



KeyCite Yellow Flag - Negative Treatment

Distinguished by American Civil Liberties Union of Kentucky v. Mercer County, KY, E.D.Ky., September 6, 2002

96 F.Supp.2d 679  
United States District Court,  
E.D. Kentucky,  
London Division.

AMERICAN CIVIL LIBERTIES UNION OF  
KENTUCKY; Louanne Walker and David Howe,  
Plaintiffs,

v.

McCREARY COUNTY, KENTUCKY; and Jimmie  
Greene, In his official capacity as McCreary  
County Judge Executive, Defendants.

No. CIV.A. 99-507.

|  
May 5, 2000.

Organization and individuals sued county judge executive and county, claiming that posting of Ten Commandments and documents from American history violated First Amendment. Plaintiffs moved for preliminary injunction requiring removal of display and defendants moved for summary judgment. The District Court, Coffman, J., held that: (1) injury in fact requirement for standing to sue was satisfied by individuals and organization; (2) summons was properly served by mail; (3) plaintiffs satisfied preliminary injunction requirement of showing likelihood of succeeding on merits of claim that display violated Establishment Clause; (4) showing of deprivation of First Amendment rights satisfied irreparable injury requirement for injunctive relief; and (5) balance of harms favored issuance of injunction.

Preliminary injunction issued.

West Headnotes (16)

[1]

**Constitutional Law**

🔑 Government property and symbols in general

Individuals claiming that posting of Ten Commandments in county courthouse violated First Amendment sustained injury in fact, as required for standing purposes, as they would

encounter Ten Commandments each time they entered courthouse to transact business. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[2]

**Constitutional Law**

🔑 Government property and symbols in general

Organization claiming that posting of Ten Commandments in county courthouse violated First Amendment had standing to proceed with claim, as its members would sustain requisite injury needed for standing purposes each time they entered courthouse to transact business, and participation of individual members was not required in order for suit to go forward. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3]

**Process**

🔑 Mailing as constructive service

Complainants satisfied federal procedural rule allowing for service “in the manner provided for under state law”, by placing summons in mail themselves, despite state procedure rule requiring mailing by court clerks, as federal district court clerks did not mail summonses. Fed.Rules Civ.Proc.Rule 4(j)(2), 28 U.S.C.A.; Ky.Rules Civ.Proc., Rule 4.01(a).

Cases that cite this headnote

[4]

**Injunction**

🔑 Grounds in general; multiple factors

To receive a preliminary injunction, a plaintiff must establish (1) a strong or substantial likelihood of success on the merits, (2) that he or she will suffer irreparable harm in the absence

of an injunction, (3) that others will not suffer substantial harm if the injunction is granted, and (4) that an injunction will serve the public interest.

Cases that cite this headnote

- [5] **Injunction**  
👉 Findings and conclusions  
**Injunction**  
👉 Operation and effect

Court deciding motion for preliminary injunction must make findings of fact and conclusions of law, which are not binding at a trial on the merits.

Cases that cite this headnote

- [6] **Civil Rights**  
👉 Nature and elements of civil actions

To establish a prima facie case under § 1983, a plaintiff must establish that the action complained of occurred under color of law, and that the action was a deprivation of a constitutional right or a federal statutory right. 42 U.S.C.A. § 1983.

Cases that cite this headnote

- [7] **Civil Rights**  
👉 Governmental Ordinance, Policy, Practice, or Custom

In order for an entity to be liable for violation of a federal constitutional or statutory right under § 1983, entity's policy or custom must have played part in violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

- [8] **Civil Rights**  
👉 Color of Law

Defendant acts "under color of state law," for purposes of liability under § 1983, when he exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

- [9] **Civil Rights**  
👉 Officers and public employees, in general

County judge executive took action under color of state law, for purposes of establishing his official capacity liability and liability of county, under § 1983, when he ordered copy of Ten Commandments to be prominently posted in courthouse. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

- [10] **Constitutional Law**  
👉 Establishment of Religion

In order not to violate Establishment Clause, challenged government conduct must have both an actual secular purpose and also the effect of neither advancing nor hindering religion. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

