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

RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO STRIKE

Plaintiffs Freedom From Religion Foundation, Inc. ("FFRF"), Marie Schaub, Doe 1, Doe 2, and Doe 3 by and through their attorneys, Marcus B. Schneider, Esquire and STEELE SCHNEIDER, file the following Response Brief in Opposition to Defendant's Motion to Dismiss and Motion to Strike.

INTRODUCTION

Defendant in this case is a Pennsylvania school district that prominently displays a large, stone Ten Commandments monument on the grounds of one of its schools. Plaintiffs Doe 1 and Doe 2 are students of the Defendant school district who come into contact with the Ten Commandments monument. Plaintiffs Marie Schaub and Doe 3 are the parents of Plaintiffs Doe 1 and Doe 2. Plaintiff Schaub is a member of Plaintiff Freedom From Religion Foundation, which is a non-profit educational charity that works to defend the constitutional principle of separation between state and church.

Plaintiffs are seeking a declaration that the Defendant's prominently placed Ten Commandments monument is unconstitutional under the Establishment Clause of the First Amendment. Defendant moved to dismiss Plaintiffs' complaint for failure to state a claim. In conjunction with its Motion to Dismiss, Defendant has filed a Motion to Strike certain paragraphs of the Plaintiffs' Complaint that are essential to Plaintiffs' claims.

The Court should deny Defendant's Motion to Dismiss for four reasons. First, Defendant's argument that Plaintiffs' case is foreclosed by prior Establishment Clause jurisprudence is inappropriate in the context of a motion to dismiss, ignores a rich history of cases involving religious display cases in public schools, and is based upon a clear mischaracterization of Establishment Clause jurisprudence. Second, the Complaint presents a plausible claim for relief under the endorsement test and the primary effect prong of the *Lemon* test because the prominent display and maintenance of the monument, in conjunction with District comments and community reaction, demonstrates that a reasonable person may feel that the District is endorsing religion. Third, the Complaint presents a plausible claim for relief under the religious purpose prong of the *Lemon* test because Defendant continues to display the clearly religious monument because of the religious beliefs of representatives of the District and the community. Fourth, the Complaint presents a plausible claim for relief under the coercion test because the placement and maintenance of the Ten Commandments monument is designed to influence impressionable young students to meditate upon the text of the monument. The relevance of the averments that Defendant is seeking to strike is apparent after a review of Plaintiffs' Response.

At a high level, this case addresses a large, stone Ten Commandments monument displayed prominently on public school grounds in the unavoidable path of impressionable students, not a Ten Commandments monument located on large, open public grounds, among a number of other monuments, where passersby may avoid the display. The courts of the United States have, over many years, drawn a clear distinction between the treatment of religious display cases in the public school setting and those cases involving religious display on other public grounds. Ruling in favor of Defendant in this case will lead to the erosion of this distinction and will deprive young students of the heightened vigilance that they deserve in religious display cases.

BACKGROUND

I. Factual Background

Defendant New Kensington-Arnold School District (hereinafter "Defendant" or the "District") is a municipal corporate body that maintains control of public schools within the limits of the cities of New Kensington and Arnold. Complaint (Document No. 1) at ¶ 14.[1] For decades, the Defendant has displayed an approximately six foot tall, stone Ten Commandments monument (hereinafter "the Ten Commandments monument") directly in front of the main entrance to the Valley High School (hereinafter the "school"), one of the District schools. Compl. at ¶¶ 1, 16. In addition to being located in front of the main entrance to the school, the Ten Commandments Monument is located near two footbridges/walkways used by students and visitors to access the main entrance to the school. Compl. at ¶ 16. District staff maintains the area around and adjacent to the Ten

[1] Plaintiffs shall reference the Complaint as "Compl. at ¶ ___."

Commandments monument by, among other things, burning and cutting the brush that surrounds the monument. Compl. at ¶ 19.

Plaintiff Freedom From Religion Foundation, Inc. (hereinafter "FFRF") requested that the District remove the Ten Commandments monument, but the District declined to do so. Compl. at ¶¶ 20, 24. In between the request from Plaintiff FFRF and the filing of the Complaint in this case, District Board of School Directors Board President wrote the following on the facebook page entitled "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

Compl. at ¶ 21. During the same time period, the then superintendent of the District received over 1,000 emails and calls in support of maintaining the monument, and local clergy held a rally in front of the school -- during the school day -- in order to support the continued display of the monument. Comp. at ¶ 22, 23.

