THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION, INC., DOE 4, by DOE 4's next friend and parent, DOE 5, who also sues on DOE 5's own behalf, Plaintiffs, vs. CONNELLSVILLE AREA SCHOOL DISTRICT, Defendant.	:	Case 2:12-cv-01406

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

Plaintiffs Freedom From Religion Foundation, Inc. ("FFRF"), Doe 4, and Doe 5, by and through their attorneys, Marcus B. Schneider, Esquire and STEELE SCHNEIDER, file the following Response Brief in Opposition to Defendant's Motion to Dismiss and Motion to Strike.

INTRODUCTION

Defendant in this case is a Pennsylvania school district that prominently displays a large, stone Ten Commandments monument on the grounds of one of its schools. Plaintiff Doe 4 is a student of the Defendant school district who comes into contact with the Ten Commandments monument. Plaintiff Doe 5 is the parent of Plaintiff Doe 4 and is a member of Plaintiff Freedom From Religion Foundation, which is a non-profit educational charity that works to defend the constitutional principle of separation between state and church.

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

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

Defendant's request for dismissal of the case for lack of subject matter jurisdiction is limited to a specific portion of the Complaint and should be denied because Plaintiff's §

1983 claim is not premised upon the alleged hypothetical harm singled out by Defendant. Finally, the relevance of the averments that Defendant is seeking to strike is apparent after a review of Plaintiffs' Response to the Defendant's arguments in support of its Motion to Dismiss..

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

BACKGROUND

I. Factual Background

Defendant Connellsville Area School District (hereinafter "Defendant" or the "District") is a municipal corporate body that maintains control of public schools within the limits of the Connellsville area. Complaint (Document No. 1) at ¶ 12.[1] For decades, the Defendant has displayed an approximately six foot tall, stone Ten Commandments monument (hereinafter "the Ten Commandments monument") near the main entrance to the Connellsville Area Junior High School (hereinafter the "Junior High" or "school") auditorium. Compl. at ¶¶ 1, 15. In addition to being visible to students as a result of being

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

located near the main entrance to the Junior High auditorium, the Ten Commandments Monument is within view of students boarding or exiting school buses and those students participating in outdoor gym classes. Compl. at ¶ 15. District staff maintains the area around and adjacent to the Ten Commandments monument by, among other things, mowing the lawn surrounding the monument. Compl. at ¶ 20.

On August 29, 2012, Plaintiff Freedom From Religion Foundation, Inc. (hereinafter "FFRF") requested that the District remove the Ten Commandments monument. Compl. at ¶ 31. Soon after its receipt of the letter, Defendant made the decision to remove the Ten Commandments monument. Compl. at ¶ 31. Initially the District planned to remove the monument by September 7, 2012, but the District's solicitor later informed counsel for Plaintiffs that the removal would be pushed back to the following week. Compl. at ¶ 35.

When the initial decision to remove the monument in response to Plaintiff FFRF's letter was made, the District covered the Ten Commandments monument with plastic. Compl. at ¶ 33. In response to the covering of the monument, vandals removed the plastic on several occasions. Compl. at ¶ 34. When the decision to delay the removal of the monument was made, the District covered the Ten Commandments monument with plywood. Compl. at ¶ 36. Again, vandals removed the plywood from the monument on multiple occasions. Compl. at ¶ 37.

The Ten Commandments monument was also uncovered during a rally held at the monument on the evening of September 10, 2012. Compl. at ¶ 39. The rally was organized by a group of area pastors. *Id.* The rally advocated for keeping the monument on school grounds. *Id.* On the evening of September 12, 2012, a second rally was held at the Ten Commandments monument. Compl. at ¶ 46. At the second rally, demonstrators held

religious signs in support of the monument and religious signs were affixed to the plywood that covered the Ten Commandments monument at the time. *Id.* On September 14, 2012, a large wooden box was placed over the Ten Commandments monument.

Immediately following the September 12, 2012 rally, some of the demonstrators marched to the District Board meeting scheduled for that night. Compl. at ¶ 47. Local clergy and community members spoke for approximately two hours at the District Board meeting on September 12, 2012. Compl. at ¶ 48. Following the public comments, the District Board approved an agenda item to keep the Ten Commandments monument pending the resolution of this litigation. Compl. at ¶ 49. In response to the vote to keep the Ten Commandments monument, the room of more than 100 people erupted in a standing ovation. Compl. at ¶ 50.