- [11] **Civil Rights**  
👉 Public accommodations or facilities

Claimants seeking preliminary injunction barring posting of Ten Commandments in courthouse, on First Amendment grounds,

showed likelihood of prevailing on claim that posting did not have actual secular purpose, as required to satisfy Establishment Clause, even though other documents discussing religion were added after present suit was instituted, and county claimed that display was designed to acquaint visitors with American religious history and foundations of modern state. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[12] **Constitutional Law**

➡Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

In determining whether government action constitutes endorsement of religion, in violation of Establishment Clause, court must ask whether objective observer acquainted with action would perceive it as endorsement. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Civil Rights**

➡Public accommodations or facilities

**Civil Rights**

➡Preliminary Injunction

Claimants seeking preliminary injunction barring posting of Ten Commandments in county courthouse, were likely to prevail on merits of claim that Establishment Clause was violated, on grounds that posting of Ten Commandments and quotations from other documents of American history was endorsement of religion; all posted materials were edited to show religion in positive fashion, without reference to historical contexts. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[14] **Civil Rights**

➡Preliminary Injunction

Claimants challenging on First Amendment grounds posting of various documents from American history, on grounds that they constituted endorsement of religion, established likelihood of prevailing on claim that Establishment Clause was violated, even though some documents had been found by other courts to not violate First Amendment; in present case documents had all been edited to include only positive references to religious subjects, without regard to historical context. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[15] **Civil Rights**

➡Preliminary Injunction

Loss of First Amendment freedoms and the violation of an individual's First Amendment rights, for even minimal periods of time, constitutes irreparable injury for purposes of satisfying preliminary injunction requirements. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Civil Rights**

➡Public accommodations or facilities

Harm that would occur through issuance of preliminary injunction barring display of Ten Commandments in courthouse did not preclude injunction; costs of removing display were minimal and it could be easily restored if injunction was later withdrawn, and as posting occurred through government action, no free speech rights of private citizens would be affected by removal. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

## Attorneys and Law Firms

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Theodore H. Amshoff, Jr., Amshoff & Amshoff, PSC, Louisville, KY, Ronald D. Ray, Colonel, Crestwood, KY, for Jimmie Greene, McCreary County, Ky, defendants.

### \*682 ORDER

COFFMAN, District Judge.

This matter, which presents a First Amendment challenge to a display of the Ten Commandments and other documents,<sup>1</sup> is before the court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. This court held a hearing on April 20, 2000 and, having reviewed the arguments of counsel and being otherwise sufficiently advised, will grant the plaintiffs' motion for a preliminary injunction and will deny the defendants' motion to dismiss.<sup>2</sup>

#### *Motion to Dismiss*

[<sup>1</sup>] For the reasons explained below, the plaintiffs have stated a claim for a First Amendment violation. The defendants also have raised two procedural grounds for their motion to dismiss, arguing that the plaintiffs lack standing to bring their claims and that they were ineffectually served.

The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged "injuries in fact." The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be adjudicated. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The defendants correctly note that abstract or hypothetical injuries are insufficient. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

In *Washegesic v. Bloomington Public Sch.*, 33 F.3d 679, 683 (6th Cir.1994), the court considered a challenge to a public school's display of a portrait of Jesus. A former student was determined to have standing because he would come into unwelcome direct contact with the display while visiting the school to attend sporting events or meet former teachers. *Id.* The court held that even a member of the PTA or of the public would have standing if she attended events in the school and "took the portrait as a serious insult to her religious sensibilities." *Id.* Like the plaintiff in that case, the plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.

The defendants cite several Seventh Circuit cases holding that in order to have standing in an Establishment Clause challenge, a plaintiff must undertake a special burden or alter his or her normal routine to avoid the offensive object. In *Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir.1993), for example, the plaintiffs challenged the presence of a crucifix in their city's park. The plaintiffs' discontinued use of an area within the park conferred standing. *Id.* at 1417. Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly impractical, however, because they must enter the courthouse to conduct civic business, and therefore the individual plaintiffs have met \*683 the standing requirement for their First Amendment claim.

