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

FREEDOM FROM RELIGION FOUNDATION, INC., DOE 4, by Doe 4's next of friend and parent Doe 5, who also sues on Doe 5's own behalf, Plaintiffs, vs. CONNELLSVILLE AREA SCHOOL DISTRICT, Defendant.	:	Civil Action No. 2:12-cv-01406

BRIEF IN SUPPORT OF MOTION TO DISMISS AND MOTION TO STRIKE

Defendant, the Connellsville Area School District, by and through its attorneys John W. Smart, Esquire, Amie A. Thompson, Esquire and the law firm of Andrews & Price, file the following Brief in Support of Defendant's Motion to Dismiss and Motion to Strike pursuant to Rules 12(b)(1), 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure.[1]

I. INTRODUCTION

Plaintiffs, the Freedom From Religion Foundation, Inc. ("FFRF") of Wisconsin, Doe 4, by Doe 4's next friend and parent Doe 5, who also sues on Doe 5's own behalf (collectively referred to as "Plaintiffs"), challenge a decades-old monument inscribed with a nonsectarian version of the Ten Commandments located on the grounds of the Connellsville Area School District ("District" or "Defendant"). (Complaint at ¶¶1, 13; Exhibits 1 and 2 to the Complaint). The monument is currently covered by a large wooden box. (Complaint at ¶53). Plaintiffs

[1] Defendant directs this Court to the case of Freedom From Religion Foundation, Inc., et al. v. New Kensington-Arnold School District, Civil Action No: 2:12-cv-01319, wherein a Motion to Dismiss and Motion to Strike is currently pending before the Honorable Judge Terrence McVerry. In that case, the Court will be addressing legal arguments that are nearly identical to those presented here.

contend that the covered monument, which was originally presented to the District by the Fraternal Order of the Eagles in 1957, signifies an unconstitutional endorsement of religion. (Complaint at ¶¶18, 26). The mere presence of this historic monument, under sheets of wood, is alleged to be coercive, (Complaint at ¶28), instructive, (Complaint at ¶30), and evidencing a favored religious view within the District. (Complaint at ¶28). Plaintiff Doe 5 also alleges that the presence of the covered Ten Commandments monument usurps her parental authority over the religious and non-religious education of her child. (Complaint at ¶¶ 29, 54).

To support their claim, Plaintiffs allege facts regarding the actions of private citizens and organizations. (See Complaint at ¶¶34, 37, 38, 39, 46, 47, 48, 50, 51, and 52). These allegations are unrelated to the controversy between Plaintiffs and the Connellsville Area School District and threaten to prejudice the District or otherwise confuse the issue at hand. In particular, the allegations have no bearing on whether the presence of the Ten Commandments monument on District property deprives, or has deprived, Plaintiffs of rights secured by the First and Fourteenth Amendments to the United States Constitution. Therefore, should this Court decide not to dismiss Plaintiffs' Complaint entirely; it must strike the offending allegations pursuant to Federal Rule of Civil Procedure 12(f).

Furthermore, Plaintiff merely alleges the possibility of a future injury, based on an purported arrangement to move the monument to private property, (Complaint at ¶¶40, 41, 43, 60, 64), which is neither violative of the Establishment Clause nor ripe for review. Therefore, should this Court not dismiss Plaintiffs' Complaint entirely, it should alternately dismiss the offending allegations and related claim pursuant to Fed. R. Civ. Pro. 12(b)(1).

Nevertheless, based on the allegations of the Complaint and the current state of the law, Plaintiffs have failed to state a claim for violation of the Establishment Clause. Consequently,

their entire Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

II. STATEMENT OF FACTS[2]

In 1957, the Connellsville Area School District accepted the donation of an approximately five to six-foot-tall stone monument inscribed with a nonsectarian version of the Ten Commandments from the Fraternal Order of the Eagles ("Eagles").[3] (Complaint at ¶¶1, 13; Exhibits 1 and 2). Above the text appears two small tablets surrounded by a floral design; an all-seeing eye superimposed on a triangle (similar to the one appearing on the back of a one-dollar bill); a bald eagle; and the American flag. (Exhibits 1 and 2). Expert testimony has indicated that the all-seeing eye is an Egyptian symbol generally considered to be secular in nature.[4] Below the text are two Stars of David; the Greek letters "chi" and "rho"; and an inscription reading, "Presented to the Connellsville Joint High School by Connellsville Aerie No. 493 Fraternal Order of the Eagles May 13, 1957". (Complaint at ¶18; Exhibits 1 and 2).

The Eagles organization is a national social, civic, and patriotic organization, and the monument is one of many other Ten Commandment monuments donated by the organization to

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[2] Generally, the four corners of the Complaint are the only basis for determining a motion to dismiss. In that regard, the "facts" are taken from the Plaintiffs' Complaint. By no means does the Defendant concur with Plaintiffs rendition of the facts.
In addition, as an exception to the general rule, a Court may also consider documents that are attached to or submitted with a Complaint and any matters incorporated by reference or integral to a claim, items subject to judicial notice, matters of public record, orders, and items appearing in the case record. Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256 (3d Cir. 2006); see also Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 256 n. 5 (3d Cir. 2006) (recognizing that courts may take judicial notice of prior judicial proceedings). Moreover, a district court may consider indisputably authentic documents without converting a motion to dismiss into a motion for summary judgment. Spruill v. Gills, 372 F.3d 218, 223 (3d Cir. 2004).

[3] That the Eagles donated hundreds of monuments bearing the text of the Ten Commandments to communities across the country in an attempt to provide youths with a common code of conduct to govern their actions (and that the Eagles chose nonsectarian language for the Ten Commandments that would be acceptable to Protestants, Catholics, and Jews) is a matter of public record that is well-documented in other cases. See, e.g., ACLU Neb. Found. v. City of Plattsmouth, Neb., 419 F.3d 772 (9th Cir. 2005); Books v. City of Elkhart, 235 F.3d 292, 294-295 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001); State of Colo., 898 P.2d at 1017; Van Orden v. Perry, 545 U.S. 677 (2005) (Stevens, J., dissenting). To the extent Plaintiffs have alleged, "[t]his version of the Ten Commandments is **consistent** with the Roman Catholic version", (complaint at ¶17) (emphasis added), it is also **consistent** with the versions used by Protestants and Jews. See id.