Prior to the September 12, 2012 District Board meeting, when the District was still planning on removing the monument, the District received or solicited an offer from the Connellsville Church of God (hereinafter the "Church") to accept the monument and display it next to the Connellsville Area Senior High School. Compl. at ¶ 40. The proposed arrangements with the Church would place the Ten Commandments monument on the edge of the Church of God property, which borders the high school and one of its athletic fields, which is owned by the Church and rented and used by the District. Compl. at ¶ 41-42. Under the proposed arrangement, the Church would prominently light and display the Ten Commandments monument. Compl. at ¶ 43.

Plaintiff Doe 5 is the parent of Plaintiff Doe 4, who has come into frequent contact with the Ten Commandments monument. Compl. at ¶¶ 21. Plaintiff FFRF is a national non-profit 501(c)(3) educational charity and membership organization, of which Plaintiff

Doe 5 is a member. Compl. at ¶¶ 6-7, 9. Doe 4 attends Connellsville Area Junior High School. Compl. at ¶ 10.

Photos of the monument that were referenced in and filed with the complaint depict its text and its placement in front of the school. (Compl. ¶ 13; Exhibits 1 and 2). The monument says:

> *The Ten Commandments*
> *I AM the LORD thy God.*
>
> *I. Thou shalt have no other gods before me.*
> *II. Thou shalt not take the Name of the Lord thy God in vain.*
> *III. Remember the Sabbath day, to keep it holy.*
> *IV. Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.*
> *V. Thou shalt not kill.*
> *VI. Thou shalt not commit adultery.*
> *VII. Thou shalt not steal.*
> *VIII. Thou shalt not bear false witness against thy neighbor.*
> *IX. Thou shalt not covet thy neighbor's house.*
> *X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's*

Compl. at ¶ 17, Compl. Exhibit 2.

Plaintiff Doe 5 identifies as an atheist and views the Ten Commandments monument as being contrary to Doe 5's and Doe 5's family's personally held non-religious views. Compl. at ¶ 23. Doe 4 identifies as non-religious. *Id.* Neither Doe 5 nor Doe 4 subscribe to the religious statements that are inscribed on the monument. *Id.* The Plaintiffs feel that the moment excludes them because they do not follow the particular religion or god that the monument endorses. Compl. at ¶ 24. The Plaintiffs perceive the monument as an endorsement by the District of the religious principles set forth on the monument. Compl. at ¶ 26. The prominent display of the monument signals to the plaintiffs that the Defendant favors certain religious views. Compl. at ¶ 27. The monument places coercive

pressure on Doe 1 and Doe 2 to adopt the Defendant's favored religious views. Compl. at ¶28.

II. Procedural Background

Plaintiffs filed their Complaint against Defendant on September 27, 2012. The Complaint asserts that the District's prominently placed Ten Commandments monument violates the Establishment Clause of the First Amendment. The Plaintiffs are seeking declaratory relief, injunctive relief, and nominal damages under 42 U.S.C. § 1983.

On December 3, 2012, Defendant filed a Motion to Dismiss seeking dismissal of the case. As a secondary issue, Defendant has also filed Motion to Strike, which seeks to strike, as "immaterial, impertinent and scandalous," certain facts from the Complaint.

STANDARD OF REVIEW

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

In deciding a motion to dismiss for failure to state a claim, "[f]irst, the factual and legal elements of a claim should be separated. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d

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

ARGUMENT

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

Under Rule 12(b)(6), a defendant may challenge either the legal or factual sufficiency of a complaint. Here, Defendant has not asserted that 42 U.S.C. § 1983 fails to provide Plaintiffs with a cause of action entitling them to the requested relief. Therefore, Defendant's Brief and Motion to Dismiss must be interpreted as challenging the factual

sufficiency of Plaintiffs' Complaint. In this regard, the entire section B.1. of Defendant's Brief (the "foreclosure" arguments referenced above), which focus on whether the Plaintiffs should prevail on the final merits of the case, can essentially be disregarded as setting forth improper arguments.