[<sup>2</sup>] The defendants' claim that the American Civil Liberties Union ("ACLU") lacks organizational standing likewise must be rejected. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court held:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the

members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

*Id.* at 342, 97 S.Ct. 2434, quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, the ACLU has members in McCreary County who would have standing for the same reason that the named plaintiffs have standing. Furthermore, this lawsuit will not require the individual participation of ACLU members. Thus, the ACLU has organizational standing.

<sup>[3]</sup> The defendants next claim that they were not properly served under Fed. R. Civ.P. 4. Rule 4(j)(2) provides that a county may be served “by serving the summons and complaint in the manner prescribed by law of that state for the service of summons.” The Kentucky Rules of Civil Procedure allow a summons to be served by mail. Ky.R.Civ.P. 4.01(a). Under the Kentucky rule, the clerk of court actually mails the summons. Here, the plaintiffs placed the summons in the mail themselves, and the defendants argue that the service was ineffective because the clerk of court did not place the summons in the mail. The federal clerks of court do not, however, place summons in the mail for plaintiffs. The Federal Rules of Civil Procedure permit service “in the manner” allowed by their state counterparts—here, mailing. That the plaintiffs rather than a clerk of court mailed the summons does not render it ineffective. Accordingly, the defendants’ motion to dismiss will be denied.

#### *Preliminary Injunction*

<sup>[4]</sup> A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). To receive a preliminary injunction, a plaintiff must establish: (1) a strong or substantial likelihood of success on the merits; (2) that he or she will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that

an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). These four factors guide the discretion of the court and are not unbending prerequisites. *Id.*

<sup>[5]</sup> A party need not prove his case in full at a preliminary-injunction hearing. *Camenisch*, 451 U.S. at 395, 101 S.Ct. 1830. The court must, however, make findings of fact and conclusions of law, which are not binding at a trial on the merits, *United States v. Owens*, 54 F.3d 271, 277 (6th Cir.1995), when deciding a motion for a preliminary injunction. The court need not make specific findings of fact regarding each of the four factors if fewer are dispositive. *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1076 (6th Cir.1994). In a case brought under the First Amendment, the likelihood of success on the merits frequently may be the determinative factor. *Connection Distrib.*, 154 F.3d at 288.

#### **\*684 Findings of Fact**

McCreary County officials recently erected in the McCreary County courthouse a Ten Commandments display, pursuant to an August 17, 1999 fiscal court order, signed by the defendant Jimmie Greene, that the display be posted in “a very high traffic area” of the courthouse. When this suit was filed, the display consisted of at least one framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. After this lawsuit was filed, the defendants amended the display to include several other documents.<sup>3</sup> At oral argument, the defendants conceded that they did so in an attempt to bring the display within the parameters of the First Amendment and to insulate themselves from suit. The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver’s licenses and permits, to register cars, to pay local taxes, and to register to vote.

As it now exists,<sup>4</sup> the display consists of (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of “In God We Trust”; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible” reading, “The

Bible is the best gift God has ever given to man.”; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. While some of the documents are displayed in their entirety, the defendants have excerpted a small portion of others to include only that document’s reference to God or the Bible with little or no surrounding text.

### *Conclusions of Law*

#### *1. Likelihood Of Success On The Merits*

[6] [7] The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983, arguing that the continued posting of the Ten Commandments in the McCreary County courthouse violates their First Amendment rights. Section 1983 creates a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. *See Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Section 1983 does not create separate substantive rights, but merely provides a method of vindicating independently conferred federal rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A plaintiff must allege two elements to establish a prima facie case under § 1983:(1) that the action occurred “under color of law”; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In a § 1983 case brought against a defendant in his official capacity, the governmental entity is liable under § 1983 only when the entity itself is a “moving force” behind the deprivation; thus, in an official-capacity suit, the entity’s policy or custom must have played a part in the violation of federal law. *Kentucky \*685 v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