Plaintiffs Schaub and Doe 3 are the parents of District students, Plaintiffs Doe 1 and Doe 2, who have come into contact with the Ten Commandments monument. Compl. at ¶¶ 26-29. Plaintiff FFRF is a national non-profit 501(c)(3) educational charity and membership organization, of which Plaintiff Schaub is a member. Compl. at ¶¶ 6-7, 9. Doe 1 attends Valley Middle School and has been exposed to the Ten Commandments monument during visits to Valley High School. Compl. at ¶ 27-30. Doe 2 attends Valley High School and regularly views the six-foot Ten Commandments monument as Doe 2 enters school each day. Compl. at ¶ 26.

Photos of the monument that were referenced in and filed with the complaint depict its text and its placement in front of the school. (Compl. ¶ 16; Exhibits 1 and 2). The monument says:

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

Compl. at ¶ 17, Compl. Exhibit 2.

Plaintiff Schaub identifies as agonistic and views the Ten Commandments monument as "commanding" that students and visitors worship "thy God." Compl. at ¶ 33. Plaintiff Schaub views the monument as excluding her and Doe 1. Compl. at ¶ 33. Doe 2 and Doe 3 identify as non-religious and do not subscribe to the religious statements that are inscribed on the Ten Commandments monument. Compl. at ¶ 37. The Plaintiffs object to and are offended by the Defendant's practice of displaying the Ten Commandments monument. Compl. at ¶ 38. The Plaintiffs perceive the monument as an endorsement by the District of the religious principles set forth on the monument. Compl. at ¶ 39. The prominent display of the monument signals to the plaintiffs that the Defendant favors certain religious views. Compl. at ¶ 41. The monument places coercive pressure on Doe 1 and Doe 2 to adopt the Defendant's favored religious views. Compl. at ¶42.

II. Procedural Background

Plaintiffs filed their Complaint against Defendant on September 14, 2012. The Complaint asserts that the District's prominently placed Ten Commandments monument violates the Establishment Clause of the First Amendment. The Plaintiffs are seeking declaratory relief, injunctive relief, and nominal damages under 42 U.S.C. § 1983.

On November 16, 2012, Defendant filed a Motion to Dismiss the case. As a secondary issue, Defendant has also filed Motion to Strike, which seeks to strike, as "immaterial, impertinent and scandalous," certain facts from the Complaint.

STANDARD OF REVIEW

When reviewing a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), the Court must "accept the truth of all factual allegations and must draw all reasonable inferences in favor of the non-movant." *Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir. 2008). Fed. R. Civ. P. 8(a)(2) requires only that the pleader "state a short and plain statement showing that the pleader is entitled to relief" so as to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 500 U.S. 544, 555 (2007)).

In deciding a motion to dismiss for failure to state a claim, "[f]irst, the factual and legal elements of a claim should be separated. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). "A complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. The Supreme Court's formulation of the pleading standard in Twombly does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Mell v. GNC Corp.*, CIV.A. 10-945, 2010 WL 4668966 at *4 (W.D. Pa. Nov. 9, 2010) (citing *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009)). "So long as the complaint sets forth a 'plausible' claim to relief, [a] defendant's motion to dismiss must fail." *Kolar v. Preferred Real Estate Investments, Inc.*, 361 F. App'x 354, 359 n.5 (3d Cir. 2010) (citation omitted).

ARGUMENT

Although Defendant has cast its request for dismissal as a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), in its Brief In Support (hereinafter "Brief" or "Defendant's Brief"), Defendant seeks to place the proverbial cart before the horse by arguing the final merits of Plaintiffs' claim. Defendant asserts that *Van Orden v. Perry*, 545 U.S. 677 (2005) and "Establishment Clause jurisprudence" have "foreclosed" this case. In these "foreclosure" arguments, rather than challenge the sufficiency of Plaintiffs' Complaint, the Defendant endeavors to guide the Court through a final analysis of the merits of Plaintiffs' claims.

Under Rule 12(b)(6), a defendant may challenge either the legal or factual sufficiency of a complaint. Here, Defendant has not asserted that 42 U.S.C. § 1983 fails to provide Plaintiffs with a cause of action entitling them to the requested relief. Therefore, Defendant's Brief and Motion to Dismiss must be interpreted as challenging the factual sufficiency of Plaintiffs' Complaint. In this regard, the first approximately seven pages of the Argument section of Defendant's Brief (the "foreclosure" arguments referenced above), which focus on whether the Plaintiffs should prevail on the final merits of the case, can essentially be disregarded as setting forth improper arguments.

Nonetheless, because Defendant mischaracterizes much of the Establishment Clause jurisprudence examined in that portion of its Brief, Plaintiffs first address these matters in this Response. Next, Plaintiffs address the factual sufficiency challenges made by Defendant under the various tests used by the courts to examine Establishment Clause claims. Finally, Plaintiffs respond to the Motion to Strike portion of Defendant's Motion.