Nonetheless, because Defendant mischaracterizes much of the Establishment Clause jurisprudence examined in that portion of its Brief, Plaintiffs first address these matters in this Response. Plaintiffs also address the factual sufficiency challenges made by Defendant under the various tests used by the courts to examine Establishment Clause claims. Next, Plaintiffs address the subject matter jurisdiction argument raised by Defendant. The review of the factual sufficiency of the Complaint will make clear that Plaintiff's claims do not rely upon the "hypothetical harm" identified by Defendant in its Brief. Finally, Plaintiffs respond to the Motion to Strike portion of Defendant's Motion. As with the jurisdictional argument, Plaintiffs' response to the 12(b)(6) portion of Defendant's Brief will show the clear relevance and materiality of the averments that Defendant seeks to strike.

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

Courts have drawn a clear distinction between religious display cases involving public schools and those involving other government property. *See Stone v. Graham*, 449 U.S. 39 (1980) (finding a Kentucky statute requiring the placement of the Ten Commandments in public school classrooms to be unconstitutional, noting the impressionability of schoolchildren); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (stating that "we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public

schools"); *Van Orden*, 545 U.S. at 691 (holding that the Court has "'been particularly vigilant in monitoring compliance with the Establishment Clause in [schools]'") (citing *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (emphasizing that students in attendance at schools are impressionable and that their attendance is involuntary)); *Harlan County v. ACLU of Ky.*, 545 U.S. 1152 (2005), *cert. denied*, 545 U.S. 1152;[2] *Doe v. Indian River School Dist.* ("*Indian River*"), 653 F.3d 256, 275, *cert. denied*, 132 S. Ct. 1097 (U.S. 2012) (holding that the possibility of coercion in schools is greater because children are more "'susceptible to pressure from their peers'" (citing *Lee*, 505 U.S. at 53)); *Alqhuist v. City of Cranston ex rel. Strom*, 840 F.Supp.2d 507 (D.R.I. 2012) (finding a long-standing prayer banner located in a public school to be unconstitutional, noting the "clear line between government conduct which might be acceptable in some settings and the conduct which is prohibited in public schools"). Defendant's review of *Van Orden* and other Establishment Clause cases downplays and attempts to marginalize the significance of this distinction.

The Supreme Court has also observed that "[i]n each [Establishment Clause] case . . . no *per se* rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678-679 (1984). "[T]he Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application." *Lynch*, 465 U.S. at 678. The Court in *Lynch* went on to state, "The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The clause directs a 'blurred, indistinct, and variable barrier *depending on all the circumstances* of a particular relationship." *Id.* at 678-679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614

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

(1971) (emphasis added). Despite this, in its Brief, Defendant seeks to derive bright line rules from Establishment Clause jurisprudence to support its "foreclosure" argument. It is no surprise that the Defendant finds it hard to succeed and refers to Establishment Clause cases as "appear[ing] inconsistent." Defendant's Brief, p. 17.[3] These purported inconsistencies are nothing more than the case-by-case decisions that one should expect to find in Establishment Clause cases given the Court's statement in *Lynch* and other cases.

Against the well-established principle that Establishment Claus cases are not suited for *per se* rules, Defendant conjures the following bright line rule from *Van Orden*: "[A] longstanding display of an Eagles' Ten Commandment monument on government property does not violate the Establishment Clause of the First Amendment." Def. Brief, p. 14. This purported rule stated by Defendant is incorrect for primarily two reasons. First, Defendant makes no exception for displays on school grounds despite the well-established distinction between school cases and other government cases. Second, Defendant relies upon a misreading and/or mischaracterization of *Van Orden* which overlooks and/or downplays the importance of the role that the specific, unique facts of the display in that case had in the ultimate decision, especially as compared with the decision in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), which was issued on the same day.

The Supreme Court has long recognized a heightened vigilance in the judicial review of religious displays on public school grounds where impressionable children are in attendance. *See supra*, p. 9-10. Furthermore, no court has ruled that a Ten Commandments monument on the grounds of a public school is constitutionally permissible. The plurality opinion in *Van Orden* even specifically distinguished the display in *Stone v. Graham* from

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

the Texas Capitol display in *Van Orden* precisely because *Stone* involved public schools. *Van Orden*, 545 U.S. at 690-691.

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

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

Stone, 449 U.S. at 42.

