

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

DOE 1, by Doe 1’s next friend and parent,)
DOE 2, who also sues on Doe 2’s own behalf,)
)
Plaintiffs,)
)
v.) Case No. 7:11-cv-00435
)
SCHOOL BOARD OF GILES COUNTY,)
)
Defendant.)
)
)
)
)
)

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

No federal court has upheld a display of the Ten Commandments in a public school -- and for good reason: “Families entrust public schools with the education of their children” with 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.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). As the Supreme Court has recognized, “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools,” *Lee v. Weisman*, 505 U.S. 577, 592 (1992), prompting the judiciary to be “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (quoting *Edwards*, 482 U.S. at 583-84). The undisputed facts of this case show no reason to depart from this precedent.

Indeed, even without the special public-school context, the Giles County displays could not pass constitutional muster under the federal courts’ Ten Commandments jurisprudence,

including the Supreme Court’s ruling in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). The undisputed facts, including the history and evolution of the current displays, their content, and the board’s and community’s reaction, illustrate that (1) the board has acted with one primary end in mind—to keep the Ten Commandments posted in district schools no matter what; and (2) that the display has had one primary effect—to send a message of official religious endorsement by the district. As would any reasonable student, John Doe understands the Ten Commandments display challenged here to be, in purpose and effect, an official endorsement of the Decalogue’s religious content and to convey a message that students who subscribe to these religious tenets are favored by his school, while students, like him, who do not, are outsiders. Doe should not have to submit to this message of religious favoritism as a condition of attending a public school. Accordingly, Plaintiffs respectfully request that the Court grant summary judgment in their favor.

STATEMENT OF UNDISPUTED FACTS

The Original Ten Commandments Display

1. In 1999, Pastor Shahn Wilburn donated to Giles County Public Schools a number of displays containing the Ten Commandments and the U.S. Constitution in a single frame. The displays were posted in each school in the district. (Ex. 2, Wilburn dep. at 8-11; Ex. 3, photographs of display.)

2. Pastor Wilburn donated the displays in the wake of a rash of school shootings in the United States, with the explicit purpose of having students look upon the commandment “thou shalt not kill.” (Ex. 2, Wilburn Dep. at 8-9.) Pastor Wilburn testified, “I think that those commandments give us a basis for citizenship, good citizenship. We were trying to make good

citizens, hopefully good citizens that didn't shoot one another. It seemed to be prevailing trend across our country.” (Ex. 2, Wilburn dep. at 10-11.)

3. On December 8, 2010, the Freedom From Religion Foundation sent a letter on behalf of a local person to the Superintendent of Giles County Public Schools, Dr. Terry Arbogast, objecting to the display of the Ten Commandments at a Giles County elementary school. The letter stated the display was unconstitutional and requested that it be removed. (Ex. 4, Arbogast dep., at 9-10; Ex. 5, 12/8/10 letter from Elliott to Arbogast.)

4. On December 17, 2010, Dr. Arbogast sent a letter to the Freedom From Religion Foundation stating that the Ten Commandments would be removed and replaced with a “historical document.” (Ex. 4, Arbogast Dep. at 10-11; Ex. 6, 12/17/2010 letter from Arbogast to Elliott.)

5. Thereafter, the Ten Commandments were removed from all of the Giles County Public Schools and were replaced with a copy of the Declaration of Independence. Ex. 4, Arbogast dep. at 9-10.)

6. Pastor Wilburn and Pastor George Creger, another prominent member religious leader, urged their congregants to attend the January 20, 2011 school board meeting to show support for the Ten Commandments. (Ex. 7, Creger dep. at 8-10; Ex. 2, Wilburn dep. at 26.)

7. On January 20, 2011, more than 200 residents filled the room at the Giles County school board meeting to express disapproval of the removal of the Ten Commandments from the district’s schools. (Ex. 8, 1/20/11 Sch. Bd. News Release; Ex. 9, McMahan dep. at 9-10; Ex. 10, Whitehead dep. at 11-12; Ex. 11, Buckland dep. at 12-13; Ex. 12, Gollehon dep. at 12.)

8. At the January 20, 2011 school board meeting, many speakers defended the Ten Commandments display in expressly religious terms. One speaker said, “We all know that

America was founded on biblical beliefs Our forefathers came to America and fought others for their Christian beliefs (our Christian beliefs).” Pastor Creger said that “in the past, Christians have not stood up, they allowed Madalyn Murray O’Hair to take prayer out of schools. . . . It was never our forefathers’ idea for the Ten Commandments and for God to be taken out of the system.” Eric Gentry, the chair of the Giles County Board of Supervisors, said that he “grew up with prayer still in the schools We turned out all right I talked to all of my board members last night and today. Don’t remove [the Ten Commandments]. We are behind you.” Pastor Wilburn said that he had been responsible for giving the Ten Commandments displays to the school after the school shootings at Columbine High School. He said, “I have pastored a church for over 30 years and I can tell you that God has never done us a disservice in this county and he’s blessed us with the beauty and all we have so we certainly want to honor him by posting his word in the eyes of our students and all that walk the halls.” (Ex. 8, 1/20/11 Sch. Bd. News Release at 2-4.)¹ School board member Joseph Gollehon understood that the two pastors spoke because “they were Christian preachers and because they believed in them [the documents].” (Ex. 12, Gollehon dep. at 14-15.)

9. Although the matter was not on the meeting agenda, following public comments, school board member Drema McMahon made a motion “to put the Ten Commandments back up.” (Ex. 8, 1/20/11 Sch. Bd. News Release at 4.) Ms. McMahon acknowledges that one reason for making the motion was the fact that she is a Christian and believes the Ten Commandments are “a document . . . for anyone to live by.” (Ex. 9, McMahon Dep. at 18.) The school board unanimously voted in favor of the motion, and the Ten Commandments were re-hung in the schools. (Ex. 8, 1/20/11 Sch Bd. News Release at 4.)