I. *Van Orden* and Establishment Clause Jurisprudence Fortify That Defendant's Motion Must Be Denied.

Courts have drawn a clear distinction between religious display cases involving public schools and those involving other government property. *See Stone v. Graham*, 449 U.S. 39 (1980) (finding a Kentucky statute requiring the placement of the Ten Commandments in public school classrooms to be unconstitutional, noting the impressionability of schoolchildren); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (stating that "we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"); *Van Orden*, 545 U.S. at 691 (holding that the Court has "'been particularly vigilant in monitoring compliance with the Establishment Clause in [schools]'") (citing *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (emphasizing that students in attendance at schools are impressionable and that their attendance is involuntary)); *Harlan County v. ACLU of Ky.,* 545 U.S. 1152 (2005), *cert. denied*, 545 U.S. 1152;[2] *Alqhuist v. City of Cranston ex rel. Strom*, 840 F.Supp.2d 507 (D.R.I. 2012) (finding a long-standing prayer banner located in a public school to be unconstitutional, noting the "clear line between government conduct which might be acceptable in some settings and the conduct which is prohibited in public schools"). Defendant's review of *Van Orden* and other Establishment Clause cases downplays and attempts to marginalize the significance of this distinction.

The Supreme Court has also observed that "[i]n each [Establishment Clause] case . . . no *per se* rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678-679 (1984). "[T]he Establishment Clause . . . is not a precise, detailed provision in a legal code capable of

[2] While the Supreme Court also granted certiorari in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), it declined the petition in this companion case involving display in a public school.

ready application." *Lynch*, 465 U.S. at 678. The Court in *Lynch* went on to state, "The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The clause directs a 'blurred, indistinct, and variable barrier *depending on all the circumstances* of a particular relationship." *Id.* at 678-679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (emphasis added). Despite this, in its Brief, Defendant seeks to derive bright line rules from Establishment Clause jurisprudence to support its "foreclosure" argument. It is no surprise that the Defendant finds it hard to succeed and refers to Establishment Clause cases as "appear[ing] inconsistent." Defendant's Brief, p. 14.[3] These purported inconsistencies are nothing more than the case-by-case decisions that one should expect to find in Establishment Clause cases given the Court's statement in *Lynch* and other cases.

Against the well-established principle that Establishment Claus cases are not suited for *per se* rules, Defendant conjures the following bright line rule from *Van Orden*: "[A] longstanding display of an Eagles' Ten Commandment monument on government property does not violate the Establishment Clause of the First Amendment." Def. Brief, p. 11. This purported rule stated by Defendant is incorrect for primarily two reasons. First, Defendant makes no exception for displays on school grounds despite the well-established distinction between school cases and other government cases. Second, Defendant relies upon a misreading and/or mischaracterization of *Van Orden* which overlooks and/or downplays the importance of the role that the specific, unique facts of the display in that case had in the ultimate decision, especially as compared with the decision in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), which was issued on the same day.

[3] Plaintiff's shall reference Defendant's Brief as "Def. Brief, p(p). __."

The Supreme Court has long recognized a heightened vigilance in the judicial review of religious displays on public school grounds where impressionable children are in attendance. *See supra*, p. 9. Furthermore, no court has ruled that a Ten Commandments monument on the grounds of a public school is constitutionally permissible. The plurality opinion in *Van Orden* even specifically distinguished the display in *Stone v. Graham* from the Texas Capitol display in *Van Orden* precisely because *Stone* involved public schools. *Van Orden*, 545 U.S. at 690-691.

In *Stone*, the Supreme Court ruled that, even when the state of Kentucky avowed a secular purpose, the state government had an impermissible religious purpose in placing the Ten Commandments on school walls. The Court said:

> If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."

Stone, 449 U.S. at 42.

Although Defendant asserts that *Stone* is no longer good law, the mere fact that the Court in *Van Orden* took the care to specifically distinguish that case from *Stone* reveals that this is not the case. Defendant also asserts that *Stone* is factually distinguishable from this case because

> [in *Stone*,] the newly required postings essentially encouraged schoolchildren to meditate upon the Ten Commandments during the school day . . . Those concerns are absent here, where the Eagles' Ten Commandments monument is displayed outside the School District and does not lend itself to meditation."

Def. Brief, p. 12. It is insignificant that the display here is outside, rather than inside. To read and "meditate upon, perhaps to venerate and obey" the Commandments

means to read them, think deeply about them, find them to be important, and to follow them. The Valley High School Ten Commandments monument is prominently located and maintained in front of the school such that students entering the building will see it. Rather than confront students in the classroom as was the case in *Stone,* the Ten Commandments in this case confront students when they enter school. The Plaintiffs have asserted that they view the monument and that it places pressure on Doe 1 and Doe 2 to adopt or "obey" the Defendant's favored religious views. Compl. at ¶ 42. Despite these facts, Defendant has argued that the present case is more like *Van Orden* than *Stone*. As will be discussed further in Section II.B.3. below, the display in this case, like the display in *Stone,* is indicative of a religious purpose.

