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. SCHOOL BOARD OF GILES COUNTY, Defendant.	)	Case No. 7:11-cv-00435

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, by counsel, respond to defendant's Motion to Dismiss as follows:

INTRODUCTION

Having passed a resolution finding that the Ten Commandments "positively contribute[s] to the educational foundations and moral character of students in our schools" and expressly allowing the Ten Commandments to be posted in public schools, defendant School Board of Giles County ("School Board") now disclaims any responsibility for the fact that, pursuant to the resolution, the Ten Commandments are now on the wall of Narrows High School. Further, ignoring the Complaint's allegations about the religious history of this controversy, the School Board erroneously contends that cases involving displays posted in a courthouse, with no history of religious intent, should be determinative of this case. Both of these arguments are specious, and the motion to dismiss should be denied.

STATEMENT OF FACTS

For over ten years, a copy of the Ten Commandments was prominently posted in each of the public schools of Giles County. Until earlier this year, the Decalogue was mounted in a single frame along with a copy of the United States Constitution. The Ten Commandments displays were donated by a local pastor following the 1999 school shootings at Columbine High School in Colorado. (Compl. ¶ 6.)

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. (Compl. ¶ 7.) 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letter to the Freedom From Religion Foundation stating that the Ten Commandments would be removed and replaced with a "historical document." (Compl. ¶ 8.) 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. (Compl. ¶ 9.)

On January 11, 2011, more than 200 residents, including a number of clergy, attended the Giles County School Board meeting to express disapproval of the removal of the Ten Commandments. During public comments, citizens stressed the need to keep God in the schools. 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)." Another, 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." Reverend Shahn 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." (Compl. ¶ 10.)

Following public comments, the Giles County School Board unanimously voted to re-hang the Ten Commandments in the schools. (Compl. ¶ 11.) Thereafter, the original display consisting of the Constitution and the Ten Commandments was again posted in each of the county's public schools, including Narrows High School. (Compl. ¶ 12.)

After it became public that some Giles County families were preparing to challenge the display in court, the Giles County School Board held a special meeting on February 22, 2011. 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. (Compl. ¶ 14.)

The decision sparked outrage in the community, prompting various public declarations of support for the display. Many supporters made clear that they viewed the Ten Commandments displays as expressing approval for their religious beliefs and, therefore, did not want them removed from the schools. For example, some supporters of the displays posted signs with the Ten Commandments, some with the motto "THE TEN COMMANDMENTS, OUR NATION'S MORAL FOUNDATION"; others attached magnets with the Ten Commandments on their automobiles; two tractor trailers were emblazoned with the Ten Commandments and the slogan

"In GOD We Trust," and a local billboard displayed the Ten Commandments with the slogan, "THE TEN COMMANDMENTS, AND THE RIGHT TO SEE THEM." (Compl. ¶ 15.)

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 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." (Compl. ¶ 16.)

At a Board meeting on March 15, 2011, Bobby Lilly, a local attorney and parent of a Giles County Public Schools student, proposed that the Ten Commandments be re-hung with a number of historical documents. (Compl. ¶ 17.) At a May 19, 2011 Giles County School Board meeting, Mr. Lilly formally presented his proposal to the school board. Approximately 100 citizens were present at the meeting to express support for the proposal, many of them wearing Ten Commandments t-shirts or carrying Ten Commandments posters, and many bused to the meeting by a local church. (Compl. ¶ 18.)

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." (Compl.¶ 19.)

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 Mr. 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. (Compl. ¶ 20.) 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." (Compl. ¶ 21.)

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. The display can also be seen by visitors who attend school events, such as parents and younger students. (Compl.¶ 22.)