[8] [9] Here, the plaintiffs have shown a substantial likelihood of success on the merits for both elements required by a § 1983 claim. First, Jimmie Greene acted under color of state law<sup>5</sup> and in his capacity as County Judge Executive when he promulgated the August 17, 1999 Fiscal Court order requiring that the Ten Commandments be displayed in the courthouse. Greene possessed policy-making authority, so that his order to post the Ten Commandments constituted official McCreary County policy. That policy serves as a driving force behind the constitutional violations alleged in this case. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Second, violations of the First Amendment such as those

alleged in this case are remediable through a § 1983 claim. The First Amendment declares, “Congress shall make no law respecting an establishment of religion....” U.S. Const. amend I. Pursuant to the Establishment Clause of the First Amendment, governmental bodies may not “take a position on questions of religious belief or [make] adherence to a religion relevant in any way to a person’s standing in the political community.” *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O’Connor, J., concurring)). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon*, the governmental action first must have a secular purpose and “second, its principal or primary effect must be one that neither advances nor inhibits religion.” Finally, the governmental action must not result in “excessive governmental entanglement with religion.” *Id.* at 612–13, 91 S.Ct. 2105. In the past decade, the Supreme Court has reframed the *Lemon* analysis, focusing on whether either the purpose or the effect of the challenged governmental action results in the endorsement of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Courts in this circuit treat the endorsement test as a refinement or clarification of the *Lemon* analysis, *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999), and this court will apply that test to decide whether the Ten Commandments display, both in its original form and as amended, passes constitutional muster.

[10] The endorsement test forecloses governmental action that “a reasonable observer would think is an endorsement of religion by the government.” *Id.* Justice O’Connor formulated the endorsement test, explaining:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

*Lynch*, 465 U.S. at 690, 104 S.Ct. 1355 (O’Connor, J., concurring).<sup>6</sup> In other words, the challenged conduct must have both an actual secular purpose and also the effect of

neither advancing nor hindering \*686 religion. Because the government's use of a religious reference or of an object with religious meaning may be appropriate under some circumstances but not in others, the court must assess the constitutionality of government conduct with careful attention to the manner and context of the action. *Compare Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, with *Lynch*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (display of creche held unconstitutional in former but constitutional in latter).

[11] The purpose prong of the endorsement analysis asks whether a secular purpose actually motivated the government's action.

In considering the purpose prong ... the focus of the inquiry is on the intentions of the government. Namely, did the government intend to convey a message of endorsement or disapproval of religion when it implemented the challenged policy. Courts should generally be deferential to the government's articulation of a secular purpose. The government's secular purpose, however, must be sincere and not a mere sham. Although the government's purpose need not be exclusively secular, a practice will violate the Establishment Clause if it is entirely motivated by a purpose to advance religion.

*Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir.1999), citing *Edwards v. Aguillard*, 482 U.S. 578, 585–86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Lynch*, 465 U.S. at 681 n. 6, 104 S.Ct. 1355; *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). See *Granzeier*, 173 F.3d at 574. Here, the court will look to the County's proffered purpose, the brief history of the Ten Commandments display, and the display itself to determine whether the display serves an actual, secular purpose.

In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God, and their very nature precludes a finding of a prevalingly secular purpose here. Indeed, "the pre-eminent purpose for posting the Ten

Commandments ... is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).<sup>7</sup>

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: worshiping 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.

*Id.* at 41–42, 101 S.Ct. 192. In their briefs and at oral argument, the defendants suggest that the Ten Commandments were posted in order to teach McCreary County residents about American religious history and the foundations of the modern state. The defendants also concede that the display purports to demonstrate America's Christian heritage.<sup>8</sup> The narrow scope of \*687 the display—a single religious text unaccompanied by any interpretation explaining its role as a foundational document—can hardly be said to present meaningfully the story of this country's religious traditions, and for this court to conclude that the original display had a secular purpose belies reason.

The challenged display now includes other documents which the defendants argue illustrate the display's secular purpose: the education of McCreary County residents concerning American religious history. As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case. Furthermore, the requirement of a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). While the government's stated purpose may be entitled to some deference, the history of the display here and the choice of documents in the display contradict the County's assertion. That the display originally consisted solely of the Ten Commandments and that it was altered—albeit without any legally significant change—only after this lawsuit was filed weigh heavily against the finding of a secular purpose.