¹ Quotations from speakers at school board meetings are taken from “News Releases” prepared by school board Clerk Amanda Tickle from audio recordings of each meeting. The recordings themselves are taped over at the next school board meeting. (Ex. 4, Arbogast dep. at 13-15).

10. After media reports stated that Giles County families were preparing to challenge the display in court (Ex. 14, “Two Giles Co. families come forward to sue school system for posting of Ten Commandments,” wdbj7.com, 2/16/11), the Giles County School Board held a special meeting on February 22, 2011. (Ex. 15, 2/22/11 Sch. Bd. minutes.) At the meeting, the superintendent reported that attorneys from Liberty Counsel had told him that it would not represent the school district if the Ten Commandments displays remained in place in their present form. The board then unanimously voted to take down the displays. (*Id.*) As detailed below, less than a month later, the board heard a proposal for a revised display containing the Ten Commandments.

Community Reaction

11. After this decision, many local supporters of the displays posted signs with the Ten Commandments, while others attached magnets with the Ten Commandments to their vehicles. (Ex. 16, Doe 2 decl. ¶ 5; Ex. 10, Whitehead dep. at 46-48; Ex. 12, Gollehon dep. at 31-32.)

12. Many of the Ten Commandments signs and car magnets were distributed by Pastor Wilburn and Pastor Creger. Pastor Wilburn estimates that he distributed approximately 300-400 signs and 900 magnets. Pastor Creger explained that he distributed the signs and bumper stickers to show “support for the word of God.” (Ex. 2, Wilburn dep. at 34; Ex. 7, Creger dep. at 17-19.)

13. According to news reports,² on March 7, 2011, approximately 200 Giles High School students walked out of class in support of community efforts to restore the displays to the schools. A local radio host led the students in prayers. One student protester said, “God went

² Quotations from news reports are submitted not for the truth of the matter asserted, but as items that would have affected a reasonable observer’s perception of the controversy.

through so much for us, so we are going through just this little bit today." Another student said, "This is Giles County and Christ is a big, big, big part of Giles County. For those who don't like it, go somewhere else." (Ex. 17, "Ten Commandments walk-out draws 200+ at Giles High School," The Daily Progress, 3/7/11; Ex. 18, "Students walk out of high school to bring Ten Commandments back in," WDBJ7.com, 3/7/11.)

14. Between January 2011 and January 2012, 94 letters to the editor and op ed pieces regarding the Giles County Ten Commandments display were printed in the Roanoke Times and the Bluefield Daily Telegraph. Both before and after March 15, 2011, large majorities of both supporters and opponents of the display perceived the Ten Commandments as sending a religious message. (Ex. 19, Fitzpatrick decl.; Ex. 20a-20f, letters to the editor; Ex. 21, table of letters to the editor; Ex. 22, chart of letters to the editor).

15. Pastor Creger testified: "This [the Ten Commandments controversy] has done more to perpetuate the gospel of Jesus Christ than we could have done in years. . . . Because you [plaintiffs and the ACLU] raised up in defiance against the word of God. And my church has actually increased, and I want to thank you." (Ex. 7, Creger dep. at 18-19.)

The Revised Narrows High School Display

16. At a Giles County School Board meeting on February 15, 2011, Bobby Lilly told the school board that having seen the public interest in "the Ten Commandments issue," he and members of the Giles County Bar Association were interested in putting together a "broader based display." (Ex. 13, 2/15/11 Sch. Bd. News Release at 1.)

17. At a Giles County School Board meeting on March 15, 2011, Lilly described his proposal, naming the Declaration of Independence, the Mayflower Compact, the Virginia Declaration of Rights, the Virginia Statute for Religious Freedom, the Magna Carta, the Ten

Commandments, the Bill of Rights, the Star Spangled Banner, and a picture of Lady Justice as documents to be included in the display. (Ex. 23, 3/15/11 Sch. Bd. News Release at 1-2.) The school board chairman, Mr. Buckland, stated that the board would need copies of the documents to refer to legal counsel, and that action would be taken on the proposal at a subsequent meeting. (*Id.* at 2.)

18. Following that meeting, some citizens approached Lilly and offered to frame the proposed documents. (Ex. 24, Lilly dep. at 47-48.)

19. At a May 19, 2011 Giles County School Board meeting, Lilly presented to the board the framed documents, including the Ten Commandments, that he proposed be posted in the schools. He also read a proposed Resolution into the record. (Ex. 25, 5/19/11 Sch. Bd. News Release at 1-2.)

20. A large contingent of citizens was present at the May 19, 2011 meeting to express support for the proposal, some of them wearing Ten Commandments t-shirts or carrying Ten Commandments stickers or signs. (Ex. 24, Lilly dep. at 101; Ex. 2, Wilburn dep. at 37-38) Many of the observers had been provided transportation by Pastor Wilburn's church (Ex. 2, Wilburn dep. at 37-38). Pastor Wilburn also spoke at the meeting, saying, among other things, "We are basically a Christian nation," and "I believe that we as Christians and [sic] we wanted to maintain a Christian presence today." (Ex. 25, May 19, 2011 News Release at 3.) He later testified that it was particularly important for Christians to speak out because "it [Christianity] was being attacked and we have a Christian heritage." (Ex. 2, Wilburn dep. at 40-41.)

21. According to news reports, on May 20, 2011, citizens held a "Ten Commandments rally" to demand the posting of the Ten Commandments in the Giles County Public Schools. One demonstrator said, "We are strong Christians and are not going to back

down...we just want people to know we really need the Ten Commandments in our school system.” (Ex. 26, “People rally to put 10 commandments back up in Giles County Schools,” WSLs.com, 5/21/11.)