[4] See State of Colo., 898 P.2d at 1017 (analyzing the all-seeing eye).

towns, cities and states in the 1950s and 1960s.[5] A juvenile court judge, seeking to provide troubled youth with a common code of conduct, was the original impetus behind the Eagles' Ten Commandment project.[6]

The monument has remained on District grounds, unobjected to and without incident, for at least 55 years. However, on August 29, 2012, the District's Superintendent, Dan Lujetic, received a letter from Plaintiffs' counsel requesting that the monument be removed and threatening legal action for noncompliance. (Complaint at ¶31). The School District and its officials considered removing the monument. (Complaint at ¶32, 35). In the days following the receipt of counsel's letter, the text of the Ten Commandments monument was covered with plastic. (Complaint at ¶33). On or about September 6, 2012, District employees covered the text of the monument with plywood. (Complaint at ¶36).

The Connellsville Area School District Board of Education ("School Board") held a public meeting on September 12, 2012. (Complaint at ¶48). At the meeting, the School Board approved an agenda item from the Building and Grounds Department providing for a delay in further action concerning the monument until further notice and pending further legal action. (Complaint at ¶49).

On numerous occasions throughout the Complaint, Plaintiffs attempt to attribute the actions of private citizens and organizations to the School District. Plaintiffs specifically impute the behavior of "vandals", (Complaint at ¶¶34, 37), pastors, (Complaint at ¶39), unidentified actors, (Complaint at ¶¶38, 39, 52), "community members and students", (Complaint at ¶46), unidentified "demonstrators", (Complaint at ¶47), "local clergy and community members", (Complaint at ¶48); and 100 members of the general public attending a School Board meeting,

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[5] See ACLU Neb. Found., 419 F.3d at 773 (discussing the Eagles' Ten Commandments project).
[6] See City of Elkhart v. Books, 532 U.S. 1058, 1060 (2001) (denying petition for writ of certiorari) (Rehnquist, C.J., dissenting) (discussing the Eagles' Ten Commandments project).

(Complaint at ¶50), to the Connellsville Area School District. Tellingly, Plaintiffs offer no allegations that connect the actions of these third parties, who are not before this Court, to any employee or official policy maker of the School District.[7]

On September 14, 2012, a large wooden box was placed over the monument. (Complaint at ¶53). The covered monument remains at the School District, and is located near the entrance of the Connellsville Junior High School ("Junior High") auditorium. (Complaint at ¶15). Plaintiffs allege that the District has received or solicited an offer from the Connellsville Church of God to accept the monument and display on Church property bordering the District's high school and one of its athletic fields. (Complaint at ¶¶40-43). Plaintiffs allege that the purpose of this arrangement is to continue to bring students in contact with the monument. (Complaint at ¶44).

Plaintiff Doe 4 is a student at the Connellsville Area Junior High School and identifies as non-religious. (Complaint at ¶¶ 10, 23). She has observed the Ten Commandments monument during the course of the school day this year, and in previous years. (Complaint at ¶21). Doe 5 is the parent of Doe 4 and identifies as an atheist. (Complaint at ¶9, 23). She has observed the monument while conducting necessary business at the school. (Complaint at ¶ 22). Doe 4 and 5 allegedly do not subscribe to the statements inscribed on the Ten Commandments monument. (Complaint at ¶23).

Together, the Plaintiffs allege that they perceive the monument as excluding them, and others, who do not follow the religion or god the monument allegedly endorses. (Complaint at ¶24). Plaintiffs see the monument as an endorsement by the District of the religious principals set

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[7] As argued herein, the activity of these third party individuals and organizations is not attributable to the School District, its employees or policy makers, for purposes of finding an impermissible religious purpose and effect of the monument at issue; and therefore, these allegations must be stricken pursuant to Federal Rule of Civil Procedure 12(f).

forth on the monument. (Complaint at ¶26). Plaintiffs allege that the monument evidences a favored religious view within the District, (complaint at ¶27), places coercive pressure on Doe 4 to adopt the District's favored views, (complaint at ¶28), and usurps the parental authority of Doe 5 over the religious or non-religious education of her child, (complaint at ¶29). Plaintiffs seek various relief, including a declaration that the District's display of the monument is a violation of the Establishment Clause, and an injunction directing the District to remove the monument and not to relocate it near District property.

For the reasons set forth herein, Plaintiffs have not alleged any facts that if established would entitle them to relief under the Establishment Clause. Consequently, Plaintiffs have failed to state a claim for which this Court has jurisdiction or for which relief can be granted.

III. STANDARDS OF REVIEW

A. FEDERAL RULE 12(b)(1) STANDARD OF REVIEW

A complaint may be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). Subject matter jurisdiction is an essential element to every lawsuit and must be demonstrated "at the successive stages of the litigation." Chapman v. Pier 1 Imports (U.S.), Inc., 631 F.3d 939, 954 (9th Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Where subject matter jurisdiction is absent, a court has no discretion and must dismiss the case. Chapman, 631 F.3d at 954.

A central component to subject matter jurisdiction is the question of standing. Lujan, 504 U.S. at 1 (citing Whitemore v. Ark, 495 U.S. 149, 155 (1990)). A party's standing to bring a case is not subject to waiver, and can be used to dismiss the instant case at any time. Fed.R.Civ.P. 12(h)(3); U.S. v. Hays, 515 U.S. 737, 742 (1995). Ripeness also affects justiciability; therefore,

when a claim is unripe, it should be dismissed pursuant to Rule 12(b)(1). See Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285 (3d Cir. 1993).

A motion to dismiss made under Rule 12(b)(1) "may be treated as either a facial or factual challenge to the court's subject matter jurisdiction . . . . In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff. In reviewing a factual attack, the court may consider evidence outside the pleadings." Gould Elecs. v. United States, 220 F.3d 169, 176 (3d Cir.2000) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)).