Likewise, a review of the documents themselves forecloses a characterization of the purpose of the display as secular. The County narrowly tailored its selection of foundational documents to incorporate only those with

specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate McCreary County residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation's founders or about the complex role religion has played in this country's history. In short, as shown by the facts of the case and the display itself, the exhibit—both in its original form and as altered—serves no secular purpose, nor was it ever intended to do so. As the display clearly lacks a secular purpose, it violates the First Amendment and the court's analysis need go no further. *See Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. The court, however, will complete the *Lemon* analysis to determine whether the effect of the display also violates the Establishment Clause.

[12] In determining such an effect, the court must ask whether an objective observer acquainted with the display would perceive it as a governmental endorsement of religion. *See ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir.2000). The objective-observer standard parallels the reasonable-person standard in torts law; the question is not whether one particular, uninformed, subjective observer would view the display as an endorsement of religion but whether an objective, reasonable, knowledgeable observer would do so. Here, the prevailing effect of the display is one of governmental endorsement of religion.

[13] The overriding theme of each individual document as presented in the display and of the display as a whole is one of religion and more specifically of Christianity. The first document is a copy of the Congressional Record from February 2, 1983, proclaiming that year the Year of the Bible and reflecting the remarks of Representative Phillip M. Crane about his personal beliefs concerning the importance of the Bible and the Ten Commandments, a version of which is included in the remarks. The next document consists of two brief excerpts: one from the Declaration of Independence, "All men ... are endowed by their Creator with certain unalienable \*688 Rights, that among these are Life, Liberty and the pursuit of Happiness," and one from the Constitution of Kentucky, "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." The next document is President Lincoln's Proclamation of a Day of Prayer. Issued in 1863, it confesses to God and seeks forgiveness for national sins committed during the Civil War. Another presidential proclamation follows, from President Reagan, declaring

1983 the Year of the Bible in honor of its influence in shaping America. A copy of the Mayflower Compact follows, in which the colony's founders invoke "the name of God" and explain that their journey was taken, among other reasons, "for the glory of God and advancement of the Christian faith." Finally, bearing a picture of Abraham Lincoln, the next states, "The Bible is the best gift God has ever given to man."

While a display of some of these documents may not have the effect of endorsing religion in another context, they collectively have the overwhelming effect of endorsing religion in the context of this display. No reasonable observer of the display could conclude otherwise. Each and every document refers to religion. Several have been edited to include only their religious references. Indeed, the only unifying element among the documents is their reference to God, the Bible, or religion. Furthermore, the display lacks an explanation of the documents' historical significance or of the reasons for their references to religion. Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion.

[14] The defendants argue that the display cannot be held to violate the First Amendment because it includes excerpts from texts which have been held to be constitutional despite references to God or religion. They point specifically to this nation's motto of "In God We Trust" and the phrase "one nation under God" found in the Pledge of Allegiance. The defendants' argument, however, fails. First, as to several of the documents, the defendants did not include the entire text or even a meaningful section of each text. Rather, they narrowly extracted only the sections directly mentioning God. This effectively changed the meaning and significance of each of the documents from the original, particularly when read in conjunction with the rest of the Ten Commandments display. Second, and more generally, in upholding examples of ceremonial deism, such as the phrase "In God We Trust," courts have pointed to the long-standing existence of such phrases as well as their non-sectarian nature, concluding that "a reasonable observer, aware of the purpose, context, and history of the phrase ..., would not consider its use ... to be an endorsement of religion." *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d at 721–22 (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996)). *See Allegheny*, 492 U.S. at 602–04, 109 S.Ct. 3086. Here, there is neither a long-standing tradition of posting the Ten Commandments in county courthouses nor any secular purpose for doing so. As the court has explained, a reasonable observer would conclude that the



Ten Commandments display represents a governmental endorsement of religion, rather than merely a traditional manner of solemnizing a government meeting or giving a stamp of legitimacy to national currency. To the extent the defendants have invited this court to break with precedent and hold that the posting of the Ten Commandments should be viewed as only another example of ceremonial deism, the court declines to do so.