22. The school board met again on June 7, 2011. At that meeting, the board voted 3 to 2 to restore the Ten Commandments displays to Giles County schools. Adopting Lilly’s proposal, the board authorized displays that would include the Ten Commandments along with a picture of Lady Justice, the Star-Spangled Banner, the Bill of Rights to the United States Constitution, the Virginia Statute for Religious Freedom, the Declaration of Independence, the Virginia Declaration of Rights, the Mayflower Compact, and the Magna Carta. (Ex. 27, June 7, 2011 News Release at 1.)

23. Although it is not clear if it was specifically mentioned in the motion, it was the understanding of school board members who voted in favor of the display that they were also approving the resolution presented by Bobby Lilly at the May 19, 2011 school board meeting, with minor editorial corrections. (Ex. 24, Lilly Dep. at 71-87; Ex. 28, Resolution; Ex. 10, Whitehead dep. at 25-26; Ex. 11, Buckland dep. at 37-38.) The Resolution was drafted by Lilly with assistance from a Liberty Counsel attorney. (Ex. 24, Lilly dep. at 80-86.)

24. Board member Joseph Gollehon voted for the display because “I’m a Christian” and he felt that the Ten Commandments “was a great thing if you can live by it.” (Ex. 11, Gollehon dep. at 39-40.)

25. Board members Drema McMahon and J. Lewis Webb voted against the display. Webb explained, “This issue creates a great conflict between what is in my heart as opposed to my mind. I took an oath to uphold the Constitution of this great country.... Personally, I feel this issue violates the Constitution.” Ex. 27, 6/7/11 News Release at 2.

26. At his deposition, Dr. Webb added that the other documents in the display were merely a “smoke screen” to hide the school board’s purpose of posting the Ten Commandments. (Ex. 29, Webb dep. at 62.)

27. The display containing the Ten Commandments is now posted in a main hallway near the trophy case in Narrows High School, where plaintiff Doe 1 must encounter it every day when he goes to and from the cafeteria. (Ex. 32, Doe 1 Decl. ¶ 5; Ex. 31, Photograph of display.)

28. The text of the Ten Commandments as set forth in the Narrows High School Display is as follows:

TEN COMMANDMENTS

I

I AM THE LORD THY GOD, . . .
THOU SHALT HAVE NO OTHER GODS BEFORE ME

II

THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGES

III

THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN

IV

REMEMBER THE SABBATH DAY, TO KEEP IT HOLY

V

HONOR THY FATHER AND THY MOTHER

VI

THOU SHALT NOT KILL

VII

THOU SHALT NOT COMMIT ADULTERY

VIII

THOU SHALT NOT STEAL

IX

THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR

X

THOU SHALT NOT COVET THY NEIGHBOR'S GOODS.

EXODUS 20:1-17

ACCORDING TO ANCIENT SCRIPTURE, THE HEBREWS WERE CAST OUT OF EGYPT BY PHAROAH AND MADE TO WANDER THROUGH THE DESERT IN SEARCH OF THE PROMISED LAND. GOD SPOKE TO THE PROPHET MOSES ON MOUNT SINAI IN THE EGYPTIAN DESERT, WHERE HE ORDERED MOSES TO TAKE HIS COMMANDMENTS TO HIS PEOPLE, SO THEY COULD LIVE ACCORDING TO HIS WISHES. THESE LAWS FORM THE BASIS OF THE MODERN RELIGIONS OF JUDAISM AND CHRISTIANITY.

(Ex. 32.)

29. The display also contains an “explanation document” with descriptions of each of the

posted documents. The paragraph concerning the Ten Commandments states:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

(Ex. 33, Lilly explanatory document at 2.³)

Additional Documents Proposed by Pastor Wilburn

30. At a school board meeting on February 16, 2012, Pastor Wilburn proffered a number of additional documents to be added to the Narrows High School display. These included: the First Charter of Virginia; the Fundamental Orders of Connecticut, a picture of Patrick Henry, Henry’s “Give Me Liberty or Give Me Death” speech; a picture of minutemen; a picture of George Washington; Washington’s Farewell Address; a picture of Thomas Jefferson;

³ The explanatory document attached as Exhibit 3 hereto is excerpted from Exhibit 1 to defendant’s Motion to Dismiss, which purports to include the text of all of the documents in the Narrows High School display. The document contains some formatting errors (*see* Ex. 4, Lilly dep. at 53), but appears in substance to be the document included in the display.

Jefferson's Letter to the Danbury Baptists, 1799 Thanksgiving Proclamation, and letter to Reverend Samuel Miller; and the Northwest Ordinance. (Ex. 34, 2/16/12 Sch. Bd. News Release; Ex. 2, Wilburn dep. at 42-51; Ex. 35 at 2-4, Wilburn explanatory document.)

31. These documents were submitted pursuant to paragraph 4 of the Resolution, which allows the school board to approve additional documents submitted by individuals or organizations. (Ex. 28, Resolution at 2.)

32. Pastor Wilburn later testified, "I wanted to add to the historical documents to show in a more profound way our Christian heritage from those historical documents." (Ex. 2, Wilburn dep. at 42.)

33. Pastor Wilburn also submitted an explanatory document that described the submitted documents. The document was initially drafted by Pastor Wilburn, then substantially revised by attorney Richard Mast at Liberty Counsel. (Ex. 2, Wilburn dep. at 42-46; Ex. 35 at 8-9 (draft explanation document prepared by Wilburn) and at 2-4 (final explanation document as edited by Mast).