Doe 1, a student at Narrows High School, objects to and is offended by defendant's policy and practice of displaying the Ten Commandments because the display promotes a particular faith to which Doe 1 does not subscribe. Doe 1 understands the current display to be merely a continuation of the Board's longstanding policy, practice, and custom of promoting the Ten Commandments in the school. Doe 1 perceives the display as an endorsement by the school of the religious principles set forth in the Ten Commandments and the Bible and a rejection of other religions. The display sends a message to Doe 1 that he is an outsider and not a full participant in the school community. It also places coercive pressure on Doe 1 to suppress Doe 1's personal beliefs and adopt the Board's favored religious views. (Compl. ¶ 23.) Doe 1's parent, plaintiff Doe 2, also objects to the display of the Ten Commandments in Doe 1's school. Doe 2 feels that Doe 1's religious upbringing is Doe 2's responsibility, not the school's, and that the display of the Ten Commandments usurps Doe 2's parental authority over the religious education of Doe 1. (Compl. ¶ 24.)

STANDARD OF REVIEW

A motion to dismiss

> tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Although a complaint does not need detailed factual allegations, a plaintiffs obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A court need not accept the legal conclusions drawn from the facts or accept as true unwarranted inferences, unreasonable conclusions, or arguments. Factual allegations must be enough to raise the right to relief above the speculative level, with all the allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor.

Historic Green Springs, Inc. v. U.S. E.P.A., 742 F. Supp.2d 837, 843-44 (W.D. Va. 2010).

Additionally, in deciding a motion to dismiss, "the Fourth Circuit has held that courts may consider the complaint itself and any documents that are attached to it." *CACI Intern., Inc. v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 150 (4th Cir. 2009). Thus, the Resolution attached as Exhibit 1 to defendant's Memorandum in Support of Motion to Dismiss should be excluded from consideration. In seeking to include that document, defendant relies on *Phillips v. LCI Int'l., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999), which states that "a court may consider [an extrinsic document] in determining whether to dismiss the complaint because it was integral to and explicitly relied on in the complaint and because the plaintiffs do not challenge its authenticity." But plaintiff's complaint neither quotes nor relies on the Resolution. The complaint merely states that the School Board voted to authorize certain documents to be posted on school walls. The photograph attached as Exhibit B to the complaint is not a reference to the Resolution; it is a depiction of what was actually posted on the wall. Thus, the Resolution does not fall within *Phillips*'s

exception to the rule that only documents within the four corners of the complaint and attachments thereto may be considered.[1]

ARGUMENT

I. THE SCHOOL BOARD IS LIABLE FOR THE POSTING OF THE TEN COMMANDMENTS ON PUBLIC SCHOOL WALLS.

The School Board claims that because the Ten Commandments display was privately donated and not erected by school personnel,[2] the School Board has no responsibility for its presence on the walls of Narrows High School. This is absurd. At all times, the School Board has exercised control over the posting of the Ten Commandments, as the following facts demonstrate. The original Ten Commandments display was also privately donated, but the Superintendent used his authority to remove it from the walls of schools. (Compl. ¶ 9.) On January 11, 2011, the School Board voted to put the displays back up, and the displays were put back up. (Compl. ¶¶ 11-12.) On February 22, 2011, the School Board voted to take the displays down again, and the displays were taken down again. (Compl. ¶ 14.) Finally, on June 7, 2011, the Board voted to authorize the posting of the Ten Commandments with various historical documents, and those documents were posted in Narrows High School. (Compl. ¶¶ 20, 22.) If the Board voted tomorrow to take those documents down, they would be taken down.

This basic cause-and-effect logic is borne out by the case law, which uniformly holds that, in the absence of a public forum, when a government entity permits a private person to erect a religious display on public property, the religious speech is attributable to the government. *See Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1133 (2009) ("Just as government-

[1] This brief includes several references to the Resolution; these are included to rebut points made in the defendant's brief. However, plaintiffs understand that if the Court agrees with plaintiffs that the Resolution should be excluded from consideration, references to that document by both parties should be disregarded.

[2] These allegations come from the Resolution attached to defendants' memorandum, not from the Complaint. Accordingly, if the Court concludes that the Resolution should not be considered, they should be disregarded. However, as explained below, even if the Court accepts that the documents were privately donated and installed, the School Board is still liable for their content.

commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."); *Stone v. Graham,* 449 U.S. 39, 42 (1980) ("It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits.") (*citing School Dist of Abington Tp. v. Schemp*, 374 U.S. 203, 222 (1963)); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994) (finding that donated portrait of Jesus displayed in school hallway violated the Establishment Clause); *Doe v. Harlan County School Dist*., 96 F.Supp.2d 667 (E.D. Ky. 2000), *aff'd*, *ACLU of Ky. v. McCreary Co.,* 354 F.3d 438 (6th Cir. 2003) (granting motion for preliminary injunction against school Ten Commandments displays that were selected by private group but were posted in accordance with school board policy); *Joyner v. Forsyth County,* 653 F.3d 341, 350 (4th Cir. 2011) (legislative prayers delivered by invited clergy are government speech).