The defendants direct the court's attention to three cases in which other courts held Ten Commandments displays to be constitutional. All three of the cases are distinguishable from this case. In *Books v. City of Elkhart, Ind.*, 79 F.Supp.2d 979 (N.D.Ind.1999), the district court held that \*689 a fifty-eight-year-old stone monument containing, among other things, a copy of the Ten Commandments, did not violate the Establishment Clause. The monument was merely one of several historical and cultural plaques and memorials, all donated by private parties, standing on the edges of a city-owned lot, removed from government buildings. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), considered an identical memorial, which it held to be constitutional. That opinion, however, has been called into question by the Tenth Circuit, which noted that it was decided before *Stone* and which commented that "more recent cases [cast] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Sumnum v. Callaghan*, 130 F.3d 906, 910 n. 10 (10th Cir.1997)(decided on grounds of freedom of speech). Here, the Ten Commandments display is not in an area with other memorials and is not incorporated as part of a larger, secular sculpture or display. Furthermore, the court's holding in *Elkhart* that the Ten Commandments should be considered to be secular is by no means definitive in light of the Supreme Court's holding in *Stone*, and the holding in *Elkhart* was largely dependent upon the manner in which the Commandments were displayed, differing greatly from the Ten Commandments display here.

Similarly, in *Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D.N.C.1999), the court held that a granite frieze in a courthouse did not violate the Establishment Clause. That sculpture recounted the historical development of the law, with images of "the blind Goddess of Justice, now called Lady Justice[,] ... ancient gods and goddesses, and the laws of Rome and the Tribes of Israel." *Id.* at 386. On either side of Lady Justice, who bears the Scales of Justice in one hand and holds the Sword of Justice in another, were two marble plaques bearing the Ten Commandments. The court noted that the courthouse had been entered into the National Register of Historic Places by the United States

Department of the Interior, with special note paid to the sculpture, which could not be removed without its destruction. The court held that the purpose in sculpting the frieze was to display artistically the history of ethics, civilization, and the law, and that when viewed as a whole the sculpture did not communicate a governmental endorsement of religion. Again, the Ten Commandments display challenged here is not part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions. Instead, it is a narrowly tailored display, intended to convey and having the effect of conveying a very specific governmental endorsement of religion.

The First Amendment will not permit such an endorsement, as "it sends a 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." *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086, quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. 1355. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity,<sup>9</sup> whose \*690 message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display violates the Establishment Clause of the First Amendment. Thus, the court concludes that the plaintiffs have shown a strong likelihood of success on the merits.

## 2. Irreparable Harm

<sup>[15]</sup> The loss of First Amendment freedoms and the violation of an individual's First Amendment rights "for even minimal periods of time [ ] unquestionably constitute [ ] irreparable injury." *Connection Distrib.*, 154 F.3d at 288, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). See also *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995). Thus the plaintiffs here have shown that failure to grant the relief sought will result in their suffering irreparable harm.

3. *Harm to Others*

[16] If the court grants the preliminary injunction sought by the plaintiffs, the defendants will be required to remove the religious display from the site upon which it is posted. This will require little expense. Should the defendants be successful at a trial on the merits, they may construct the display again at little expense.

The defendants argue that an order requiring the removal of the Ten Commandments and accompanying documents would infringe on their First Amendment right to free speech and would be tantamount to censorship. The defendants’ concerns, however, are misplaced. Greene’s official actions as McCreary County Judge Executive are distinguishable from those of private citizens. Greene’s actions are subject to First Amendment scrutiny because he acted in his official capacity as Judge Executive when he posted the Ten Commandments and later when he revised the display in the McCreary County Courthouse. The Establishment Clause of the First Amendment restricts the conduct of the government and its agents, not of private citizens. *Allegheny*, 492 U.S. at 590, 109 S.Ct. 3086. Thus, the action of a government official creating such an exhibit in a public area of a courthouse is analytically distinct from that of a private citizen who, for example, posts a copy of the Ten Commandments in his own home, in his front yard, or in his private business. The private citizen’s actions do not implicate the Establishment Clause of the First Amendment. The speech at issue here was not that of private citizens, but of the government itself.<sup>10</sup> Thus, the removal of the display at issue here will not infringe upon the defendants’ First Amendment free speech rights. *See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Rather than limiting the religious speech of private citizens, the First Amendment ensures, in two separate ways, the freedom to engage in such speech and in doing so protects the public’s interest. First, “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, the Free Speech Clause would, for \*691 example, preclude a county government from fining a private citizen for carrying a copy of the Ten Commandments or discussing the Ten Commandments