34. At its March 15, 2012 meeting, the school board approved the inclusion of Pastor Wilburn's additional documents in the Narrows High School display by a 3-2 vote. (Ex. 36, 3/15/12 News Release at 2.) School board member Webb later testified that he voted against the documents because he believed they were an additional "smoke screen" to hide the school board's actual intent of posting the Ten Commandments. (Ex. 29, Webb dep. at 62.)

The Does

35. Plaintiff Doe 1 is a student at Narrows High School. (Ex. 30, Doe 1 Decl. ¶ 2.)

36. Doe 1 objects to and is offended by the presence of the Ten Commandments on the walls of the school because it sends a message to Doe 1 that the school favors the religious

doctrines set forth in that document above all other beliefs, and that Doe 1, who does not subscribe to those beliefs, is not a full member of the school community. (Ex. 30, Doe 1 Decl. ¶ 7.)

37. Doe 1 believes the Ten Commandments do not belong in a display of American historical documents, because the Ten Commandments are a set of religious principles, not one of America's foundational documents. Doe 1 believes that the presence of the Ten Commandments in the display does not teach Doe 1 anything about American history. Doe 1 believes that that the display is in Doe 1's school simply because the schools wanted to continue posting the Ten Commandments because of their religious significance, and thought they could do so legally by surrounding it with other documents. (Ex. 30, Doe 1 Decl. ¶ 6.)

38. Plaintiff Doe 2 is Doe 1's parent. (Ex. 16, Doe 2 Decl. ¶ 1.)

39. Although Doe 2 is a Christian and believes in the Ten Commandments, Doe 2 respects Doe 1's different beliefs. Doe 2's approach to Doe 1's religious education is to answer questions about Doe 2's religion as they come up for Doe 1, rather than indoctrinating Doe 1 in Doe 2's own faith. Doe 2 believes this gives Doe 1 the information Doe 1 needs to make up Doe 1's own mind about religion. By promoting the religious tenets of the Ten Commandments, Doe 2 believes that the school board is interfering with Doe 2's way of providing religious education to Doe 1. (Ex. 16, Doe 2 Decl. ¶ 7.)

ARGUMENT

I. NO COURT HAS UPHELD ANY DISPLAY OF THE TEN COMMANDMENTS IN A PUBLIC SCHOOL

Courts are "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)). "The State exerts great authority and

coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." Thus, it is unsurprising that federal courts have consistently prohibited permanent displays of the religious iconography in public schools. *See, e.g., Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 957, 965 (9th Cir. 2011) (upholding removal of banners hung in public school classroom to emphasize various religious messages including, "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee"); *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (holding that display of portrait of Jesus in hallway of public high school violated Establishment Clause); *Roberts v. Madigan*, 921 F.2d 1047, 1049, 1051, 1057 (10th Cir. 1990) (holding that teacher's display of poster stating, "You have only to open your eyes to see the hand of God," along with other religious activities "had the primary effect of communicating a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class"); *Ahlquist v. City of Cranston*, No. CA 11-138L, 2012 WL 89965, at *17 (D.R.I. Jan. 11, 2012) (enjoining public school's display of prayer banner mural).

Indeed, no court has upheld the display of the Ten Commandments in a public school, whether the Decalogue has appeared alone, *Stone v. Graham*, 449 U.S. 39 (1980), or in conjunction with "historic documents." *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (6th Cir. 2003) (*McCreary I*); *Baker v. Adams County/Ohio Valley School Board*, 86 Fed.Appx. 104, 2004 WL 68523 (6th Cir. 2004); *Doe v. Harlan County Sch. Dist.*, 96 F.Supp.2d 667 (E.D.Ky. 2000).

In *Stone*, the Supreme Court invalidated a state statute requiring the Ten Commandments to be posted in every public school classroom. The Court analyzed the statute under the three-

part *Lemon* test,⁴ and concluded that it was unconstitutional because it lacked any secular purpose:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. 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.

449 U.S. at 41-42. The Court therefore rejected the state's "avowed" secular purpose of promoting the Ten Commandments as "the fundamental legal code of Western Civilization and the Common Law of the United States." 449 U.S. at 41.

The addition of other documents to an unconstitutional Ten Commandments display does not cure the constitutional violation. In *McCreary I*,⁵ the Sixth Circuit preliminarily enjoined a public school display very much like the one at issue here, containing the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments, a Kentucky statute regarding the posting of historical displays, and a School Board Resolution. 354 F.3d at 443-44. The court noted that "[t]o comply with *Stone*, . . . a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." *Id.* at 448. The school display did not

⁴ Under the *Lemon* test, a court determines whether a government act violates the Establishment Clause by considering whether the government action has a primary secular purpose, whether its primary effect is to advance or inhibit religion, and whether it fosters an "excessive entanglement" with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Additionally, a government act is unconstitutional if it suggests to a reasonable, informed observer that the government is endorsing religion. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989). The Fourth Circuit has "treat[ed] the endorsement test as a refinement of *Lemon*'s second prong." *Mellen v. Bunting*, 327 F.3d 355, 371 (2003).

⁵ In *McCreary I*, the Sixth Circuit considered two courthouse Ten Commandments displays as well as the schoolhouse display. *Certiorari* was granted as to the courthouse displays but not the school display. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 851 n.1 (2005) (*McCreary II*).

meet this requirement. The court found that “[i]t is difficult to determine what subject, if any, the display even purports to study.”

Moreover, the Resolution in no way connects the Ten Commandments with the other historical documents. . . . None of the other historical documents concern the religious duties of those who believe in God. Nor do these documents discuss the Ten Commandments' requirement to honor parents or the prohibitions against killing, committing adultery, stealing, bearing false witness and coveting.