The plurality in *Van Orden* noted 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." *Id.* (citations omitted). The opinion notes, "Indeed, *Edwards v. Aguillard* recognized that *Stone*-along with *Schempp* and *Engel*-was a consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.'" *Id.* (citing *Edwards*, 482 U.S. at 584-585). Additionally, the placement of the Ten Commandments monument on the Texas Capitol grounds was "far more passive" than the display in *Stone*, "where the text confronted elementary students every day," as is the case here where students confront a large, well-maintained stone monument upon entering the main entrance of their school each day. *Id.* These statements clearly support the fact that there are "limits to the government's display of religious messages or symbols." *Van Orden*, 545 U.S. at 678.

Justice Breyer's concurring opinion also highlights the distinction between public school grounds and other government property. At the outset, Justice Breyer focused on the particular context of the Texas Capitol monument and called *Van Orden* "a borderline case." *Id.* at 700. Justice Breyer distinguished the Texas Capitol display from the public school context: "This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is 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. (citing *Lee v. Weisman,* 505 U.S. 577, 592; *Stone,* 449 U.S. at 39). In its Brief, the Defendant purports to explain away this statement by Justice Breyer by conjuring up hidden meaning. Def. Brief, p. 12. According to the Defendant's memorandum, "For it was not merely the school setting that Justice Breyer was arguably recognizing as distinguishable, but the manipulative, coercive, and restraining conduct by the State evidenced in *Lee." Id.* There is no support for this bald assertion. Justice Breyer's statement specifically distinguished *Van Orden* from a display "on the grounds of a public school" with no mention of further conduct by the government.

Beyond the fact that this case involves a public school setting, a cursory review of *Van Orden* and other Establishment Clause jurisprudence supports a rejection of the idea that *Van Orden* has "foreclosed" this case or any other case involving a so-called "Eagles' Ten Commandment monument." Def. Brief, p. 11. In *Van Orden*, as in all Establishment Clause cases, the Court recognized the contextual, case-by-case analysis that needed to be undertaken. *Id.*; *see also McCreary*, 545 U.S. at 867 (2005) (stating that "under the Establishment Clause detail is key") (citing *County of Allegheny v. ACLU, Greater*

Pittsburgh Chapter, 492 U.S. 573, 595 (1989) (holding that the relevant inquiry, "of necessity, turns upon the context in which the contested object appears")). In *Van Orden*, Justice Breyer, who was the deciding vote, emphasized in his concurring opinion how important the context of the Ten Commandments display was to his decision. *Van Orden*, 545 U.S. at 702. Justice Breyer emphasized the fact that "[t]he monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." *Id*. The presence of the Ten Commandments display among so many other monuments and historical markers in *Van Orden* make the facts of that case very unique.

Defendant's position that *Van Orden* stands for the general rule that "a longstanding display of an Eagles' Ten Commandments monument on government property does not violate the Establishment Clause," wholly ignores the unique facts of *Van Orden* and the necessity of a fresh factual review in each new case. Even the later cases cited by Defendant in support of their broad interpretation of the holding in *Van Orden* recognize (1) the need to review the facts and context surrounding a religious display on a case-by-case basis and (2) the importance of the integration of the Ten Commandments monument in *Van Orden* with other monuments. *See Card v. City of Everett*, 520 F.3d 1009, 1019-1021 (9th Cir. 2008) (reviewing the specific facts of that case despite "applying" *Van Orden* and emphasizing the similarity between that case and *Van Orden* given the presence of the Ten Commandments among other monuments). Clearly, *Van Orden* should not be read as creating the *per se* rule suggested by Defendant (or any other *per se* rule).

The facts of this case make it distinguishable from *Van Orden* on multiple levels. However, even if this case did not involve a public school setting, it could still proceed beyond the pleading stage based upon the fact that each Establishment Clause case must be considered on its own facts and surrounding context. When those facts and circumstances are considered here, it becomes clear that the case is further distinguishable from *Van Orden* because the Valley High School Ten Commandments monument stands alone, is not integrated into a larger display of other monuments, and is prominently located on a path that the students cannot avoid. By arguing for the immediate, complete application of *Van Orden* to this case, Defendant is advocating for a reading that would extend the holding of that case far beyond its above-discussed well-defined limits.