B. FEDERAL RULE 12(b)(6) STANDARD OF REVIEW

A complaint must be dismissed pursuant to Rule 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 556 (2007). "Factual allegations must be enough to raise a right to relief above a speculative level." Id. at 555. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). In making the plausibility determination, the Court must first separate the factual and legal elements of the claim and "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 (3d Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown 'that the pleader is entitled to relief.' " Iqbal, 129 S.Ct. at 1950 (quoting Fed.R.Civ.P. 8(a)(2))

This Court need not accept inferences drawn by the Plaintiffs if they are unsupported by the facts as set forth in the Complaint. See Cal. Pub. Employee Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)). Nor must this Court accept legal conclusions set forth as factual allegations. Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). Additionally, a civil rights claim "must contain specific allegations of fact which indicate a deprivation of constitutional rights; allegations which are nothing more than broad, simple and conclusory statements are insufficient to state a claim under § 1983." Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987).

C. FEDERAL RULE 12(f) MOTION TO STRIKE STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(f) provides that "[t]he court may strike from a pleading . . . any redundant, impertinent, or scandalous matter." "The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." McInerney v. Moyer Lumber & Hardware, Inc., 244 F.Supp.2d 393, 402 (E.D. Pa. 2002). "Rule 12(f) allows the court to ensure that spurious issues will not pollute the trial." U.S. v. 0.28 Acre of Land, 2009 WL 4408194, *2 (W.D. Pa. 2009).

"Immaterial" matter is that which has no essential or important relationship to the claim for relief. Conklin v. Anthou, 2011 WL 1303299, *1 (M.D. Pa. 2011) (citations omitted). "Impertinent" matter consists of statements that do not pertain, and are not necessary, to the issues in question. Id. Scandalous allegations may be stricken if the matter alleged, "bears no possible relation to the controversy or may cause the objecting party prejudice." See Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir. 1992).

IV. ARGUMENTS

A. PART OF THE COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

The doctrine of standing derives from Article III of the United States Constitution, which limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. Art. III, § 2. The "irreducible constitutional minimum" of standing requires that a plaintiff establish three elements in order to invoke federal jurisdiction: injury, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted). First, the plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent. Id. Second, the plaintiff must establish a causal connection between the injury and the conduct complained of. Id. Third, the plaintiff must establish that it is likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." Id.

These requirements are the "bedrock" that "protects the system of separated powers and respect for the coequal branches by restricting the province of the judiciary to 'decid[ing] on the rights of individuals.' " In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 244 (3d Cir. 2012) (citations omitted). The Plaintiffs bear the burden of establishing the existence of standing by alleging facts that plausibly establish the three elements described above. Id.

The Court of Appeals for the Third Circuit recently held that a district court must apply a "plausibility" standard when analyzing whether the factual allegations of a complaint, taken as true, show that the plaintiff possesses Article III standing: "With respect to 12(b)(1) motions in particular, the plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent

with such a right." In re Schering Plough, 678 F.3d at 244 (quoting Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007)).

With regard to the alleged arrangements to move the Ten Commandments monument to the Connellsville Church of God, injury in fact becomes a significant obstacle to the justiciability of Plaintiffs' claim. This is so, because a plaintiff must allege some form of injury as a result of the defendant's conduct that is "distinct and palpable," not "abstract or conjectural or hypothetical." Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005).

Plaintiffs merely speculate that Doe 4 will view the Ten Commandments monument *if* it is moved to private church property and *if* it is placed adjacent to the District's athletic field. (See Complaint at ¶45). This is simply an abstract and hypothetical allegation of some future possibility of harm. See Danvers Motors Co., 432 F.3d at 291. It is clear that this issue is not ripe for review, as there has been no injury or any certainty of a future injury. When a claim is unripe, it must be dismissed pursuant to Rule 12(b)(1). See Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285 (3d Cir. 1993). Therefore, all of Plaintiffs' allegations regarding an alleged arrangement to display the monument on the private property of the Connellsville Church of God, and any related claim under the First and Fourteenth Amendments to the U.S. Constitution must be dismissed pursuant to Rule 12(b)(1).

B. THE REMAINING COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

1. Plaintiffs' Claim is Foreclosed by Van Orden v. Perry

Plaintiffs' Establishment Clause claim is foreclosed by the United States Supreme Court's decision in Van Orden v. Perry, 545 U.S. 677 (2005). In Van Orden, the Court held that the State of Texas did not violate the Establishment Clause when it accepted a Ten Commandments monument from the Eagles (a monument virtually identical to the one at issue

here) and displayed it on the grounds of the Texas State Capitol. Id. To this day, the monument stands on the Texas State Capitol to "commemorat[e] the 'people, ideals, and events that compose Texan identity.' " Id. at 682 (citing Tex. H. Con. Res. 38, 77th Leg. (2001)).

In the plurality opinion finding no Establishment Clause violation, Chief Justice Rehnquist, (joined by Justices Scalia, Kennedy, and Thomas), provided that the Court's Establishment Clause analysis would be "driven both by the nature of the monument and by our Nation's history." Id. at 686. Acknowledging the history and significance of the Ten Commandments, the Court distinguished the "passive use" of the Eagles' Ten Commandments monument by the State of Texas from the impermissible use of the text by the State of Kentucky, which had mandated by statute that the text be posted inside every public classroom. Id. at 691 (distinguishing Stone v. Graham, 449 U.S. 39 (1980)). After a detailed discussion of our Nation's history regarding the use of the Ten Commandments and other religious symbols, id. at 683-90, Chief Justice Rehnquist, with a fifth vote from Justice Breyer concurring in the judgment, concluded that the State did not violate the Establishment Clause by its display of the Eagles' Ten Commandments monument on Capitol grounds. Id. at 691-692 ("We cannot say that Texas' display of *this monument* violates the Establishment Clause of the First Amendment") (emphasis added).

Justice Breyer, concurring in the judgment, agreed that the text of the Ten Commandments conveys a religious message, but cautioned, as did Chief Justice Rehnquist, see id. at 690, that focusing on the religious nature of the message alone cannot resolve an Establishment Clause case. Id. at 698. Instead, the context in which the text is used must also be considered. According to Justice Breyer, the State of Texas displayed the monument on its Capitol to communicate both a secular and a religious message. Id. He concluded, however, that

the "circumstances surrounding the display's placement on the Capitol grounds and its physical setting suggest that the State" intended the secular aspects of the monument's message to predominate, despite the monument's religious content. Id. at 701 (Breyer, J., concurring in judgment).