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

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

Def. Brief, p. 15. It is insignificant that the display here is outside, rather than inside. To read and "meditate upon, perhaps to venerate and obey" the Commandments means to read them, think deeply about them, find them to be important, and to follow them. The Junior High Ten Commandments monument is prominently located and maintained near the main entrance to the auditorium such that students entering the auditorium will see it. Additionally, students encounter the monument when boarding or exiting school buses and when participating in outdoor gym

classes. Rather than confront students in the classroom as was the case in *Stone*, the Ten Commandments in this case confront students when they engage in a number of normal activities around the school building. The Plaintiffs have asserted that they view the monument and that it places pressure on Doe 4 to adopt or "obey" the Defendant's favored religious views. Compl. at ¶ 28. Despite these facts, Defendant has argued that the present case is more like *Van Orden* than *Stone*. As will be discussed further in Section II.B.3. below, the display in this case, like the display in *Stone,* is indicative of a religious purpose.

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

Justice Breyer's concurring opinion also highlights the distinction between public school grounds and other government property. At the outset, Justice Breyer focused on the particular context of the Texas Capitol monument and called *Van Orden* "a borderline

case." *Id.* at 700. Justice Breyer distinguished the Texas Capitol display from the public school context: "This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state." *Id.* at 703. (citing *Lee v. Weisman*, 505 U.S. 577, 592; *Stone*, 449 U.S. at 39). In its Brief, the Defendant purports to explain away this statement by Justice Breyer by conjuring up hidden meaning. Def. Brief, p. 14-15. According to the Defendant's memorandum, "For it was not merely the school setting that Justice Breyer was arguably recognizing as distinguishable, but the manipulative, coercive, and restraining conduct by the State evidenced in *Lee." Id.* There is no support for this bald assertion. Justice Breyer's statement specifically distinguished *Van Orden* from a display "on the grounds of a public school" with no mention of further conduct by the government.

Beyond the fact that this case involves a public school setting, a cursory review of *Van Orden* and other Establishment Clause jurisprudence supports a rejection of the idea that *Van Orden* has "foreclosed" this case or any other case involving a so-called "Eagles' Ten Commandment monument." Def. Brief, p. 11. In *Van Orden*, as in all Establishment Clause cases, the Court recognized the contextual, case-by-case analysis that needed to be undertaken. *Id.*; *see also McCreary*, 545 U.S. at 867 (2005) (stating that "under the Establishment Clause detail is key") (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (holding that the relevant inquiry, "of necessity, turns upon the context in which the contested object appears")). In *Van Orden*, Justice Breyer, who was the deciding vote, emphasized in his concurring opinion how

important the context of the Ten Commandments display was to his decision. *Van Orden*, 545 U.S. at 702. Justice Breyer emphasized the fact that "[t]he monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." *Id*. The presence of the Ten Commandments display among so many other monuments and historical markers in *Van Orden* make the facts of that case very unique.

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

The facts of this case make it distinguishable from *Van Orden* on multiple levels. However, even if this case did not involve a public school setting, it could still proceed beyond the pleading stage based upon the fact that each Establishment Clause case must be considered on its own facts and surrounding context. When those facts and circumstances

are considered here, it becomes clear that the case is further distinguishable from *Van Orden* because the Junior High Ten Commandments monument stands alone, is not integrated into a larger display of other monuments, and is prominently located in an area where students will encounter the monument. By arguing for the immediate, complete application of *Van Orden* to this case, Defendant is advocating for a reading that would extend the holding of that case far beyond its above-discussed well-defined limits.

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

Defendant has claimed that the well-pleaded facts in the complaint are insufficient to support Plaintiffs' Establishment Clause claim under *any* of the judicial Establishment Clause tests. As discussed below, Plaintiffs need only assert a *plausible* claim under the endorsement test or primary effect prong of the *Lemon* test in order to proceed with their First Amendment claim. *See infra*, p. 19-20. Even so, the complaint and reasonable inferences drawn from it, would also allow this case to proceed under the secular purpose prong of the *Lemon* test and/or the coercion test. Before evaluating the facts of this case under the various Establishment Clause tests, Plaintiff must first address (1) the additional facts asserted by Defendant (not contained in the Complaint) that Defendant asks this Court to consider and (2) the well-pleaded facts contained in the Complaint, which Defendant claims cannot be considered by this Court because they amount to no more than bare legal conclusions.