The case of *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989), is illustrative. There, the Supreme Court held that a privately donated crèche displayed in a county building constituted an endorsement of religion by the county. As the Court observed, "No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the display of the crèche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." 492 U.S. at 599-600. Similarly, the fact that a particular document occupies a prominent place on a school wall unquestionably denotes approval of that document by the school district.

Allegheny also found that, "[t]he fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own." *Id.* at 600. Here, the Ten Commandments display does not even have such a designation of private ownership. But even if the views expressed by the Ten Commandments display could be imputed to the person who donated the display, the school board, like the county in *Allegheny*, is still endorsing those private views.

Allegheny further noted that the setting of the crèche was not "the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche in that location for over six weeks would then not serve to associate the government with the crèche." *Id.*at 600 n.50. Likewise, the walls of a public school are not a public forum open for any citizen to express any view. It is true that the Resolution allows for individuals or groups to include additional "historical documents" in the display, but those documents, as well, must be approved by the School Board, and bear the Board's imprimatur. *See Washegesic*, 33 F.3d at 684 (school hallway "is not a limited public forum because the school maintains the right to control what is posted there and does not offer space to other religions and causes."); *Johnson v. Poway Unified Sch. Dist.*, --- F.3d ----, 2011 WL 4071974 (9th Cir. Sept. 13, 2011) (noting that "[a]n ordinary citizen could not have walked into [a] classroom and decorated the walls as he or she saw fit, anymore than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share.")

Thus, *Allegheny* demonstrates that the Ten Commandments display, even if privately donated, represents the views of the government. The Fourth Circuit's government speech cases

yield the same result. There is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Community Sch. v. Mergens,* 496 U.S. 226, 250 (1990). In determining whether particular message constitutes private or governmental speech, the Fourth Circuit examines four factors: "(1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; (3) the identity of the 'literal speaker'; and (4) whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech." *Sons of Confederate Veterans v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (finding specialty license plates to be private speech); *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) (holding legislative prayer to be government speech). In this case, all of these factors weigh in favor of finding that the display at Narrows High School is government speech.

First, the central purpose of the display is to inculcate certain values in public school students. The plaintiffs contend that these values are the religious ones set forth in the Ten Commandments (*see infra*, Part II), but taking the School Board's representations at face value, the purpose is to "contribute to the educational foundations and moral character of students in our schools" and "instill qualities desirable of the students in our schools." (Def.'s Ex. 1 p. 1.) In other words, the purpose is the education of public school students – a governmental function.

Second, the School Board exercises absolute editorial control over the content of the display. The School Board designated the nine documents that constitute the display. Any additional documents require the approval of the School Board. (Def.'s Ex. 1 p.2)

Third, the "literal speaker" is the school. In *Sons of Confederate Veterans*, in the course of considering whether specialty license plates were government speech, the court noted that "[t]he 'literal' speaker here might be said to be the license plate itself, which would seem not to suggest either government or private speech strongly." 288 F.3d at 621. But the court went on to observe that "the special plates are mounted on vehicles owned by private persons," and therefore concluded that this factor weighed in favor of private speech. Conversely, here, the documents are posted on walls owned by the school district, and therefore this factor weighs in favor of government speech.

Fourth, the School Board bears "ultimate responsibility" for the speech. As noted above, the display was posted only because of a vote of the School Board, and a vote of the School Board could remove the display. Accordingly, the Ten Commandments display must be considered governmental speech by the School Board, and not the speech of some private individual.