II. The Plaintiffs Have Asserted a Plausible Claim Under the Establishment Clause Tests.

Defendant has claimed that the well-pleaded facts in the complaint are insufficient to support Plaintiffs' Establishment Clause claim under *any* of the judicial Establishment Clause tests. As discussed below, Plaintiffs need only assert a *plausible* claim under the endorsement test or primary effect prong of the *Lemon* test in order to proceed with their First Amendment claim. *See infra*, p. 18. Even so, the complaint and reasonable inferences drawn from it, would also allow this case to proceed under the secular purpose prong of the *Lemon* test and/or the coercion test. Before evaluating the facts of this case under the various Establishment Clause tests, Plaintiff must first address (1) the additional facts asserted by Defendant (not contained in the Complaint) that Defendant asks this Court to consider and (2) the well-pleaded facts contained in the Complaint, which Defendant claims cannot be considered by this Court because they amount to no more than bare legal conclusions.

A. Facts to be considered by the Court

Defendant asserts the following additional facts in its Brief, which are not contained anywhere in Plaintiffs' Complaint.

- The version of the Ten Commandments displayed on the Valley High School Ten Commandments monument is "nonsectarian." Def. Brief, p. 3, 19, 23.[4]
- The Ten Commandments monument has never been objected to and has stood without incident at all times prior to the first letter sent by Plaintiff FFRF requesting the removal of the monument. Def. Brief, p. 4.
- The Plaintiffs are "particularly sensitive people" when it comes to their view of the Ten Commandments monument. Def. Brief, p. 20, 25.
- The purpose of the Eagles in donating the Ten Commandments monument was "to provide youths with a common code of conduct to govern their actions." Def. Brief, pp. 3, 4.
- The "all-seeing eye" is an Egyptian symbol generally considered to be secular. Def. Brief, p. 3.
- The Ten Commandments monument is one of many donated by the Eagles in the 1950s and 1960s. Def. Brief, p. 3.

A defendant moving for dismissal under Rule 12(b)(6) may, in very limited circumstances, present the Court with facts in addition to those contained in a plaintiff's complaint. These circumstances include only "matters incorporated by reference or integral

[4] The Defendant's statement regarding the nonsectarian nature of the Ten Commandments monument is especially problematic given the unique features of the monument as compared with other versions of the Commandments, which include the omission of the prohibition against idol worship and the splitting of the prohibition against coveting into the ninth and tenth commandment.

to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

Defendant offers no support for its claims that the Ten Commandments Monument is nonsectarian, that the monument has stood without objection or incident until Plaintiff FFRF's first request that it be removed, and that the Plaintiffs are particularly sensitive observers. As such, these alleged facts may not be considered by the Court in the context of this Motion to Dismiss.

In support of the remaining "facts" listed, Defendant cites to findings contained in a number of cases dealing with "Eagles'" Ten Commandments monuments. *See* Def. Brief, p. 3. With respect to the statement regarding the secularity of the "all-seeing eye," in particular, Defendant cites to expert testimony in one such case. With each of these "facts," while the findings made in the cited cases are a matter of public record, it cannot be concluded that the same facts are true in this case until this Court considers testimony following discovery. Furthermore, even if the Court determines that it may consider these purported "facts" offered by Defendant based upon prior cases, the facts relating to the purpose of the Eagles in donating the Ten Commandments monument is not conclusive of the purpose of *the District* in accepting and displaying the monument.

In addition to offering these new facts in its Brief, Defendant also asks the Court to disregard two of the factual averments contained in Plaintiffs' Complaint. Specifically, Defendant argues that the following averments contain "thread-bare recitals" and legal conclusions and should not be considered by the Court.

- Plaintiffs perceive the prominent display of the Ten Commandments monument as an endorsement by the District of the religious principals set forth on the monument. Def. Brief, p. 17, 19, 24 (citing Compl. at ¶ 39).
- Plaintiffs perceive the prominent display of the Ten Commandments monument as evidencing a favored religious view within the District. Def. Brief, p. 17, 19 (citing Compl. at ¶ 41).

That the Plaintiffs perceive the prominent display of the Ten Commandments monument as described in the Complaint is a fact that can be testified to by the Plaintiffs. Plaintiffs do not mean to say that the Plaintiffs' feelings on these issues alone are conclusive of whether, for example, the display violates the endorsement test or the secular purpose prong. The legal import of these facts and the facts supporting *why* Plaintiffs feel this way is for the Court to determine. Nonetheless, these averments are indisputably facts that may be considered by the Court in the context of this motion.

Defendant also points to Plaintiffs' recital of the necessary elements for their Establishment Clause claim, which is found in the "Count One" section of the Complaint, as constituting legal conclusions. As will be demonstrated in Section II.B. below, any statement contained in the "Count One" section of the Complaint that constitutes a legal conclusion is supported by averments in the "Facts" section of the Complaint and is merely present for pleading purposes. As will be clear below, the Court need not rely upon these statements as facts in order to deny Defendant's Motion.