A. Facts to be considered by the Court

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

- The version of the Ten Commandments displayed on the Junior High School Ten Commandments monument is "nonsectarian." Def. Brief, p. 3, 22, 26.[4]
- The Ten Commandments monument has never been objected to and has stood without incident at all times prior to the first letter sent by Plaintiff FFRF requesting the removal of the monument. Def. Brief, p. 4.
- The Plaintiffs are "particularly sensitive people" when it comes to their view of the Ten Commandments monument. Def. Brief, p. 23, 28.
- The purpose of the Eagles in donating the Ten Commandments monument was "to provide youths with a common code of conduct to govern their actions." Def. Brief, pp. 3, 4.
- The "all-seeing eye" is an Egyptian symbol generally considered to be secular. Def. Brief, p. 3.
- The Ten Commandments monument is one of many donated by the Eagles in the 1950s and 1960s. Def. Brief, p. 3.

A defendant moving for dismissal under Rule 12(b)(6) may, in very limited circumstances, present the Court with facts in addition to those contained in a plaintiff's complaint. These circumstances include only "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

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

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

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

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

- Plaintiffs perceive the prominent display of the Ten Commandments monument as an endorsement by the District of the religious principals set forth on the monument. Def. Brief, p. 22, 23, 27 (citing Compl. at ¶ 27).

- Plaintiffs perceive the prominent display of the Ten Commandments monument as evidencing a favored religious view within the District. Def. Brief, p. 22, (citing Compl. at ¶ 27).
- The presence of the Ten Commandments . . . has the primary effect of both advancing religion generally and advancing the tenants of a specific faith in particular. Def. Brief, p. 27 (citing Compl. at ¶ 61).

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

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

B. Application of facts to the Establishment Clause tests

In the most recent Third Circuit Establishment Clause case in the public school context, the court in *Indian River*, 653 F.3d at 282, noted that "[i]n the public school

context, the Supreme Court has been inclined to apply the *Lemon* test." The *Lemon* test considers (1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion. *Id.* The court also acknowledged the fact that the *Lemon* test has become the subject of debate and has been called into question. *Id.* (citations omitted). The court went on to recognize the "endorsement" test as an alternative to the *Lemon* test. *Id.* Ultimately, the *Indian River* court applied both the *Lemon* test and the endorsement test (but not the "coercion" test). The court did not apply the "coercion test" advocated by Defendant.[5] Based upon the recent holding by the Third Circuit in *Indian River*, Plaintiffs submit that the *Lemon* test and the endorsement test are more appropriate tests to be applied in this case than the coercion test. Such a conclusion makes sense in light of the fact that no school case, given the mandatory attendance of students at schools and the impressionability of the student population, can be of the "passive" category of cases that Justice Thomas viewed *Van Orden* to be. Nonetheless, Plaintiffs address each of the possible tests below, including the coercion test.

1. Endorsement Test/Primary Effect Prong

The endorsement test and the second *Lemon* test prong are essentially the same. *Id.* at 282-283. Under either, school and government endorsement of religion violates the

[5] The coercion test advocated by Defendant stems from Justice Thomas' concurring opinion joining the plurality of the Court in *Van Orden*. Justice Breyer, whose concurring opinion arguably decided the case on the narrowest grounds of the plurality, did not employ the same coercion test used by Justice Thomas. *See, e.g., Card v. City of Everett*, 520 F.3d 1009, 1010 (9th Cir. 2008) (a display case holding that "we must agree with the district court that *Van Orden, particularly Justice Breyer's concurring-and determinative-analysis*, controls the decision here and that "[w]e cannot say how narrow or broad the "exception" may ultimately be; not all Ten Commandments displays will fit within the exception *articulated by Justice Breyer . . .* [h]owever, we can say that the exception at least includes the display of the Ten Commandments at issue here.").

Establishment Clause of the First Amendment. Here, the Junior High Ten Commandments monument constitutes government speech. *See Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 470-471 (2009) (holding that "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land"). Government speech endorsing religion in the public schools context violates the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 309-10 (2001) (holding that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and accompanying message to adherents that they are insiders, favored members of the political community'") (quoting *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring)). The judicial inquiry under this test is "whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Indian River,* 653 F.3d at 284 (3d Cir. 2011) (citing *ACLU v. Black Horse Pik Reg'l Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996). As the Defendant correctly states, under the endorsement test/primary effect prong, the relevant inquiry is whether a reasonable observer would find that, "under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." Def. Brief, p. 22; *Indian River*, 653 F.3d at 284.