II. THE COMPLAINT STATES A CLAIM FOR RELIEF BECAUSE THE TEN COMMANDMENTS DISPLAY HAS THE PURPOSE AND EFFECT OF ADVANCING RELIGION

Under the Supreme Court's *Lemon* test, a court determines whether a government act violates the Establishment Clause by considering whether the government action has a 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. *Allegheny,* 492 U.S. at 592-94. 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). In this case, the allegations in the complaint demonstrate – or at least raise the inference – that the School Board's purpose in authorizing the posting of the

Ten Commandments is religious, and that the primary effect of the display is to endorse the Christian religion.[3]

Additionally, 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)). "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*, 482 U.S. at 584. Moreover, "[t]he 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." *Id. See also Lee v. Weisman*, 505 U.S. 577, 592 (1992) (noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools.")

A. The Purpose of the Ten Commandments Display is Religious.

In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court upheld a preliminary injunction against a courthouse Ten Commandments display that was, as defendant acknowledges, almost identical to the one at issue here.[4] The Court found that examining the

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[3] Notably, the display uses the New King James Version (NKJV) of the Ten Commandments, a specifically Protestant version. Def.'s Mem. Supp. Mot. to Dismiss Ex. 1 p. 22. As one court has explained:

> Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments. "In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama,* 15 Const. Comment. 471, 474-76 & n. 18 (1998); *cf. Lemon,* 403 U.S. at 628-29, 91 S.Ct. at 2119 (noting the conflict between Catholics and Protestants over the use of the King James Version of the Bible in nineteenth century public schools)

Glassroth v. Moore, 335 F.3d 1282, 1299 n.3 (11th Cir. 2003). Thus, the purpose and effect of the Ten Commandments display is not only to advance religion, but to advance Protestant Christianity in particular.

[4] The display in *McCreary* 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-

government's purpose in erecting the display was an essential part of the Establishment Clause analysis. 545 U.S. at 860-61. "The eyes that look to purpose belong to an objective observer, one who 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,* 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

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Spangled Banner, the Mayflower Compact, the Virginia Statute for Religious Freedom, the Virginia Declaration of Rights, and Lady Justice. (Compl. ¶ 20.) As in the present case, the display in *McCreary* was accompanied by an explanatory document, in which the description of the Ten Commandments read:

> 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.

Id. at 856; Def't's Ex. 1 p. 4.

as their sole common element," including a county resolution referencing "Jesus Christ, the Prince of Ethics." 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."

Like the *McCreary* display, the Narrows High School display has a history that illustrates its religious purpose. The school district started with a display of the Ten Commandments accompanied by the U.S. Constitution. This display was unquestionably unconstitutional under *Stone v. Graham*, 449 U.S. 39 (1980), in which the Supreme Court invalidated a state statute requiring the posting of the Ten Commandments in every public school classroom. The Court analyzed the statute under the three-part *Lemon* test, 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.

Stone, 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.

Thus, as in *McCreary*, the original Narrows High School display had a religious purpose. As in *McCreary*, the School Board removed that unconstitutional display, and sought to disguise its religious motives by erecting a display that surrounded the Ten Commandments with documents of a less religious nature. The defendant claims that the new display has no connection with the old display, but the temporal proximity of the two displays, along with the events leading up to the new display, indicates otherwise.

After the Superintendent initially removed the first display, a public outcry ensued, with 200 residents attending the next school board meeting to protest. The religious motivation of the attendees was obvious, as they made comments such as: "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 direct response to its constituents' demands, the School Board voted to re-hang the Ten Commandments in the schools. When the Board again removed the displays, more public outrage erupted. Signs, billboards, and magnets displaying the Ten Commandments were displayed across the County. Giles County High School students walked out of class in support of community efforts to restore the displays to the schools, making comments such as, "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." When Bobby Lilly appeared before the Board to present his alternative version of a Ten Commandments display, approximately 100 citizens turned up at the meeting, many of them wearing Ten Commandments t-shirts or carrying Ten Commandments posters, and

many bused to the meeting by a local church. 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." In the midst of all of this activity, in which the community made clear that it wanted the Ten Commandments in school for religious reasons, the Board authorized the current Ten Commandments display.

