community to stand up to the atheists. May God had this plan for me here. I know he is helping me . . . It has been quite an awesome experience and I know I am doing God's work." CSF ¶ 59.
- "We are going to not cave in. I am determined to keep the Ten Commandments on our high school lawn. We are doing the right thing for our children, community and graduates." CSF ¶ 60.
- "We have the support of our entire student body, community and many Christians like you from all over the country. We are doing the right thing and will prevail over a small group of atheists." CSF ¶ 61.
- "I have the total support of the students in my school, community and board of school directors. It has been quite awesome for me. I know God is helping me do what is right. No ever stands up to the atheists on things like this but we are doing it!" CSF ¶ 62.

In light of this contradiction in positions, Batterson's admission that he "stuck to the script . . . about how [the Monument] is a historical monument" when speaking to the media is unsurprising. Were it not for this script, Batterson would have likely spoken his true mind.

Similarly, Pallone's lengthy diatribe, addressed only to a group that supported keeping the Monument, suggests a religious motivation for keeping the Monument. Pallone said, "We WILL NOT remove this monument without a fight !!!!!" CSF ¶ 45. He described the claims of FFRF as "ridiculous," a "complete travesty," "ludicrous," and "frivolous," before referring to

FFRF as a "radical group." *Id.* Weeks later, Pallone made similar comments in an email to a supporter of the District's position. CSF ¶ 67. In both situations, Pallone suggested that he was motivated by the "heart-warming" and "overwhelming" support that the District had received. *Id.* Other individual board members also participated on the Facebook group page, where their activity suggested a religious motivation for opposing the removal of the Monument.

In their comments, Batterson and Pallone suggested that they were speaking on behalf of the entire District, the student body, the board, or the community. As was the case in *Green*, a reasonable observer aware of these circumstances would attribute the religious sentiments of these two individuals to the District. Having done so, the reasonable observer would be faced with the impossible task of squaring these unguarded comments with the scripted comments that appeared in the media stories on the situation. In resolving this resolution, the lack of record evidence elaborating on the purported historic value of the Monument is revealing. Moreover, both Robert Pallone and John Pallone—lifelong members of the New Kensington-Arnold community—claimed to not even know what was on the Monument until the District received the FFRF letter. These facts and circumstances belie their claims regarding the Monument's purported historic value.

Underscoring the religious purpose of the District in retaining the Monument is the original purpose that the Eagles had for donating the Monument. Beyond the fact that the content of the Monument itself suggests a religious purpose, the purpose of Eagles' broad initiative to distribute Ten Commandments monuments bespeaks a religious purpose in the school context, where students are especially susceptible to the coercive pressures of a religious message. The Eagles specifically had the aim of affecting students' behavior. Even if such an aim can be considered secular, government use of religious means to accomplish secular goals is

unconstitutional.

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 District's retention of the Monument, it is clear that the New Kensington-Arnold community and its school district favor Christianity. This favoritism motivated not only the District's decision to accept the Monument and place it in the path of students in 1957, but also its decision to retain the Monument in the face of this litigation. 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 the community. This conclusion renders the display of the Monument unconstitutional under the purpose prong of *Lemon.*

D. 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, it accepted undertaking the aims of the Eagles—whether secular or religious—through the use of a religious code premised upon the existence of God. Likewise, in light of the passionate religious views of the outspoken decisionmakers of the District, the decision to retain the Monument utilizes the state to advance the religious agenda of a few individuals. Entangling the state in such a manner is precisely the

type of concern that the third prong of *Lemon* is designed to protect, and under its analysis, the Board's actions constituted improper government sanction of a religious agenda and excessively entangled the District and the Christian religious view of its leaders and the Monument itself.

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 decisionmakers of the District and a majority of the members of the New Kensington-Arnold community. The District's conduct in serving these personal religious agendas 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,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 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.

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