Plaintiffs have offered facts that set forth a plausible claim that the Defendant's display of the Ten Commandments monument conveys a message favoring religion. As discussed above, Plaintiffs' averments as to the impact that the Ten Commandments monument has on the Plaintiffs and how they perceive it are not mere recitations of an

element of a claim. These averments are statements of fact that must be presumed to be true at this stage of the pleadings. While Defendant claims that the feelings of the Plaintiffs are the feelings of overly sensitive individuals, the facts as pleaded in the Complaint lend far more support to the reasonability of Plaintiffs' feelings about the Ten Commandments monument than they do to the Defendant's argued position.

At bottom, the Plaintiffs are asserting that the Defendant's display of and the surrounding circumstances relating to the Ten Commandments monument sends a distinct message of school support for the religious views set forth on the monument. The Defendant has posted statements of religious obligation quite prominently in a large monument near a public school's main auditorium entrance, which is also near the student bus area. The monument stands alone and is not incorporated into a larger display. Plaintiffs Doe 4 and Doe 5 are non-religious and do not subscribe to the idea that they are commanded to follow the edicts on the monument, and they are offended by it. Although standing alone these facts are sufficient to support a plausible claim that the District conveys a message favoring religion, the facts relating to the District and community reaction to the request that the monument be removed provide even greater support for Plaintiffs' claim.

The recent circumstances surrounding the monument, which culminated in the official vote of the District School Board to keep the Ten Commandments monument, are critical to the consideration of whether a reasonable observer would believe that the District is endorsing a religion. While Defendant attempts to downplay, the Board's decision to keep the monument by casting it as "merely declin[ing] to remove the monument . . . [i]n anticipation of this Court's opinion," the Board's vote must be

considered against the complete factual background set forth in the Complaint. Def. Brief, p. 27.

The ultimate decision to keep the Ten Commandments monument occurred *after* the District had initially made the decision to remove the monument and *before* this case was filed. In conjunction with the decision to remove the monument, the District attempted to cover the monument, presumably in an attempt to remedy the constitutional violation that it recognized was occurring. Following these decisions by the District (to remove the monument and cover until removal occurred), the actions of the local community showed a clear preference for keeping the monument. Community members removed the various coverings that were placed on/over the monument on several occasions, attended rallies or vigils at the monument, and eventually spoke for two hours at the Board meeting where the potential removal of the monument was addressed. Cleary, the District's decision to attempt to cover the monument only served to call additional attention to the Decalogue.

Following this fervent community response, despite its initial plan to remove the monument, the District ultimately voted to keep the monument, a reversal which was met with supporting applause at the public Board meeting. Although Defendant argues that the decision was undertaken in anticipation of this Court's opinion on the matter, Plaintiffs had not filed a lawsuit at the time of the Board vote. The District's own reversal of its decision is the final act that caused litigation to actually ensue.

Defendant ignores this telling recent history and focuses only upon the purported original intent of the Eagles in donating the monument to the District. The recent conduct of the community and the apparent response by the Board is clearly relevant to an analysis under the Primary Effect prong of the *Lemon* test and/or the Endorsement test. *Indian*

River, 653 F.3d at 286-287; *see also Ahlquist*, 840 F.Supp.2d at 522-523 (holding that the recent "retention" of the prayer mural in that case constituted an improper endorsement and violated the second prong of the *Lemon* test based upon the comments and conduct surrounding the decision to retain the mural).

Indian River dealt with a challenge to a school board's practice of opening its meetings with a prayer. *Id.* In applying the facts of the case to the applicable Establishment Clause tests, specifically to the Primary Effect prong/Endorsement test, the court in *Indian River* found the recent conduct of the school board and the conduct of the local community to be critical to its analysis. *Id.* at 286-287. At one point in the history of the board's practice, the board became concerned that it would be the subject of a lawsuit. *Id.* at 286. After holding a special board meeting where the board discussed the fact that constituents did not want the board to change its practice of opening meetings with a prayer, the board's next scheduled meeting was heavily attended by community members. *Id.* at 286-287. The many community members that attended the meeting applauded when the board opened the meeting with a prayer, shouted in support of continuing the practice during the meeting, and spoke in favor of the continuation of the practice during the public comment portion of the meeting. *Id.* at 287. The board ultimately enacted a formal prayer policy in its attempt to avoid a lawsuit. *Id.* at 286.