Like the defendants in *McCreary*, the School Board is "simply asking [the Court] to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." Here, the history shows that the School Board responded to the public's insistent, religiously motivated demands that the Ten Commandments be posted in the school. The School Board claims that these facts are evidence only of the motivations of "third parties," and not of the School Board. But evidence that a legislative body has reacted to the public's strong religious motive is evidence of the legislative body's religious purpose as well. Thus, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Supreme Court relied on advertisements and letters to the editor urging the legislature to ban the teaching of evolution in order to find that the legislative action was religiously motivated. 393 U.S. at 108 n. 16 (quoting letters opining that teaching evolution would be "subversive of Christianity," and that it would cause children to "disrespect the Bible").[5] In this case, the allegations show that the display was approved in

[5] Analogously, in cases dealing with intentional discrimination, courts have also held that the illegitimate motives of the community "taints" the motives of legislators who act in response. *See Innovative Health Sys., Inc. v. City of White Plains,*117 F.3d 37, 44 (2dCir.1997) ("[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter."); *Open Homes Fellowship, Inc. v. Orange County, Fla.*, 325 F.Supp.2d 1349 (M.D. Fla 2004); ("[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent. . .") *Tsombanidis v. City of West Haven, Conn.*, 129 F.Supp.2d 136 (D.

response to religiously motivated public opinion, raising a strong inference of a religious purpose.

This historical evidence of religious purpose differentiates this case from those cited by the defendant: *ACLU of Ky. v. Grayson County,* 591 F.3d 837 (6th Cir. 2010); *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *Books v. County of Elkhart,* 401 F.3d 857 (7th Cir. 2005). In those cases, the history of the displays did not evince any religious purpose. *See Grayson*, 591 F.3d at 849 ("the approval of the display in Grayson County was not attended by a history evidencing a predominantly religious purpose."); *Mercer*, 432 F.3d at 632 ("The Mercer County display was neither immediately preceded by nor invariably connected to previous unconstitutional displays."); *Brooks*, 401 F.3d at 858-59 (describing history of display).[6] Because the history of the Narrows High School display as described in the complaint raise an inference of religious purpose, *McCreary* is the more appropriate analog.

In addition to the history of the Ten Commandments display, *McCreary* 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 this explanation, 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

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Conn. 2001) ("[E]ven where individual members of government are found not to be biased themselves, liability may still be imposed where discriminatory governmental actions are in response to significant community bias."); *Community Housing Trust v. Department of Consumer and Regulatory Affairs*, 257 F.Supp.2d 208, 227 (D.D.C. 2003); *Project Life, Inc. v. Glendening*, 139 F.Supp.2d 703, 711 (D. Md. 2001); *McKinney Found. v. Town Plan & Zoning Comm'n,* 790 F. Supp. 1197, 1212 (D.Conn.1992); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford,* 808 F.Supp.120, 134 (N.D.N.Y.1992).

[6] These cases are also distinguishable in that none of them involves the Ten Commandments in a *school* setting, where special considerations apply. *See supra.*

> 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.

B. The Effect of the Display is to Endorse Religion.

Posting the Ten Commandments in public schools is religious not only in purpose but in 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. Moreover, 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 v. Bloomingdale Public Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (portrait of Jesus in school hallway unconstitutional because it may be seen "as a governmental statement favoring one religious group and downplaying others").

The fact that the Ten Commandments are posted with documents from American history does not necessarily mitigate the religious effect. As the Sixth Circuit has explained, the pairing of 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 indoctrination by the school.

Further, the history of the Narrows High School display, described above, contributes to the effect of endorsement. This history shows that the community saw the controversy over the Ten Commandments display as a religious one, with support for the display equivalent to support for God. Thus, the community is likely to perceive the display as an expression of religious support by the School Board. 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. Similarly, the allegations in the complaint demonstrate 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 his proposed 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). Viewing the controversy in this light, a reasonable observer would see the School

Board's ultimate decision to post the Ten Commandments with other documents as a victory for the Ten Commandments, and for religion.

CONCLUSION

For the foregoing reasons, the defendant's Motion to Dismiss should be denied.

Respectfully submitted,

DOE 1
DOE 2

By:

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2011, 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:

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