Id. at 450. Additionally, the history of the display, which evolved from the Ten Commandments alone, to a set of historical documents chosen for their religious content, to the final challenged display, demonstrated the school board's religious intent. *See also Baker* (striking down stone monuments of Ten Commandments in front of school building accompanied by monuments of other historical documents); *Doe v. Harlan County Sch. Dist.* (an earlier iteration of *McCreary I*) (granting preliminary injunction against display of Ten Commandments with historical documents containing religious references).

The unanimity with which the courts have dealt with permanent displays of religious iconography in public schools generally, and the Ten Commandments in particular, reflects the need for special care to avoid Establishment Clause violations in school settings. The Court should adhere to this precedent in its analysis of the present case.

II. THE PURPOSE OF THE DISPLAY IS RELIGIOUS

Asked why he voted in favor of Lilly's proposed historical document display on June 7, 2011, school board member Joseph Gollehon testified as follows:

A. I thought it was the right thing to do.

Q. And why was it the right thing to do?

A. I'm a Christian.

Q. And was – the way you voted for this was because you're a Christian?

A. It had right much to do with it. I thought it was a great thing if you can live by it. It's hard to live by.

Q. What's hard to live by?

A. One particular historical document.

Q. Which one is that?

A. You know.

Q. I don't.

A. All right. The Ten Commandments. You know that.

Ex. 12, Gollehon dep. at 39-40. School board member Webb, who voted against the display, perceived it as a “smoke screen” for the board’s true purpose: posting the Ten Commandments. (Ex. 29, Webb dep. at 62.)

The history and content of the display confirm that, with the threat of litigation looming, the board’s actions in removing the original unconstitutional Ten Commandments display and replacing it with the current “historical foundations” display have been taken with only one clear and primary purpose: to keep the Ten Commandments posted in district schools because of their religious significance. The reactions of the community, which defended the display in expressly religious terms, corroborate that a reasonable observer would perceive the display, in purpose and effect, as conveying a message of religious endorsement.

A. The History of the Display Indicates a Religious Purpose

In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (*McCreary II*), the Court upheld a preliminary injunction against a courthouse Ten Commandments display that was almost identical to the one at issue here.⁶ The Court found that examining the government’s purpose for the display was an essential part of the Establishment Clause analysis. 545 U.S. at 860-61. A determination of purpose is based upon the objective facts surrounding the government action. “The eyes that look to purpose belong to an objective observer, one who

⁶ The display in *McCreary II* included the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. 545 U.S. at 856. The display at Narrows High School includes the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star-Spangled Banner, the Mayflower Compact, the Virginia Statute for Religious Freedom, the Virginia Declaration of Rights, and Lady Justice. (Compl. ¶ 20.) The display in *McCreary II* was accompanied by an explanatory document, with the same description of the Ten Commandments that appears in the display challenged here. *Id.* at 856; Ex. 33 at 2.

takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.” *Id.* at 862 (internal quotation marks and citations omitted). Moreover, “although a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 864. A governmental purpose must be discerned by all of the available evidence, including evidence of the history of the government action. “[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose.” *Id.* at 866 (internal quotation marks and citation omitted).

In *McCreary II*, the Court held that the history of the county’s display indicated a religious purpose. The county had originally posted the Ten Commandments alone. Of this display, the Court noted, “Where the text [of the Ten Commandments] is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.” *Id.* at 868. The display of the Ten Commandments alone, said the Court, had an “unmistakable” religious objective. *Id.* at 869. After being sued over the first display, the County erected a second one, in which the Ten Commandments were “juxtapose[ed] . . . to other documents with highlighted references to God as their sole common element.” The court found that “[t]ogether, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.” *Id.* at 870. The third display contained almost exactly the same documents as are now displayed in Narrows High School. The county claimed that the purpose of the display was “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.” *Id.* at 871. The Court found that “[n]o

reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.” *Id.* at 872.

Like the *McCreary* display, the Narrows High School display has a history that illustrates its religious purpose. The school district started with a bare-bones display of the Ten Commandments in near isolation. After being threatened with litigation, the school board removed the display, and replaced it with one like the third *McCreary* display, which it thought could better survive constitutional scrutiny. Finally, the school board approved additional documents specifically chosen for their religious references.

1. The First Display: Unquestionably Unconstitutional

As in *McCreary*, the initial display was patently unconstitutional. The display framed a copy of the Ten Commandments alongside the U.S. Constitution. It hung alone with no explanatory documents or disclaimers. It was donated by Shahn Wilburn, a local pastor, in the wake of the Columbine and other school shootings, in the hopes that students who read and reflected on the Commandments would be less likely to commit such acts. Discussing the history of the original display at 2011 Board meeting, Wilburn explained, “I can tell you that God has never done us a disservice in this county and he’s blessed us with the beauty and all we have so we certainly want to honor him by posting his word in the eyes of our students and all that walk the halls.” In short, as in *Stone*, the goal was to “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” 449 U.S. at 42. While encouraging students not to engage in violence is certainly a laudable goal, the government may not accomplish its secular ends by employing religious means, where secular means are readily available. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123-24 (1982). *See also, School District of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (a

government may not “employ religious means to reach a secular goal unless secular means are wholly unavailing”); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1285-86 (11th Cir. (2004) (holding that “[w]hile promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not” because “the unmistakable message of the Supreme Court’s teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests”) (internal quotation marks omitted).

The fact that the original Ten Commandments display also included a copy of the U.S. Constitution did not mitigate its unconstitutional religious purpose and effect. As the Sixth Circuit has explained, pairing the Ten Commandments with patriotic documents suggests a false equivalence:

In the case of a single religious symbol or document placed alongside symbols of patriotic or political importance, it is understood that “the reasonable observer will see one religious code placed alongside . . . political or patriotic documents, and will understand that the [government actor] promote[s] that one religious code as being on a par with our nation’s most cherished secular symbols and documents. This is endorsement. . . .