Finally, the Ten Commandments monument had stood on the Texas State Capitol grounds for forty years without a legal challenge. In Justice Breyer's view, "those 40 years suggest more strongly than can any set of formulaic tests that few individuals ... are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort" to promote, endorse, or favor religion. Id. at 702-703.

Like the Ten Commandments in Van Orden, the longstanding Eagles' Ten Commandments monument in this case makes passive and permissible use of the text to acknowledge, in part, the role of religion in our Nation's heritage. (See also arguments, *infra*, acknowledging the parallel moral and ethical messages). As the Supreme Court recognized, similar references to and representations of the Ten Commandments on government property are replete throughout our country.[8] In addition, the Supreme Court has recognized the role of religion in our Nation's history in numerous opinions. See, e.g., Engel v. Vitale, 370 U.S. 421, 434 (1962) (noting that the "history of man is inseparable from the history of religion"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212 (1963) (acknowledging that "religion has been closely identified with our history and government"); Lynch v. Donnelly, 465 U.S. 668, 675 (1984) ("Our history is replete with official references to the value and invocation of Divine

[8] Buildings housing the Library of Congress, the National Archives, the Department of Justice, the Court of Appeals and District Court for the District of Columbia, and the United States House of Representatives all include depictions of the Ten Commandments. See Van Orden. 545 U.S. at 688-89 n.9 (listing additional examples of government buildings and monuments reflecting the prominent role religion has played in our Nation's history). Indeed, in the United States Supreme Court's own Courtroom, a frieze depicts Moses holding tablets that represent the Ten Commandments, and the Ten Commandments decorate the metal gates and doors around the Courtroom. Id. at 689.

guidance ...."); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in judgment) (recognizing that "patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound").

The Supreme Court has also approved certain government activity that directly or indirectly recognizes the role of religion in our nation and our schools. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002) (upholding school voucher program); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (permitting religious school groups' use of public school facilities); Agostini v. Felton, 521 U.S. 203 (1997) (allowing public employees to teach at religious schools); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995) (permitting disbursement of funds from student activity fees to religious organizations); Lynch, 465 U.S. at 687 (upholding Christmas display including a creche); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (upholding legislative prayer); Mueller v. Allen, 463 U.S. 388, 391 (1983) (allowing tax deduction for certain religious school expenses).

Given this "rich American tradition of religious acknowledgments," Van Orden, 545 U.S. at 690, the display of the Eagles' Ten Commandments monument cannot be held to violate the Establishment Clause, particularly in light of the Supreme Court's binding case precedent. See ACLU Neb. Found. v. City of Plattsmouth, Neb., 419 F.3d 772, 776-777 (8th Cir. 2005) ("Van Orden governs our resolution of this case. Like the [Eagles'] Ten Commandments monument at issue in Van Orden, the Plattsmouth [Eagles'] monument makes passive-and permissible-use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage."); Card v. City of Everett, 520 F.3d 1009, 1021 (9th Cir. 2008) ("Van Orden controls our decision. Accordingly, the City of Everett's [Eagles'] Ten Commandments display does not run afoul of the Establishment Clause[ ]. . . .").

Van Orden clearly stands for the proposition that a longstanding display of an Eagles' Ten Commandment monument on government property does not violate the Establishment Clause of the First Amendment.[9] As Plaintiffs' Complaint is based upon a display of a virtually identical Eagles' Ten Commandments monument, Plaintiffs' claim is simply foreclosed by the holding in Van Orden.

Although Plaintiffs Establishment Clause challenge is essentially identical to the one raised in Van Orden, Plaintiff will likely argue that Van Orden is not binding precedent. Plaintiffs may contend that Van Orden, and in particular, part of Justice Breyer's separate opinion concurring in the judgment, stands for the proposition that such monuments are not to be displayed on school grounds. Id. at 703 (recognizing that the monument in Van Orden was on State Capitol grounds, not school grounds). However, the dicta in Justice Breyer's concurring opinion is not dispositive or binding in this matter. To be clear, Justice Breyer's statement merely distinguished Van Orden from Lee v. Weisiman, 505 U.S. 577 (1992) and Stone v. Graham, 449 U.S. 39 (1980).

In Lee, the Supreme Court held that reciting a prayer during a high school graduation violated the First Amendment. 505 U.S. at 592–93. The Court reasoned that circumstances common to a high school graduation coerced those attending to join in the prayer, whether or not doing so violated their personal religious beliefs. Id.

The circumstances here, and in Van Orden, are entirely different. For it was not merely the school setting that Justice Breyer was arguably recognizing as distinguishable, but the

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[9] Prior to Van Orden, the public ownership and display of the Eagles' Ten Commandments monument was upheld as constitutional by other courts. See, e.g., Anderson v. Salt Lake City Corp., 475 F.2d 29, 33 (10th Cir. 1973) (concluding that an Eagles' Ten Commandments display was secular in purpose and effect); State of Colo., 898 P.2d at 1013 (Court concluded there was neither religious purpose in, nor religious effect from, an Eagles monument because (1) the version of Ten Commandments used was not that of any particular sect, (2) the monument included various secular and sacred symbols of different religions, and (3) the Eagles' purpose for donating the monument was secular-specifically, providing a code of behavior for wayward youth.).

manipulative, coercive, and restraining conduct by the State evidenced in Lee. Here, the simply passive monument cannot be seen as coercive. Analogous to Van Orden, "[t]he mere presence of the monument along [Plaintiffs'] path involves no coercion." See 545 U.S. at 694 (Thomas J., concurring).

In Stone, the Supreme Court held that a recently enacted statute requiring the posting of the Ten Commandments in all public school classrooms was an endorsement of religion by the state of Kentucky. 449 U.S. at 39. Using the Lemon analysis, the Stone majority found that the legislature had no secular purpose for requiring postings, and disposed of the case without reaching the statute's religious effect or its potential for fostering a government entanglement with religion. Id. The Court declined to hear oral argument and declined briefing on the issues.[10]

The Court's decision in Stone is factually and legally distinguishable from this case. Stone is factually distinguishable because the newly required postings essentially encouraged schoolchildren to meditate upon the Ten Commandments during the school day. Id. at 42. Those concerns are absent here, where the Eagles' Ten Commandments monument is displayed outside the School District and does not lend itself to meditation. Furthermore, the pre-eminent purpose of the longstanding Eagles' Ten Commandments monument, which is inscribed with symbols such as the American flag and bald eagle, is predominantly secular and illustrative of moral and historic ideals. See Van Orden, 545 U.S. at 702 (Breyer, J., concurring in the judgment).