B. Application of facts to the Establishment Clause tests

In the most recent Third Circuit Establishment Clause case in the public school context, the court in *Doe v. Indian River School Dist.* ("*Indian River*"), 653 F.3d 256, 282,

cert. denied, 132 S. Ct. 1097 (U.S. 2012), noted that "[i]n the public school context, the Supreme Court has been inclined to apply the *Lemon* test." The *Lemon* test considers (1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion. *Id.* The court also acknowledged the fact that the *Lemon* test has become the subject of debate and has been called into question. *Id.* (citations omitted). The court went on to recognize the "endorsement" test as an alternative to the *Lemon* test. *Id.* Ultimately, the *Indian River* court applied both the *Lemon* test and the endorsement test (but not the "coercion" test). Based upon the recent holding by the Third Circuit in *Indian River*, Plaintiffs submit that the *Lemon* test and the endorsement test are more appropriate tests to be applied in this case than the coercion test. Such a conclusion makes sense in light of the fact that no school case, given the mandatory attendance of students at schools and the impressionability of the student population, can be of the "passive" category of cases, like *Van Orden*, where the coercion test was more thoroughly discussed. Nonetheless, Plaintiffs address each of the possible tests relevant to this case below, including the coercion test.

1. Endorsement Test/Primary Effect Prong

The endorsement test and the second *Lemon* test prong are essentially the same. *Id.* at 282-283. Under either, school and government endorsement of religion violates the Establishment Clause of the First Amendment. Here, the Valley High School Ten Commandments monument constitutes government speech. *See Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 470-471 (2009) (holding that "[j]ust as government-commissioned and government-financed monuments speak for the government, so do

privately financed and donated monuments that the government accepts and displays to the public on government land"). Government speech endorsing religion in the public schools context violates the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2001) (holding that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and accompanying message to adherents that they are insiders, favored members of the political community'") (quoting *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring)). The judicial inquiry under this test is "whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Indian River*, 653 F.3d at 284 (3d Cir. 2011) (citing *ACLU v. Black Horse Pik Reg'l Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996). As the Defendant correctly states, under the endorsement test/primary effect prong, the relevant inquiry is whether a reasonable observer would find that, "under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." Def. Brief, p. 22; *Indian River*, 653 F.3d at 284.

Plaintiffs have offered facts that set forth a plausible claim that the Defendant's display of the Ten Commandments monument conveys a message favoring religion. As discussed above, Plaintiffs' averments as to the impact that the Ten Commandments monument has on the Plaintiffs and how they perceive it are not mere recitations of an element of a claim. These averments are statements of fact that must be presumed to be true at this stage of the pleadings. While Defendant claims that the feelings of the Plaintiffs are the feelings of overly sensitive individuals, the facts as pleaded in the Complaint lend

far more support to the reasonability of Plaintiffs' feelings about the Ten Commandments monument than they do the Defendant's argued position.

At bottom, the plaintiffs are asserting that the Defendant's display of and the surrounding circumstances relating to the Ten Commandments monument sends a distinct message of school support for the religious views set forth on the monument. The Defendant has posted statements of religious obligation quite prominently in a large monument directly in front of a public school's main entrance. The monument is maintained so as to ensure the utmost visibility of the monument at all times. The monument stands alone and is not incorporated into a larger display. Plaintiffs Schaub, Doe 1, Doe 2, and Doe 3 are non-religious do not subscribe to the idea that they are commanded to follow the edicts on the monument, and they are offended by it. Although standing alone these facts are sufficient to support a plausible claim that the District conveys a message favoring religion, the facts relating to the District and community reaction to the request that the monument be removed provide even greater support for Plaintiffs' claim.

The statements made by Robert Pallone, the District's Board President, are relevant to whether a reasonable observer would view the District's decision to keep the Ten Commandments monument as an indication that the District favors a religion. In making his remarks, Pallone appeared to be speaking on behalf of the Defendant. *See* Compl. at ¶ 22 (referencing "the administration, the board, and our staff" and using the phrases "we" and "all of us"). As support for how a reasonable observer would view the overall context of the Ten Commandments display, it does not matter whether Pallone has authority to act as a final policy maker on his own -- he was speaking as a representative of the District and

his comments were intended to inform members of the community on the dispute. The heated language by the Board President would signal to a reasonable observer that the Defendant is strongly in support of the Ten Commandments monument and opposes moving it.

