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,	:	Civil Action No. 2:12-cv-01406
Plaintiffs,	:	
vs.	:	
CONNELLSVILLE AREA SCHOOL DISTRICT,	:	
Defendant.	:	

DEFENDANT'S REPLY BRIEF TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S 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 this Reply Brief to Plaintiffs' Brief in Opposition. Defendant incorporates by reference the arguments raised in its Brief in Support of its Motion to Dismiss and Motion to Strike.

ARGUMENT

I. PLAINTIFFS FAIL TO PLEAD A CLAIM FOR RELIEF

Plaintiffs argue that Defendant has failed to challenge the legal sufficiency of their Complaint. (Br. in Op. at 8). However, it is clear from Defendant's Brief in Support of its Motion that it properly argued that Plaintiffs' Complaint is legally deficient. While Plaintiffs may wish to diminish the Defendant's argument that the binding Supreme Court precedent in the case of *Van Orden v. Perry*, 545 U.S. 677 (2005) forecloses their claim, it is clear that Defendant properly argued that Plaintiffs' Complaint is factually and legally deficient as a result of the rulings of the high court and its progeny.[1]

[1] 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

Thus, the Defendant's arguments should absolutely not be "disregarded," as these arguments are proper and appropriate challenges to the legal sufficiency of Plaintiffs' Complaint.

II. THE COURT MAY PROPERLY CONSIDER MATTERS SUBJECT TO JUDICIAL NOTICE AND MATTERS OF PUBLIC RECORD

The Plaintiffs argue that this Court should disregard certain facts not contained in their Complaint. (Br. in Op. at 16-17). This argument must fail. While Plaintiffs contend that Defendant has offered no support for its arguments, (Br. in Op. at 18), it is worth noting the arguments that Defendant raised in its Brief in Support. (Def. Br. in Supp. at 3-4, footnotes 2-6).

Generally, the facts in the complaint are the only basis for deciding a motion to dismiss. However, as an exception to the rule, a Court may 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).[2]

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 they chose nonsectarian language) 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).[3]

Is also a matter of public record, and a fact for which this Court may take judicial notice, that the Eagles donated monuments to towns, cities and states in the 1950s and 1960s. See ACLU Neb. Found.,

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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[ ]. . . ."). Even 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); State of Colo. v. FFRF, 898 P.2d at 1017, 1013 (Colo. 1995).

[2] 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).

[3] 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, 545 U.S. at 677 (Stevens, J., dissenting).

419 F.3d at 773 (discussing the Eagles' Ten Commandments project). In State of Colo. v. FFRF, a case that involved the Freedom From Religion Foundation, it was documented that the all-seeing eye is an Egyptian symbol considered to be secular. 898 P.2d at 1017. Furthermore, it is a matter of public record in the case of City of Elkhart v. Books, that a judge, seeking to provide troubled youth with a common code of conduct, inspired the Eagles' Ten Commandment project.[4] 532 U.S. 1058, 1060 (2001).

Finally, there has been no litigation involving the monument at issue, the absence of which is a matter of public record. Therefore, this Court may take into consideration that this monument has stood without incident at all times prior to the letter sent by Plaintiffs requesting that the monument be removed and threatening legal action.

III. PLAINTIFFS' RELIANCE UPON SCHOOL PRAYER CASES IS MISPLACED

This case must be governed by Establishment Clause jurisprudence regarding religious symbols, and should not be governed by school prayer jurisprudence. Nonetheless, the Plaintiffs have heavily relied upon school prayer cases throughout their Brief. (See generally, Br. in Op.).[5] Plaintiffs' reliance upon these cases is misplaced, as such cases are analyzed differently. See Indiana River School District, 653 F.3d 256, 270-271 (addressing school prayer jurisprudence and analyses). Whereas, in cases involving permanent displays of religious symbols, courts analyze, among other things, whether the display was established for a primarily secular, rather than a religious purpose, and whether those who view the display would react to them as secular, with only an incidental religious reference or message, or as primarily a government-based message endorsing a religion. See, e.g., Van Orden v. Perry, 545 U.S. 677 (2005). Thus, Plaintiffs' reliance upon school prayer cases is simply erroneous.

[4] See also 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).

[5] Citing Doe v. Indiana River Sch. Dist., 653 F.3d 256 (3d Cir. 2011); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577, 592 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2001); Alqhuist v. City of Cranston ex rel. Strom, 840 F.Supp.2d 507 (D.R.I. 2012) (prayer banner); and Edwards v. Aguillard, 482 U.S. 578 (1987) (regarding teaching of evolution, not religious symbols).

IV. ALLEGATIONS IN THE COMPLAINT MUST BE STRICKEN

Plaintiffs rely upon *Doe v. Indiana River*, 653 F.3d 256 (3d Cir. 2011), for the proposition that 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), should not be stricken pursuant to Federal Rule of Civil Procedure 12(f). Plaintiffs also contend that Defendant merely supported its position with *Conklin v. Anthou*, 2011 WL 1303299 *1 (M.D. Pa. 2011). These arguments must fail.

To be clear, 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 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).

In *Doe v. Indiana River*, a school prayer case, the actions of School Board Members were directly at issue. 653 F.3d 256, 261 (3d Cir. 2011). The actions of third parties and/or the public at large were never imputed to the School District to confer liability. As the Court explained, the Indian River School Board prayed since the District was formed. *Id.* Then, in 2004, the School Board formalized this practice in a written policy. *Id.* The Court determined that it was this action that violated the Establishment Clause. *Id.* Thus, Plaintiffs' reliance upon this case, for this issue, is misplaced.

The Plaintiffs simply have no legal basis for including allegations that are immaterial, impertinent, and scandalous. It is clear that the allegations in 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), should be stricken pursuant to Federal Rule of Civil Procedure 12(f).

To argue that these allegations pertain to the way a reasonable observer would view this display is questionable at best, (Br. in Op. at 30), as the Defendant received an intent to sue letter from the

Freedom From Religion Foundation prior to any of the public fervor that took place. (Complaint at ¶31) (demand sent on August 29, 2012).

Finally, the Connellsville Area School Board, on September 12, 2012, simply decided to remain neutral and take no action at all.[6] As Plaintiffs' Complaint details, the Board approved an agenda item to "[r]equest approval to delay any further action…." (Complaint at ¶49). The monument has been on the grounds of the Connellsville School District for fifty-five years. (Complaint at ¶18). For fifty-five years the School Board has taken no further action. Thus, despite the public response to the threat of a lawsuit, it is reasonable to infer that the School Board would have continued to maintain the status quo. It is implausible to presume that the neutral response was a result of the public's reaction.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court dismiss the Complaint 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,

ANDREWS & PRICE

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[6] The removal of a religious symbol may send a hostile message (not merely a neutral message) to believers. See Van Orden, 545 U.S. at 698 (Breyer, J., concurring in the judgment).