In considering these events in finding that a reasonable person would conclude that the board policy had the primary effect of endorsing religion, the court held:

> This history is illuminating. This sequence of events shows that the Board's Prayer Policy is closely linked to the desire to maintain prayer at Indian River school events . . . [, a]fter all, it was in response to this community uproar that the Board was compelled to draft a formal Prayer Policy These events also show how the public viewed the prayer issue. As exemplified by the . . . meeting, there was clearly broad

> support among community members for the practice of prayer at the School Board meetings and District graduations. Not only did most of the attendees support the Board's practice, but their conduct reveals that in the minds of many, the issue of prayer at the Board meetings and graduations was closely intertwined with religion. The Policy was drafted in order to safeguard against a potential lawsuit challenging the Board's unwritten practice of praying at every public meeting. The Policy was also drafted in an atmosphere of contention and hostility towards those who wanted prayers to be eliminated from school events. A reasonable person aware of this history would conclude that the primary effect of the Board's Policy was to endorse religion.

Id. at 287.

Just as the Court in *Indian River* considered this recent history as "part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion," here the recent history provides the necessary context for the Court to determine that Plaintiffs have set forth a plausible claim for relief. Based upon the sequence of events, the Defendant Board here, like the board in *Indian River*, took action that appears to have been in response to the "community uproar." And as was the case in *Indian River*, the Connellsville community clearly demonstrated "broad support for" the display of the Ten Commandments monument. This conduct supports the plausibility of Plaintiffs' claims that the other members of Plaintiffs' community ascribe religious importance to the monument and that Defendant's decision to keep the monument is rooted in its favoring a particular religion. The facts that Plaintiffs have pleaded relating to plans with the Church to accept the District's Ten Commandments monument and to prominently display the monument in a location where it will be viewable by students and student athletes provides further support for this conclusion -- these facts point to a decidedly religious public discourse on the issue of how to handle the Plaintiffs' complaints about the monument.

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

2. Religious Purpose Prong

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

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

District has voted to retain the monument, Plaintiffs assert that the Defendant has acted with a religious purpose in this case.

As the Supreme Court in *McCreary* observed, the text of the Ten Commandments "is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." 545 U.S. at 869. The fact that the Board's reversal of its initial decision came in response to the uproar from the community -- which strongly supports retention of the monument -- reflects not only the Board's endorsement of religion but also the District's religious purpose in continuing to display the monument. Plaintiff has averred facts relating to the types of community support received by the District, including multiple vigils or rallies held at the monument by community members and/or local clergy and the persistent removal of coverings from the monument. Just as this conduct is considered in determining whether a reasonable observer would find there to be endorsement of religion, it must also be reviewed to determine whether that same reasonable observer would believe that the District has a religious purpose in continuing to prominently host and maintain the Ten Commandments monument.

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

that the decision to keep the Ten Commandments monument was based upon a religious purpose consistent with the religious views of those supporting the Ten Commandments monument.

It is also worth noting that the first *Lemon* prong, given the unique nature of the issue of intent, is one that is typically developed in discovery. At this early stage, Plaintiffs have pleaded facts which support a reasonable inference that a religious purpose may be present in this case. Following discovery, the factual record will likely include specific comments made by District Board members at the public meeting where the vote on the retention of the monument was held or in any prior meeting that may have been held to discuss the removal of the monument before that decision was changed. Such statements may lend further support to the already plausible claim that the Defendant here has acted with a religious purpose. Because the facts stated in the Complaint point to the possible existence of such facts, this case should be permitted to proceed beyond the pleading stage.

3. Coercion

The Defendant asserts that the Plaintiffs' claim "fails under the coercion test analysis" because "the Plaintiffs have not alleged that the monument compels them to participate in religion or its exercise." Def. Brief, p. 19. Plaintiffs themselves certainly feel like they are being pressured to "adopt the District's favored religious views." Compl. at ¶ 42. Defendant seeks to liken the Plaintiffs' situation in this case to that of Thomas Van Orden, where Mr. Van Orden encountered the monument "along his path to the Texas Supreme Court Library" and where "he need not stop to read it or even to look at it." *Van Orden*, 545 U.S. at 694. This argument again indicates the Defendant's failure to recognize

the distinction between this case and *Van Orden*, which arises out of the the fact that this is a public school case.

Here, the students of the District cannot avoid the Ten Commandments monument. The monument is prominently located at the main entrance to the Junior High auditorium and the student busing area of the school. Students at the Junior High encounter the monument when they use or travel upon the area of the school grounds where the monument is displayed. Unlike Thomas Van Orden, the students at the Junior High *must attend school*, where they encounter the monument. Where Thomas Van Orden was free to take a different path to the Texas Supreme Court Library or visit a different library altogether, junior high school students cannot avoid attendance at school.