In another Establishment Clause challenge to a Ten Commandments monument, the Tenth Circuit Court of Appeals relied on statements by board members to the media in finding that a reasonable observer would find government endorsement of religion. *Green v. Haskell County Bd. Of Com'rs*, 568 F.3d 784, 802 (10th Cir. 2009). The Court in *Green v. Haskell County* reasoned as follows:

> In particular, we find support for this conclusion [that the reasonable observer would find that these facts tended to strongly reflect a government endorsement of religion] in the public statements of the Haskell County commissioners. In none of their statements did the commissioners attempt to distinguish between the Board's position and their own beliefs. Several of the commissioners' 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 the fight," App. at 459 (emphasis added), and "*We're* definitely going to leave our monument there until the law tells *us* to take it down." App. at 1170 (emphasis added). 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. *See, e.g.,* App. at 458-59 (where one commissioner's statement that "God died for me and you, and I'm going to stand up for him" appeared in close proximity to the statement "I won't say that we won't take it down, but it will be after the fight").

Green, 568 F.3d at 802 (10th Cir. 2009).

Similarly here, Board President Pallone's statements did not attempt to distinguish between the Board's position and his own beliefs. Pallone said in part:

> . . . 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. *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…"

Compl. at ¶ 22 (emphasis added). These statements are material facts that relate to the overall context of the Ten Commandments display and how a reasonable observer would view that display.

Likewise, the fact that the Defendant's acting superintendent had received over 1,000 calls and emails in support of keeping the Ten Commandments and that area clergy held a rally in support of the Ten Commandments monument at the school (during the school day) is also relevant to the surrounding context and impression on the reasonable observer. This conduct is indicative of the religious message ascribed to the monument by other members of Plaintiffs' community and the fact that Defendant's decision to keep the monument is rooted in its favoring a particular religion. *See Ahlquist*, 840 F.Supp.2d at 522-523 (holding that the recent "retention" of the prayer mural in that case constituted an improper endorsement and violated the second prong of the *Lemon* test based upon the comments and conduct surrounding the decision to retain the mural).

Defendant, meanwhile, seeks dismissal of this Complaint at the earliest possible stage based only upon additional facts offered regarding the purported purpose of the Eagles in making its donation to the District. Even if the Court considers the purported purpose of the Eagles, the Eagles' purpose cannot serve to cleanse the District of any alternate or additional purpose. In light of the overall context of Defendant's Ten Commandments monument, at this pleading stage, Plaintiffs have clearly set forth a plausible claim that the monument is an endorsement of religion.

2. Religious Purpose Prong

In applying the religious purpose prong, courts "ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Indian River*, 653 F.3d at 283 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). "The secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864.

Defendant's discussion of the secular purpose prong of *Lemon v. Kurtzmann* oversimplifies Plaintiffs' claim. The Defendant states that Plaintiffs' First Amendment claim involves only the "display" of the Ten Commandments monument. This is not true. The Plaintiffs have primarily pled facts relating to the display of the monument because that is what the Plaintiffs encounter at Defendant's school. However, the Complaint contains other facts and reference to other District conduct that is relevant for determining whether Plaintiff has set forth a plausible claim that the Defendant has acted with a religious purpose. Given the prominent placement of the monument by Defendant, the fact that it stands alone, the fact that Defendant maintains it, and, most recently, the fact that the District has declined to remove it, Plaintiffs assert that the Defendant has acted with a religious purpose in this case.

As the Supreme Court in *McCreary* observed, the text of the Ten Commandments "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." 545 U.S. at 869. In addition to being reflective of an endorsement of religion, the statements made by Board President Pallone clearly reflect a religious motivation for maintaining the monument.

Pallone expresses "outrage" over the "ludicrous" request by an outside "radical group" that the monument be removed. Compl. at ¶ 22. Importantly, Pallone makes direct reference to "all of . . . the District['s]" appreciation of the "overwhelming support from the community" in taking the position that the District will not remove the monument without a fight. Compl. at ¶ 22. Plaintiff has averred facts relating to the types of community support received by the District, including reference to the more than 1,000 phone calls received by the District superintendent and the rally held at the school by local clergy. Just as this conduct is relevant to whether a reasonable observer would find there to be endorsement of religion, it is also relevant to whether that same reasonable observer would believe that the District has a religious purpose in continuing to prominently display and maintain the Ten Commandments monument. *See Green*, 568 F.3d at 802 *supra*; *see also Ahlquist*, 840 F.Supp.2d at 522 (finding the recent conduct of the state to retain the disputed prayer mural to violate the purpose prong of the *Lemon* test).