Footnotes

1 The subject display originally included only the Ten Commandments. Because the exhibit was merely a futile attempt to render constitutional the original display, it is analytically meaningless when measured by the Establishment Clause.

with others. Second—and more central to the case at hand—the Establishment Clause guarantees that private citizens can think and speak freely on religious matters without fear of government coercion or penalty. Absent the Establishment Clause, a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to convert to islam on threat of imprisonment or could heavily fine anyone who entered a church. Clearly, such governmental conduct is at odds with the United States Constitution, which established this nation as a democracy, not as a theocracy. Subtler forms of government-sanctioned religious intolerance also serve to limit freedom of religious thought, speech, and practice and are therefore unconstitutional.

4. *The Public Interest*

As explained above, the protection of First Amendment rights and vindication of constitutional violations is always in the public’s interest. *Connection Distrib.*, 154 F.3d at 288; *Dayton Area Visually Impaired*, 70 F.3d at 1490; *G & V. Lounge, Inc.*, 23 F.3d at 1079. Accordingly,

**IT IS ORDERED** that the plaintiffs’ motion for a preliminary injunction is **GRANTED**.

**IT IS FURTHER ORDERED** that the defendants’ motion to dismiss is **DENIED**.

**IT IS FURTHER ORDERED** that the Ten Commandments display shall be removed from the McCreary County Courthouse **IMMEDIATELY**.

**IT IS FURTHER ORDERED** that neither the defendant Jimmie Greene nor any other McCreary County official, acting in their official capacity, shall erect or cause to be erected similar displays within McCreary County, Kentucky.

All Citations

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interchangeably the terms “Ten Commandments display,” “religious documents,” and similar phrases to describe the exhibit here at issue.

The mere filing of these complaints does not create a presumption that the original display poses and least significant for the purpose of the motions case or the false and similar complaints, memoranda, and motions

both sides, the court combined the three for oral argument and today enters virtually identical opinions—with necessary but slight factual variations—in all three.

3 The defendants argue that because they altered the display, the plaintiffs' complaint is moot. Their argument fails because the new display is effectively a continuation of the original display, and the plaintiffs raise the same objections to the amended display.

4 At oral argument, it appeared that the original exhibit of the Ten Commandments was removed and replaced with the text of the Congressional Record which includes a copy of those Commandments. The exhibits attached to the defendants' brief, however, include a photograph of the Pulaski County Courthouse display in which the large framed copy of the Ten Commandments remains, with the other, smaller documents hanging to one side. For the purposes of this motion, either scenario produces the same result.

5 A § 1983 defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Indeed, Greene's activities must be subjected to First Amendment scrutiny because in hanging the Ten Commandments in the courthouse, he acted as a public, government official, not as a private citizen. See *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

6 The endorsement test was adopted by a majority of the Court in *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086.

7 While the defendants suggest that *Stone* is inapplicable here because it dealt with legislative action and declared the posting of the Ten Commandments to be unconstitutional without the benefit of full briefing, it nevertheless is still good law and this court is bound by its precedential value. The court cites the case today merely to establish that the Ten Commandments are a distinctly religious text and that their posting has a religious purpose.

8 Such an overtly Christian purpose violates the Establishment Clause. While the court recognizes that the Christian tradition has played an important role in American culture, the defendants' reliance on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), is misplaced. In that case, the Supreme Court examined whether a service contract between an incorporated church and a foreign minister fell within the purview of a statute regulating the import of foreign laborers. The Court's analysis focused upon and delineated rules of statutory construction and did not entail First Amendment jurisprudence. Indeed, the language cited by the defendants is dicta and is neither that Court's ruling nor vital to its ruling.

9 Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny*, 492 U.S. at 589, 109 S.Ct. 3086.

10 The court notes, however, that Greene and McCreary County cannot avoid the strictures of the Establishment Clause by allowing private citizens or religious organizations to post a Ten Commandments display in the courthouse. To do so would simply show "that the government is endorsing the religious message of that organization, rather than communicating a religious message of its own .... It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600, 109 S.Ct. 3086.