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[10] Justice Rehnquist, in his dissenting opinion, stated that the majority did not properly acknowledge the Kentucky legislature's findings: "This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due." Stone, 449 U.S. at 43-44 (Rehnquist, J., dissenting). Acknowledging the religious nature of the Ten Commandments, Justice Rehnquist nevertheless insisted that the Decalogue's impact on the development of secular legal codes "permitted [Kentucky] to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import." Id. at 45 (Rehnquist, J., dissenting). Justice Rehnquist found inappropriate and unwarranted a "cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky." Id. at 47 (Rehnquist, J., dissenting).

Stone is also legally distinguishable, for the law has evolved in the thirty-two years since the Supreme Court rendered its decision. Since Stone, the Supreme Court's opinions on the constitutionality of government displays has brought substantive modifications to its Establishment Clause jurisprudence. See e.g. Van Orden, 545 U.S. at 677; Lynch, 465 U.S. at 668; County of Allegheny v. ACLU ("Allegheny"), 492 U.S. 573 (1989). These decisions have effectively shifted the Court's focus away from the Lemon analysis relied on in Stone, to either a coercive test analysis or an endorsement test analysis, which turn on how a reasonable observer would perceive the display. In effect, Stone simply does not control this matter. See Freethought Soc'y of Greater Phila. v. Chester County ("Freethought"), 334 F.3d 247, 262 (3d. Cir. 2003) (recognizing that "Stone is fairly limited to its facts.").

Nonetheless, the Supreme Court has never determined, in Stone or any other case, that the Ten Commandments lack a secular purpose. Indeed, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." 449 U.S. at 41-42. However, the Ten Commandments have a significant secular purpose as well, "because they have made a substantial contribution to our secular legal codes." Even the Supreme Court in Stone opined that "integrated into the school curriculum" the Ten Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics." Id. at 42. As the Seventh Circuit Court of Appeals recognized, "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." Books v. City of Elkhart, Ind., 235 F.3d 292, 302 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001).

To survive a motion to dismiss, Plaintiffs must demonstrate that they are entitled to relief. The mere conclusion that such relief is warranted is insufficient to survive dismissal. A motion

to dismiss must be granted when the factual allegations do not rise to the level of being plausible. Here, Van Orden forecloses Plaintiffs' case, as Plaintiffs' Complaint cannot state a plausible claim for relief. Nor can the Supreme Court's holding in Stone, provide a basis for Plaintiffs' factually and legally distinguishable claims. Therefore, Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief can be granted.

However, as noted herein, if this Court should find that Van Orden does not in fact foreclose Plaintiffs' claim, it should nevertheless dismiss the Complaint for failure to allege facts sufficient to state a claim for violation of the Establishment Clause under the Iqubal and Twombly pleading standards.

2. Plaintiffs' Claim is Foreclosed by Establishment Clause Jurisprudence

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. The Establishment Clause specifically prohibits the enactment of a law or official policy that "establishes a religion or religious faith, or tends to do so." Lynch, 465 U.S. at 678. This prohibition "applies equally to the states, including public school systems, through the Fourteenth Amendment." Borden v. Sch. Dist. of Twp. East Brunswick, 523 F.3d 153, 175 (3d Cir. 2008).

To determine whether Plaintiffs have failed to state a viable First Amendment claim under Iqubal and Twombly, a review of Establishment Clause jurisprudence is in order. Establishment Clause cases, which often involve challenges to government displays, have appeared inconsistent. See, e.g., Salazar v. Buono, _U.S._, 130 S.Ct. 1803, 1811 (2010) (permitting a legislative land transfer to a private party to preserve a previously enjoined Latin cross on federal land); McCreary County. v. ACLU, 545 U.S. 844, 881 (2005) (finding a recent display of an abridged text of the King James version of the Ten Commandments, including a

citation to the Book of Exodus, in a county courthouse unconstitutional); Van Orden, 545 U.S. at 681 (finding a longstanding display of an Eagles' Ten Commandments monument on state grounds constitutional); Allegheny, 492 U.S. at 579 (finding a nativity scene at the county courthouse unconstitutional and a menorah constitutional); Lynch, 465 U.S. at 671-72 (finding a nativity scene constitutional as part of a municipal Christmas display). Nevertheless, the Supreme Court has analyzed such cases using one of three tests, each of which Plaintiffs' claim arguably fails to survive.

(a) The Establishment Clause Tests

For many years, federal courts utilized the three-pronged framework first set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). However, Lemon has "been the subject of critical debate in recent years." ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ. ("Black Horse Pike"), 84 F.3d 1471, 1484 (3d Cir. 1996); see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys...."). "[I]ts continuing vitality has been called into question by members of the Supreme Court and by its noticeable absence from the analysis in some of the Court's recent decisions." Id. See also Van Orden, 545 U.S. at 686 (describing the Court's reluctance, and ultimate denial, to apply Lemon).

Without overruling Lemon, the Supreme Court has set forth two related tests, the "coercion test," see Lee, 505 U.S. at 577, and the "endorsement test," see Lynch, 465 U.S. at 687-94 (O'Connor, J., concurring). Because Lemon has not been overruled, all three tests remain viable for purposes of determining whether governmental action violates the Establishment

Clause. Therefore, the Defendant will advocate the dismissal of Plaintiffs' claim under all three tests. See, e.g., Modrovich v. Allegheny County ("Modrovich"), 385 F.3d 397, 406 (3d Cir. 2004) (applying both the endorsement test and the Lemon test, "in case a higher court prefers to apply the traditional Lemon test," and ultimately holding that a Ten Commandments plaque affixed to the county courthouse did not violate the Establishment Clause").

i. The Coercion Test

"The coercion test looks at whether the government is 'coerc[ing] anyone to support or participate in religion or its exercise.'" Borden, 523 F.3d at 175 n.18 (quoting Lee, 505 U.S. at 587). Legal coercion has been held to include compulsory "participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups." See Allegheny, 492 U.S. at 660 (citations omitted).