That these impressionable young students encounter this monument frequently is significant. The monument is not labeled the "Ten Suggestions." In large font it says "the Ten Commandments." The monument proclaims, "I Am the LORD thy God" and lists ten religious edicts. It says, "Thou shalt have no other gods before me." It says, "Thou shalt not take the Name of the Lord thy God in vain." It says, "Remember the Sabbath day, to keep it holy." The Supreme Court in *Stone* specifically discussed the coercive nature of the placement of this text in a school setting. "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Stone*, 449 U.S. at 42. Certainly, the placement of the Ten Commandments monument in a location where students will pass by the monument may cause young, impressionable minds to read, meditate upon, and perhaps venerate and obey the text. The Plaintiffs believe that the Ten Commandments monument "commands" that students and visitors worship "thy God." To ignore these

strong words of the monument and their importance to those who find the commandments a matter of religious obligation, is not only an affront to the non-religious, but also to those of faith who venerate the Decalogue.

III. Defendant's Motion to Strike Should be Denied

As a secondary issue, Defendant seeks to strike Paragraphs 34, 37, 38, 39, 46, 47, 50, 51, 52 and 48 of the complaint asserting that the statements are "immaterial, impertinent and scandalous allegations" under FRCP 12(f). The motion to strike is baseless. In support of the motion, the Defendant's cite *Conklin v. Anthou*, 2011 WL 1303299 (M.D. Pa. 2011), a case in which a pro se plaintiff accused the court hearing his case of "judicial corruption." Here, the Defendant seeks to censor the complaint of facts that directly relate to Plaintiffs' First Amendment claim. As discussed in Section II.B. above, these types of facts are the very types of facts that other courts have considered to be meaningful in the analysis of the relevant Establishment Clause tests and how a reasonable observer would view a particular religious display.

As is evident from the review of the *Indian River* case and the court's reliance upon comments from community members and the overall community reaction in that case, the averments relating to community members and local clergy are not "immaterial, impertinent and scandalous allegations." They relate directly to how a reasonable person would view the Ten Commandments monument and the actions of the District. Especially in light of the sequence of events which saw the District reverse its initial decision to remove the monument after having an opportunity to see and appreciate the community response to the issue, these averments contained in the Complaint and the reasonable inferences derived therefrom, provide direct support to Plaintiffs' Establishment Clause

claims. Quite simply, the averments that Defendant seeks to strike are the very type of facts a plaintiff must allege under the heightened pleading standard of *Iqbal* and *Twombly*.

IV. Defendant's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction Should be Denied

Defendant also seeks to dismiss "part of the Complaint" under Federal Rule of Civil Procedure 12(b)(1) for want of subject matter jurisdiction. Defendant's motion must fail because Plaintiffs have not brought an action based upon the averments that Defendant asserts contain abstract, conjectural, or hypothetical harm. Def. Brief, p. 10. As there is no claim based upon the averments at issue, there is no claim for the Court to dismiss pursuant to Defendant's Rule 12(b)(1) motion.

Defendant essentially takes issue with Plaintiffs' inclusion of Paragraphs 40-44, which address the proposed arrangement between the District and the Church discussed *infra*. *See* pp. 5, 25. The overall content of the complaint relating to the reactions and perceptions of the community supports the plausibility of Plaintiff's claims, and Plaintiffs have included these specific averments to underscore the community's perception of the monument as being a religious symbol and the community's desire to ensure that the monument continues to be displayed in a way that will ensure that District students continue to encounter it.

Plaintiffs have not set forth a separate claim contending that the potential transfer of the monument to the Church has caused them actual harm. Plaintiffs' singular claim under 42 U.S.C. § 1983, as set forth in the Complaint and as discussed above, is based upon the distinct and palpable injury that Plaintiffs have suffered as a result of the District's display of the Ten Commandments monument and the District's recent decision to continue to display the Ten Commandments monument. The claim identifies facts

separate and apart from those facts contained in Paragraphs 40-44 which reveal a real and palpable injury. The claim, therefore, cannot be dismissed, even if the specific averments contained in Paragraphs 40-44 happen to point to a potential or hypothetical harm that Plaintiffs may eventually suffer.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2012, the foregoing **RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO STRIKE** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Marcus B. Schneider, Esquire
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