Defendant argues that the only statement offered by Plaintiffs in support of a religious purpose is a bare legal conclusion. In making this argument, Defendant attempts to place Plaintiffs in an effective pleading purgatory where the Plaintiffs are unable to state a conclusion based upon the reasonable inferences that may be drawn from the well-pleaded facts of the Complaint. Certainly, a reasonable inference can be drawn from the facts averred, which have been highlighted above, that it is plausible at this pleading stage that the decision to keep the Ten Commandments monument was based upon a religious purpose consistent with the religious views of those supporting the Ten Commandments monument.

It is also worth noting that the first *Lemon* prong, given the unique nature of the issue of intent, is one that is typically developed in discovery. At this early stage, Plaintiffs have pleaded facts which support a reasonable inference that a religious purpose may be present in this case. It is possible if not likely that the District Board had some discussion or vote on whether to keep the Ten Commandments monument after Plaintiffs' requests that it be removed. Such information will be discoverable and may lend further support to the already plausible claim that the Defendant here has acted with a religious purpose.

3. Coercion

The Defendant asserts that the Plaintiffs' claim "fails under the coercion test analysis" because "the Plaintiffs have not alleged that the monument compels them to participate in religion or its exercise." Def. Brief, p. 16. Plaintiffs themselves certainly feel like they are being pressured to "adopt the District's favored religious views." Compl. at ¶ 42. Defendant seeks to liken the Plaintiffs' situation in this case to that of Thomas Van Orden, where Mr. Van Orden encountered the monument "along his path to the Texas Supreme Court Library" and where "he need not stop to read it or even to look at it." *Van Orden*, 545 U.S. at 694. This argument again indicates the Defendant's failure to recognize the distinction between this case and *Van Orden*, which is attributable, foremost, to the fact that this is a public school case.

Here, the students of the District cannot avoid the Ten Commandments monument. The monument is prominently located at the main entrance of the school near two footbridges used to access that entrance. Students at Valley High School must encounter the monument when they enter the school building through the main entrance. Unlike Thomas Van Orden, the students at Valley High School *must attend and enter the building*.

While Thomas Van Orden was free to take a different path to the Texas Supreme Court Library or visit a different library altogether, high school students cannot avoid attendance at school.

That these impressionable young students encounter this monument to begin their day each morning is significant. The monument is not labeled the "Ten Suggestions." In large font it says "the Ten Commandments." The monument proclaims, "I Am the LORD thy God" and lists ten religious edicts. It says, "Thou shalt have no other gods before me." It says, "Thou shalt not take the Name of the Lord thy God in vain." It says, "Remember the Sabbath day, to keep it holy." The Supreme Court in *Stone* specifically discussed the coercive nature of the placement of this text in a school setting. "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Stone*, 449 U.S. at 42. Certainly, the placement of the Ten Commandments monument in a location where students must pass the monument each day may cause young, impressionable minds to read, meditate upon, and perhaps venerate and obey the text. Plaintiff Schaub has stated that she views the Ten Commandments monument as "commanding" that students and visitors worship "thy God." To ignore what the monument says and its importance to those who find the commandments a matter of religious obligation, is not only an affront to the non-religious, but also to those of faith who venerate the Decalogue.

III. Defendant's Motion to Strike Should be Denied

As a secondary issue, Defendant seeks to strike Paragraphs 21, 22, and 23 of the complaint asserting that the statements are "immaterial, impertinent and scandalous allegations" under FRCP 12(f). The motion is baseless. In support of the motion, the

Defendant's cite *Conklin v. Anthou,* 2011 WL 1303299 (M.D. Pa. 2011), a case in which a pro se plaintiff accused the court hearing his case of "judicial corruption." Here, the Defendant seeks to censor the complaint of facts that directly relate to Plaintiffs' First Amendment claim. As discussed in Section II.B. above, these types of facts are the very types of facts that other courts have considered to be meaningful in the analysis of the relevant Establishment Clause tests and how a reasonable observer would view a particular religious display.

The comments made by the Board President are not "immaterial, impertinent and scandalous allegations." They relate directly to the dispute and the District's refusal to move the monument. Mr. Pallone speaks as if he is speaking on behalf of the Board, the District, and its staff. Similarly, the reactions of the community are consistent with the way that Plaintiffs have claimed to view the monument and therefore lend credence to the plausibility of Plaintiffs' claims. Quite simply, the averments that Defendant seeks to strike are the very type of facts a plaintiff must allege under the heightened pleading standard of *Iqbal* and *Twombly*.

CONCLUSION

The Motion to Dismiss must be denied. Plaintiffs have pled facts that demonstrate they have a plausible claim for a violation of their First Amendment rights. The Motion to Strike should be denied as well because the averments that the Defendant seeks to strike relate directly to Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2012, the foregoing **RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO STRIKE** 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.

/s/ Marcus B. Schneider, Esquire
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