In Van Orden, Justice Thomas professed that the Supreme Court would be well suited to use the coercion test as its standard test. 545 U.S. at 693-694 (Thomas, J., concurring). Justice Thomas specifically opined:

> Our task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses. The Framers understood an establishment 'necessarily [to] involve actual legal coercion.' . . . 'In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.' . . . And 'government practices that have nothing to do with creating or maintaining . . . coercive state establishments' simply do not 'implicate the possible liberty interest of being free from coercive state establishments.'

Id. (Thomas, J., concurring) (citations omitted).

Here, Plaintiffs' claim fails under the coercion test analysis. Simply put, Plaintiffs have failed to allege facts to support that the Eagles' Ten Commandments monument compels them to participate in religion or its exercise. See Borden, 523 F.3d at 175 n.18. The facts that have been alleged are threadbare recitals and conclusory statements of the coercion test, which are

insufficient to state a cause of action under the heightened pleading standards of Iqbal and Twombly. (See Complaint at ¶¶28, 62) ("monument places coercive pressure on Doe 4", "The continued presence of the Ten Commandments … impermissibly coerces students…."). Borrowing Justice Thomas's reasoning in Van Orden, "[t]here is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does [the District] compel [Plaintiffs] to do anything …. The mere presence of the monument along [their] path involves no coercion." See id. at 694 (Thomas J., concurring).

Plaintiffs may argue that the coercion test is inapplicable. However, it is of great significance that, although the Van Orden Court did not distinctly apply the coercion test, the Court's plurality's analysis was consistent with the coercion test formulated in Justice Kennedy's dissent in Allegheny, 492 U.S. at 664, providing that "purely passive" monuments are not coercive, and therefore, not inconsistent with the Establishment Clause. See Van Orden, 545 U.S. at 686, 691 (declaring the Texas monument to be "passive," and a "far more passive use of [the Ten Commandments] … than was the case in Stone" 449 U.S. at 39). Therefore, the coercion test is very much alive in Establishment Clause jurisprudence, and precludes Plaintiffs' from stating a claim for relief in this case.

ii. The Lemon Test and/or the Endorsement Test

To survive an Establishment Clause challenge under Lemon test, the Ten Commandments monument at issue: (1) must have secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive government entanglement with religion. See Lemon, 403 U.S. at 612-613 (citation and quotation omitted). Governmental action is violative of the constitutional prohibition against the establishment of

religion if it violates any one of these three prongs. See Edwards v. Aguillard, 482 U.S. 578, 583 (1987). The test is not rigid, however, and provides "no more than helpful signposts" to the Court. Hunt v. McNair, 413 U.S. 734, 741 (1973). In this case, Plaintiffs do not contend that the display of the Eagles' Ten Commandments monument involves an excessive entanglement with religion; therefore, Defendant confines its analysis to the first two prongs.

Notably, the endorsement test and the second prong of the Lemon framework are essentially the same. Black Horse Pike, 84 F.3d at 1486 ("Whether 'the endorsement test' is part of the inquiry under Lemon or a separate inquiry apart from it, the import of the test is the same."); see also Freethought, 334 F.3d at 269 (describing "effect" prong of Lemon as a "cognate to endorsement"). Therefore, Defendant will succinctly analyze Plaintiffs' claim under each test within this intersecting framework. However, in light of the analysis employed by the Supreme Court in Van Orden, Defendant avows that, second to the coercion test, the endorsement test is most appropriate for the claim before this Court. 545 U.S. at 677 (although the plurality opinion did not articulate a bright-line test, it determined that the Lemon test was not useful in analyzing whether the Eagles' monument inscribed with Ten Commandments violated the Establishment Clause. Instead, it emphasized the history of religious accommodation and acknowledgement in America and refused to conclude that the monument "conveyed the message that the State endorsed religion.").[11]

[11] The Third Circuit has also used the endorsement test in cases involving tangible religious displays or public schools. See, e.g., Stratechuk v. Bd. of Educ., 587 F.3d 597 (3d Cir. 2009) (applying endorsement test to school district's policy regarding performance of celebratory religious music at school-sponsored events); Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004) (applying both the endorsement test and the Lemon test in the context of private evangelism in public schools); Modrovich, 385 F.3d at 401 (applying both the endorsement test and the Lemon test to uphold a challenge of a display of the text of the Ten Commandments on plaque affixed to county courthouse); Freethought, 334 F.3d at 247 (applying both the endorsement test and the Lemon test to a religious display); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (adopting the endorsement test to evaluate claim of selective discrimination against religious displays).

1. First Prong- Purpose Must Not Be To Endorse Religion

"The purpose prong of the Lemon test asks whether the government's actual purpose is to endorse or disapprove of religion.'" Edwards, 482 U.S. at 585 (quoting Lynch, 465 U.S. at 690 (O'Connor, J., concurring)). Under Lemon, if the government action has some secular purpose, then it survives the first prong. Freethought, 334 F.3d at 262 ("[T]he purpose prong of Lemon only requires some secular purpose, and not that the purposes ... are exclusively secular.")

Plaintiffs' allegation that the District simply displays the Eagles' Ten Commandments monument inscribed with a nonsectarian version of the Ten Commandments, accompanied by secular symbols such as a bald eagle and the American flag, is insufficient to state a cause of action for violation of the Establishment Clause, as such allegation does not overcome the first prong of the Lemon Test. (See Complaint at ¶¶13-16; Exhibits 1 and 2). The display of the monument alone is clearly insufficient to show an entitlement to relief, as it does not demonstrate that the District's purpose is to endorse religion. See Edwards, 482 U.S. at 585. To the contrary, the display itself, with its nonsectarian text and secular symbols, evidences its valid secular purpose. Notably, "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Van Orden, 545 U.S. at 690.

Plaintiffs otherwise plead a formulaic recitation of the first prong of the Lemon test, which is insufficient to state a cause of action. See Twombly, 550 U.S. at 555. For example, Plaintiffs' threadbare recitals and conclusory statements that they "perceive the … monument as an endorsement by the District of the religious principals set forth on the monument," (complaint at ¶26), and further perceive it as "evidencing a favored religious view within the District", (complaint at ¶27), does not suffice to state a cause of action for violation of the Establishment Clause. See Edwards, 482 U.S. at 585; Iqbal, 129 S.Ct. at 1949.