ACLU of Ohio v. Ashbrook, 375 F.3d 484, 493 (6th Cir. 2004) (quoting *ACLU v. McCreary County*, 145 F.Supp.2d 845, 851 (E.D. Ky. 2001)) (alterations in original). In *Ashbrook*, the court invalidated a courtroom display of the Ten Commandments placed opposite a poster of the Bill of Rights. Each document was identical in size, typeface, and framing, and each contained the words “the rule of law” in large type at the top. The court found that “the Bill of Rights poster does nothing to negate the endorsement effect of the Ten Commandments poster” There was no secular connection between the Bill of Rights, “a legal document securing the rights of parties appearing in [the judge’s] courtroom and binding [him] as a jurist,” and the Ten Commandments, which “bind no jurist and are not ‘law’ in any courtroom” *Ashbrook*, 375

F.3d at 494. Thus, “[b]y placing the Decalogue in apparent equipoise with the Bill of Rights in this manner, [the judge] has created the effect of an endorsement of a particular religious code, vis a vis the Ten Commandments, by the government.” *Id.* See also *Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (holding unconstitutional a monument on statehouse grounds containing Ten Commandments, Bill of Rights, and preamble to state constitution, noting that a reasonable observer would “reasonably believe that [the monument] impermissibly links religion and law,” and “that the state approved of such a link and was sending a message of endorsement.”) This message could only be exacerbated by the placement of the Ten Commandments with patriotic documents in a public school, where impressionable young people are particularly susceptible to religious indoctrination.

2. *The Second Display: Retains the Religious Purpose of the First*

The sequence of events shows that the second display, containing the Ten Commandments surrounded by historical documents, was merely a continuation of the school board’s longstanding policy and practice of displaying the Ten Commandments, modified so as to appeal to a court. On January 20, 2011, prompted by community outrage, the school board reversed the superintendent’s decision to replace the Ten Commandments with the Declaration of Independence, voting unanimously “to put the Ten Commandments back up.” The Board member who made the motion “to put the Ten Commandments back up” later testified that she did so, in part, because she is a Christian and believes the Ten Commandments are “a document . . . for anyone to live by.” The display was taken down only after the superintendent notified the board on February 22, 2011 that Liberty Counsel would not represent it if the displays remained in their existing form.

The so-called historical documents display arose directly from the controversy over the first display. It was presented to the school board at its very next meeting, on March 15, 2011, and was approved by the school board by June 7, 2011. In approving the display, the board also approved an accompanying resolution declaring that the documents are not merely intended to teach students about American history, but to “positively contribute to the . . . moral character of students” and “instill qualities desirable of students in our schools.” (Ex. 28, Resolution at 1.) Under these circumstances, as in *McCreary*, “[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier display[.]” 545 U.S. at 872.

3. The Additional Documents: Renew the Religious Purpose

On March 15, 2012, the school board approved the additional documents submitted by Pastor Wilburn specifically “to show in a more profound way our Christian heritage from those historical documents.” (Ex. 2, Wilburn dep. at 42.) Consistent with this objective, all of the documents have prominent religious references. For example, the Fundamental Orders of Connecticut begins:

For as much as it hath pleased Almighty God by the wise disposition of his divine providence so to order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and upon the River of Connectecotte and the lands thereunto adjoining; and well knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require; do therefore associate and conjoin ourselves to be as one Public State or Commonwealth; and do for ourselves and our successors and such as shall be adjoined to us at any time hereafter, enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus which we now profess, as also, the discipline of the Churches, which according to the truth of the said Gospel is now practiced amongst us; as also in our civil affairs to be guided and governed according to such Laws, Rules, Orders and Decrees as shall be made, ordered, and decreed as followeth:

Fundamental Orders of Connecticut, available at

http://avalon.law.yale.edu/17th_century/order.asp (last visited 4/4/12). *See also* George

Washington's Farewell Address, available at

http://avalon.law.yale.edu/18th_century/washing.asp (last visited 4/9/12) ("Whatever may be

conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."); Northwest Ordinance, available at

http://avalon.law.yale.edu/18th_century/nworder.asp (last visited 4/9/12) (Religion, morality, and

knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged); First Charter of Virginia, available at

http://avalon.law.yale.edu/17th_century/va01.asp (last visited 4/9/12) ("We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages . . .")

Three of the additional documents – Thomas Jefferson's Letter to the Danbury Baptists, 1779 Thanksgiving Proclamation, and Letter to Reverend Samuel Miller – and a page and a half of the explanation document (Ex. 35 at 2-5) are dedicated to disputing the notion that Jefferson was a strong supporter of the separation of church and state. According to Pastor Wilburn, these documents are meant to show that the statement in the Letter to the Danbury Baptists that the First Amendment builds "a wall of separation between Church & State" has "been taken completely out of context of what he meant." (Ex. 2, Wilburn dep. at 47-48). The explanation

document claims that, when the Letter to the Danbury Baptists is read with the Thanksgiving Proclamation and the Letter to Reverend Samuel Miller, it is apparent that Jefferson thought that separation of church and state applied only to the federal government and not to state governments.⁷ The explanation document is thus used to argue that Jefferson supported endorsement of religion by the states, and, implicitly, that a public school's endorsement of the Ten Commandments as a religious doctrine is consistent with our Founders' ideas of religious freedom.

By approving the documents submitted by Pastor Wilburn along with the explanation document, the school board ratified the religious message that is intended to be, and actually is, conveyed by the documents.

As a whole, the history of the display unmistakably demonstrates a religious purpose that begins with the original unconstitutional display, is carried through to the second display, and is reaffirmed by the new documents added this year.