Furthermore, given the Supreme Court's pronouncement of a "reasonable observer" standard, Plaintiffs' claim is only actionably if a reasonable person, aware of the history, purpose, and context of the Eagles' monument, would perceive it as an endorsement of religion. See Van Orden, 545 U.S. 682 (affirming the district court's holding that a reasonable observer, mindful of the history, purpose, and context of the Eagles' Ten Commandments monument would not conclude that the state was seeking to endorse religion); see also Black Horse Pike, 84 F.3d at 1486 (Court must adopt the viewpoint of the reasonable observer). While Plaintiffs' Complaint demonstrates the monument's effect on a particularly sensitive person, it fails to allege facts from which a reasonable person would perceive the monument as an endorsement of religion. In fact, the history, purpose and context of the donation of this monument, which are all matters of public record, undermine Plaintiffs' allegation that the District accepted and is displaying the monument to endorse religion.

The rule is clear; courts will not strike down government action under the first prong unless "the action is *entirely motivated* by a purpose to advance religion." Lambeth v. Bd. of Comm'rs of Davidson County, N.C., 407 F.3d 266, 270 (4th Cir. 2005) (emphasis added). Thus, in determining whether this particular display of the Ten Commandments has a valid secular purpose, this Court must evaluate the totality of the circumstances surrounding the donation of the monument.

As evidenced by matters of public record, the Eagles were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "'code of conduct or standards by which to govern their actions.'" Van Orden, 545 U.S. at 677 (citing Brief for Fraternal Order of Eagles as Amicue Curiae, at 4; State of Colo. v. FFRF, 898 P.2d at 1017; Tex. S. Con. Res. 16, 57th Leg., Reg. Sess. (1961) ("These plaques and monoliths have been

presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency")). It was the Eagles' belief that disseminating the message conveyed by the Ten Commandments would help to persuade young men and women to observe civilized standards of behavior, and would lead to more productive lives. See id. It is clear that the District's decision to display of the Eagles' Ten Commandments monument was not motivated by a purpose to advance religion, but rather by a the shared purpose of inspiring youth, curbing juvenile delinquency, and otherwise advancing the monument's history.

Plaintiffs have simply failed to allege enough facts to support their incredulous allegation that the District's purpose for displaying the monument is to endorse religion. Plaintiffs' Complaint, therefore, is insufficient under the first prong of the Lemon test to sufficiently state a cause of action for violation of the Establishment Clause.

2. Second Prong (Endorsement Test) - Effect Must Not Advance or Endorse Religion

Under the second prong of the Lemon test, the principal or primary effect of displaying the Eagles' Ten Commandments monument must neither advance nor inhibit religion. See Lemon, 403 U.S. at 612-613. This means that the District's display "cannot symbolically endorse or disapprove of religion." Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 100 (3d Cir. 2009). As explained herein, the second prong of the Lemon test is nearly identical to the endorsement test. See Black Horse Pike, 84 F.3d at 1486 (whether 'the endorsement test' is part of the inquiry under Lemon or a separate inquiry apart from it, the import of the test is the same."); see also Freethought., 334 F.3d at 269 (describing "effect" prong of Lemon as a "cognate to endorsement").

With regard to the endorsement test, the Supreme Court has inquired whether the challenged governmental action constitutes an impermissible "endorsement" of religion. See,

e.g., Allegheny, 492 U.S. at 592 (1989) (inquiry is whether the government "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred"). Under this test "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Lynch, 465 U.S. at 692 (O'Connor, J., concurring). The endorsement test adopts the viewpoint of a "reasonable observer familiar with the history and context of the display" and asks whether such observer "would perceive the display as a government endorsement of religion." Borden, 523 F.3d at 175 (citing Modrovich, 385 F.3d at 400).

In Salazar v. Buono, Justice Kennedy explained that the right to be free from exposure to anything that hints of religious significance is not absolute. In delivering the opinion for the United States Supreme Court, Justice Kennedy wrote:

> The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm …. The Constitution does not oblige government to avoid any public acknowledgement of religion's role in society …. Rather, [the Constitution] leaves room to accommodate divergent values within a constitutionally permissible framework.

130 S.Ct. at 1803. See also Rosenberger, 515 U.S. at 845-846 (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

Where a monument has stood for decades, special consideration is given for its continued placement. This is so, because removal "may be viewed by many as a sign of disrespect …. [and could be] interpreted by some as an arresting symbol of Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." Id. at 1823 (Alito, J., concurring in part and concurring in the judgment) (comparing Van Orden, 545 U.S. at 704 (Breyer, J., concurring in judgment)).

Plaintiffs' allegation that the District simply displays the Eagles' Ten Commandments monument inscribed with a nonsectarian version of the Ten Commandments accompanied by secular symbols is insufficient to state a cause of action for violation of the Establishment Clause, as such allegations do not survive analysis under the second prong of the Lemon test and/or the endorsement test. (See Complaint at ¶¶15-17; Exhibits 1 and 2). The display of the monument alone is insufficient to show an entitlement to relief, as it does not symbolically endorse religion. As Justice Breyer opined in Van Orden,

> [A] display of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) - a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

545 U.S. at 701 (Breyer, J., concurring in the judgment).

Here, just as in Van Orden, the nonreligious aspects of the monument predominate. For example, the nonsectarian text underscores the ethics-based message. (Exhibits 1 and 2); see id. at 702. The monument's inscribed acknowledgment that the Eagles donated the display distances the District from the religious aspect of the Commandment's message. Id. The setting of the monument by the District's Junior High auditorium does not lend itself to mediation or any other religious activity. (Complaint at ¶16); id.

Most compellingly, at least fifty-five years, have passed in which the monument has gone unchallenged. Just as in Van Orden:

> [T]hose [55] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significant detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practice[e]' to 'compel' any 'religious practice[e]' or to work deterrence' of any religious belief.'

545 U.S. at 702 (Breyer, J., concurring in the judgment) (citation omitted). In fact, those fifty-five years "suggest that the public visiting the [school district] has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage." Id. at 702-703.

Notwithstanding the foregoing, Plaintiffs plead a formulaic recitation of the second prong of the Lemon test and/or the endorsement test. However, these allegations are insufficient to state a cause of action. See Twombly, 550 U.S. at 555. The following are clearly threadbare recitals and conclusory statements of the second prong of the Lemon test and/or the endorsement test:

- Plaintiffs perceive the Ten Commandments monument as an endorsement by the District of the religious principals set forth on the monument. (Complaint at ¶26).
- The continued presence of the Ten Commandments … has the primary effect of both advancing religion generally and advancing the tenants of a specific faith in particular. (Complaint at ¶61).
- The continued presence of the Ten Commandments monument … constitutes an endorsement of religion by the District. (Complaint at ¶65).

Plaintiffs offer no factual allegations describing any action on the part of school district officials and policy makers, other than their simply accepting the Eagles' Ten Commandments monument fifty-five years ago, and choosing not to remove it since then.[12] The Complaint contains not one allegation of an official or policy maker of the District doing anything in modern times to celebrate the monument's existence. In fact, the Complaint is replete with facts to support that the District has suppressed, rather than endorsed, the monument by repeatedly covering it. (Complaint at ¶¶33, 36, 53). In anticipation of this Court's opinion on the matter, the School Board merely declined to remove the monument until further notice and pending further legal action. (Complaint at ¶49).

[12] Plaintiffs' allegations regarding third party individuals, who are not before this court, are immaterial, impertinent and scandalous, and should be stricken pursuant to rule 12(f) for the reasons explained more fully herein.

There are no allegations or evidence of a school district official or policy maker advancing a religious faith, attempting to suppress a non-religious belief, coercing a student or the public, or endorsing any particular religion. In that sense, Plaintiffs' are advocating for a complete prohibition, or a per-se rule, against any government display that contains religious content. Not even the dissenters in Van Orden claimed that the First Amendment prohibited such. See 545 U.S. at 737-746 (opinion of Justice Souter, with whom Justice Stevens and Justice Ginsburg joined, dissenting) (recognizing that the Establishment Clause permits some "recognition" or "acknowledgement" of religion and discussing a number of permissible displays with religious content).

Moreover, this Court "must determine whether, under the totality of the circumstances, the challenged action conveys a message favoring or disfavoring religion." Id. In doing so, this Court must adopt the viewpoint of the reasonable observer and may take into account "the 'history and ubiquity' of [the] practice," since it "'provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.'" Id. (citations omitted). As discussed herein, Plaintiffs' Complaint demonstrates the monument's effect on a particularly sensitive person; but fails to allege facts to demonstrate that a reasonable person would perceive the monument as an endorsement of religion.

Considering the "history and ubiquity" of this Eagles' Ten Commandments monument, and assessing how a reasonable person would view it, it is clear that the monument does not convey a message of endorsement of religion. As explained herein, the monument contains both religious and secular symbols, including an all-seeing eye, a bald eagle, and the American flag. Even if the religions aspects of the monument's appearance and history indicate that it has some

religious meaning, the District is not bound to display only symbols that are wholly secular, or to convey solely secular messages. In determining whether a secular purpose exists, the Supreme Court has simply required that the displays not be "motivated wholly by religious considerations." Lynch, 465 U.S. at 680. The fact that the monument conveys some religious meaning does not cast doubt on the School District's valid secular purposes for its display.

In Allegheny, and in Lynch, the Supreme Court recognized the importance of context in evaluating whether displays of symbols with religious meaning send an "unmistakable message" of government support for, or endorsement of, religion. Allegheny, 492 U.S. at 598-600; Lynch, 465 U.S. at 680. Considering the Ten Commandments monument in the context in which it appears, it sends no such message. The District has displayed the monument outside of the Connellsville Junior High School for at least fifty-five years. The location and presence for so many years, emphasizes the perception by most that the monument has an overall secular purpose. The monument conveys a historical and moral message, not a promotion of religious faith. Perhaps that is why, for five decades, no person has challenged the monument as an unconstitutional endorsement of religion.

C. ALLEGATIONS IN THE COMPLAINT MUST BE STRICKEN

1. Plaintiffs' Immaterial, Impertinent and Scandalous Allegations Must be Stricken from the Complaint

Defendant moves to strike Paragraphs 34, 37, 38, 39, 46, 47, 50, 51, 52, and part of Paragraph 48 (relating to the actions of local clergy and community members), pursuant to Federal Rule of Civil Procedure 12(f). These allegations are so unrelated to the Plaintiffs' claim as to be unworthy of any consideration, and their presence in the pleading throughout the proceeding will certainly be prejudicial to the Defendant.

Under Section 1983, a municipality or local government entity, such as a school district, may only be held liable for acts which it is actually responsible. See Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211, 215 (5th Cir. 1998). A school district may only be held liable where there is a government policy, custom, or practice set forth by a final policy maker of the District that violates a plaintiff's constitutional rights. See id. A necessary element of Section 1983 liability is a violation by state actors, not private individuals. See Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir.1989)

Plaintiffs' allegations in Paragraphs 34, 37, 38, 39, 46, 47, 50, 51, 52, and part of Paragraph 48, relate solely to the actions of private individuals, and not state actors. Therefore, it is clear that such allegations have no essential or important relationship to the claim for relief, consists of statements that do not pertain to the issues in question, bear no possible relation to the controversy, and will cause the Defendant prejudice. See Conklin v. Anthou, 2011 WL 1303299, *1 (M.D. Pa. 2011).

Plaintiffs have failed to allege any practice or policy of the District, as a whole, that violated their Constitutional rights. Instead, their allegations pertain to the criminal conduct of third parties, (see complaint at ¶¶34, 37, 38, 39, 52), for which the District cannot be held liable, and the First Amendment protected speech and expressions of private individuals, (see complaint at ¶¶39, 46, 47, 48, 50, 51), none of whom are employees or official policy makers of the District. These individuals are not before this Court, and the District simply cannot be held liable for their actions, or any injury that may have resulted therefrom. See Dallas Indep. Sch. Dist., 153 F.3d at 215 (under Section 1983, a school district, may only be held liable for acts which it is actually responsible). Therefore, these allegations must be stricken from the pleading under Rule 12(f), as they are simply immaterial, impertinent and scandalous.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant Defendant's motion to dismiss part of the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and dismiss the remaining complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Alternatively, the Defendant requests that this Court strike the aforementioned offending allegations in Plaintiffs' pleading pursuant to Rule 12(f).

Respectfully submitted,

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