B. The Content of the Display Indicates a Religious Purpose

In addition to the history of the Ten Commandments display, *McCreary II* noted that a religious purpose was evidenced by the fact that the “selection of posted material [did not] suggest a clear theme that might prevail over evidence of the continuing religious object.” *McCreary*, 545 U.S. at 872. The Court was skeptical that the documents in the display, along with the explanation document (which provided the same explanation for the Ten Commandments as the explanatory document in the Narrows display here), presented a cohesive educational message:

In a collection of documents said to be “foundational” to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna

⁷ Much of this argument in the explanations document was drafted by Richard Mast at Liberty Counsel. *Compare* Ex. 35 at 8-9 (Wilburn's draft explanation document) *with id.* at 3-5 (final explanation document).

Carta even to the point of its declaration that “fish-weirs shall be removed from the Thames.” If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the Ten Commandments' “influence is clearly seen in the Declaration”; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives “from the consent of the governed.” If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

Id. at 872-73. The same could be said of the nearly identical Narrows High School display, except that the apparent religious purpose of the display raises even greater concern in the context of a public school.

Further undermining the school board's contention that the Ten Commandments is posted merely as a historical document is the fact that school board members who voted in favor of the display could not explain how the Ten Commandments influenced the Declaration of Independence or any of the founding principles or documents of our country. School board members did say that the Declaration mentions a Creator, and that the Founders believed in God. But they were as baffled as the hypothetical observer in *McCreary II* when it came to the specific influence of the Ten Commandments. (Ex. 10, Whitehead dep. at 30-40; Ex. 11, Buckland dep. at 43-45, 76-77.)

The religious purpose is also illustrated by the text of the Ten Commandments as posted in the Narrows High School display. Rather than simply including the commandments themselves, which, according to defendants' theory, would have been familiar to the Founders and influenced their thinking, the document also includes the following passage:

According to ancient scripture, the Hebrews were cast out of Egypt by Pharaoh and made to wander through the desert in search of the promised land. God spoke to the prophet Moses on Mount Sinai in the Egyptian desert, where he ordered Moses to take his commandments to his people, so they could live according to his wishes. These laws form the basis of the modern religions of Judaism and Christianity.

Ex. 32. This passage not only offers a specific interpretation of the book of Exodus, it assumes and broadcasts the truth of that account. Bobby Lilly acknowledges that this passage is not consistent with the goal of “not put[ting] anything that was going to suggest that the Ten Commandments were divinely inspired.” Ex. 24, Lilly dep. at 58-59. Nonetheless, the school board, with full opportunity to review the documents, voted to approve the display including this passage.

Finally, the additional documents submitted by Pastor Wilburn, which are replete with religious references and were chosen with the explicit purpose of demonstrating the nation’s “Christian heritage” – similar to the second *McCreary II* display -- further verifies the religious purpose of the display.

C. The Community’s Response to the Controversy, as Viewed by a Reasonable Observer, Confirms the Religious Purpose of the Display.

The history and content of the display, by themselves, are enough to establish the school board’s religious purpose. If additional confirmation were needed, however, it could be found in the reactions of the community to the Ten Commandments issue, as seen through the reasonable observer lens.

After the superintendent initially removed the first display, a public outcry ensued, with approximately 200 residents attending the January 20, 2011 school board meeting to protest. The religious motivation of the attendees was obvious. Pastor Wilburn, after explaining the history of the display, said, “I can tell you that God has never done us a disservice in this county and he’s blessed us with the beauty and all we have so we certainly want to honor him by posting his word in the eyes of our students and all that walk the halls.” Pastor Creger, said that “in the past, Christians have not stood up, they allowed Madalyn Murray O’Hair [sic] to take prayer out

of schools. . . . It was never our forefathers' idea for the Ten Commandments and for God to be taken out of the system." Eric Gentry, the chair of the Giles County Board of Supervisors, said that he "grew up with prayer still in the schools We turned out all right I talked to all of my board members last night and today. Don't remove [the Ten Commandments]. We are behind you." Although the matter was not on the agenda, after hearing these comments, the board immediately voted to re-hang the Ten Commandments in the schools.

When the board again removed the displays, pursuant to legal advice, on February 22, 2011, more public outrage erupted. Local pastors distributed signs and magnets displaying the Ten Commandments, which were displayed on lawns and cars throughout the County, all readily apparent to the reasonable Giles County resident. A reasonable observer would also note the media reports of the March 7, 2011, Giles High School walkout in support of display of the Ten Commandments. The media noted that a local radio host led the students in prayers. One student protester said, "God went through so much for us, so we are going through just this little bit today." Another student said, "This is Giles County and Christ is a big, big, big part of Giles County. For those who don't like it, go somewhere else."

Reasonable observers would be aware of the letters to the editors of local newspapers expressing the views of their fellow citizens, who overwhelmingly saw the controversy in a religious light. Of 94 letters to the editor printed in the Roanoke Times and the Bluefield Daily Telegraph from January 2011 and January 2012, 80, or 85.11%, viewed the controversy in religious terms, and saw the Ten Commandments, as set forth in the displays at issue, as religious rather than historical documents, including large majorities of both supporters and opponents of the displays. Notably, the perception of the Ten Commandments as a religious document persisted even after March 15, when Bobby Lilly presented the concept of displaying

the Ten Commandments along with historical documents relevant to American history. *See also* Ex. 10, Whithead dep. at 45-46 (noting that when constituents asked him about the issue, they referred to “the Ten Commandments” rather than to historical documents.)

When Lilly presented the actual documents for the proposed display at the May 19, 2012 school board meeting, a large number of citizens were present, some of them wearing Ten Commandments t-shirts or carrying Ten Commandments posters, and many bused to the meeting by Pastor Wilburn’s church. Pastor Wilburn, speaking at the meeting, emphasized that “We are basically a Christian nation,” and “I believe that we as Christians and [sic] we wanted to maintain a Christian presence today.” (Ex. 25, May 19, 2011 Sch. Bd. News Release at 3.) According to news reports of which a reasonable observer would be aware, on May 20, 2011, citizens held a “Ten Commandments rally” to demand the posting of the Ten Commandments in the Giles County Public Schools. One demonstrator said, “We are strong Christians and are not going to back down...we just want people to know we really need the Ten Commandments in our school system.”

It was in the context of all of this activity, in which the community and its religious leaders made clear that they wanted the Ten Commandments in school for religious reasons, that the board authorized the Ten Commandments display at its June 7, 2011 meeting. An objective observer would reasonably conclude that the purpose of the display was to satisfy the religiously motivated public demands that the Ten Commandments be posted in the schools.

D. The School Board Has Done Nothing to Repudiate the Apparent Religious Purpose of the Display

Finally, despite the widespread public perception that the posting of the Ten Commandments had a religious purpose, the school board took no official action to disclaim that purpose. Having removed the first Ten Commandments display only due to legal pressure, the

school board never repudiated that display or its religious purpose. Having observed the Ten Commandments signs and car magnets around the county, and listened to citizens' religiously motivated comments at school board meetings, school board members never took action to distance themselves from the public's clearly religious understanding of the issue. Nor did the school board take the simple step of including a notice with the display disclaiming any attempt to inculcate the moral values included in the documents, including the Ten Commandments. Instead, the board passed a resolution explicitly stating that the documents were intended to instill "moral character" and "desirable qualities" in students. These undisputed facts further bolster the conclusion that Defendants' predominant purpose was religious and that, as in *McCreary II*, any claims of secular purpose by the Board have been adopted merely as a "litigating position." See *McCreary*, 545 U.S. at 871; see also *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 448 (6th Cir. 2010) (affirming district court's permanent injunction, issued on remand, against historical foundations displays held unconstitutional by Supreme Court and noting that resolutions adopted during litigation "provided little evidence that Defendant's actual purpose has changed and are of minimal significance in light of the evolution of the evidence"). Accordingly, Plaintiffs are entitled to summary judgment.

II. THE TEN COMMANDMENTS DISPLAY IMPROPERLY ENDORSES RELIGION.

Posting the Ten Commandments in public schools is religious not only in primary purpose but in primary effect: "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. The display of the Ten Commandments in a prominent place lays the imprimatur of the school on that document. "School sponsorship of a religious message is impermissible because it sends the ancillary message to . . . nonadherents

‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”

Santa Fe Indep.Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000). *See also Washegesic*, 33 F.3d at 684 (portrait of Jesus in school hallway unconstitutional because it may be seen “as a governmental statement favoring one religious group and downplaying others”).

A reasonable student observer, aware of the history and evolution of the Ten Commandments display, its context, and its content would unquestionably perceive the display as broadcasting a message of religious endorsement. Indeed, as detailed above, the community at large and the student body have understood the controversy over the Ten Commandments display as a religious one, with support for the display equivalent to support for God and Christianity. This type of “effect” evidence is discussed in *Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707 (M.D. Pa. 2005). There, the court analyzed letters to the editor regarding a controversy over teaching intelligent design (ID) in the schools. The court noted that most of these letters addressed the controversy in religious terms, and 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 listener's 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.

400 F. Supp. at 733-34.

In this case, as well, large majorities of letters to the editor viewed the Ten Commandments issue, and the document itself, in religious terms. As in *Kitzmiller*, those who supported the display did so because they believed that the Ten Commandments’ religious

message was appropriate for the public schools, while those who opposed it did so because they believed that public schools should not teach religion.

Other evidence also indicates that members of the community saw the controversy over posting the Ten Commandments, with or without other documents, to be a religious issue. For example, citizens came to a school board meeting at which Bobby Lilly presented the revised display with t-shirts and bumper stickers bearing the Ten Commandments (not the Declaration of Independence or Lady Justice), and citizens subsequently held a rally for the Ten Commandments (not the Star-Spangled Banner or the Bill of Rights). Pastor Creger testified that the issue so inflamed the community's religious sensibilities that his congregation increased. (Ex. 7, Creger dep. at 18-19.) Like the community members who attended board meetings, wrote letters, and displayed signs, a reasonable student observer would see the school board's ultimate decision to post the Ten Commandments with other documents conveying an explicit message of support for religion and the religious tenets set forth in the Decalogue.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant their Motion For Summary Judgment, declare the Narrows High School Display unconstitutional, and enjoin further display of the Ten Commandments in the public schools of Giles County.

Respectfully submitted,

DOE 1
DOE 2

By:

_____/s/
Rebecca K. Glenberg (VSB #44099)

Thomas O. Fitzpatrick (VSB #80364)
American Civil Liberties Union of Virginia
Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org
tfitzpatric@acluva.org

Frank M. Feibelman (VSB #13877)
Cooperating Attorney for the ACLU of Virginia
5206 Markel Rd., Suite 102
Richmond, Virginia 23230
(804) 355-1300
FAX: (804) 355-4684
frank@feibelman.com

Patrick C. Elliott
WI Bar #1074300 (*pro hac vice*)
Freedom From Religion Foundation
304 W. Washington Ave
Madison, Wisconsin 53703
(608) 256-8900
Fax: (608) 204-0422
patrick@ffrf.org

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2012, I filed the foregoing document with the Clerk of Court using the ECF system, which will send a notice of electronic filing to the following:

Stephen Crampton
Mary E. McAlister
Richard L. Mast, Jr.
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
court@lc.org

/s/
Rebecca K. Glenberg (VSB #44099)
American Civil Liberties Union of Virginia

Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org