

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-685

KATHRYN CHRISTIAN, et al.,

Plaintiffs,

v.

CITY OF GRAND JUNCTION, a home-rule municipal corporation of the State of Colorado,

Defendant.

**PLAINTIFFS' MOTION FOR AND MEMORANDUM BRIEF IN
SUPPORT OF ISSUANCE OF A PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED HEARING**

Plaintiffs, through their counsel, submit the following motion for a preliminary injunction, along with a request that the Court set an expedited date for an evidentiary hearing on the motion.

Certification pursuant to District of Colorado Local Rule 7.1.A

The undersigned counsel states that he has discussed the subject of this motion with opposing counsel and that the parties were unable to agree on a satisfactory resolution.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs request preliminary injunctive relief from an ongoing violation and threatened future violations of the Establishment Clause of the First Amendment. The Defendant City of Grand Junction has erected and continues to maintain a large granite monument on the grounds of City Hall that contains the text of the Ten Commandments. Without immediate intervention from this Court, the City will soon begin construction of a project to be named "Cornerstones of Law and

Liberty,” in which the Ten Commandments monument will be displayed with the American flag and five new monuments depicting various documents important to American legal history, such as the Bill of Rights. Plaintiffs seeks preliminary injunctive relief and an expedited hearing before the City begins construction of the Cornerstones plaza.

FACTS

It is anticipated that the following facts will be adduced at the preliminary injunction hearing.

Grand Junction City Hall is located at 5th Street and Rood Avenue in the core of downtown Grand Junction. In Colorado, municipal corporations like Grand Junction have "the power to erect and care for all necessary public buildings for use of the municipality." Colo. Rev. Stat. § 31-7-701. City Hall is home to the executive branch, the judicial branch and the legislative branch – all three branches of government – of the City of Grand Junction. The Mayor, the municipal courts, and the City Council all are accessible in City Hall. Citizens express their concerns to City Council and city employees, obtain government licenses and benefits, and pay traffic tickets and other municipal fees in City Hall. City Hall is undeniably the most important government building in Grand Junction. The City Hall building and grounds are owned by the City.

In September 2000, when the newly constructed City Hall opened for government business, a large granite monument, depicting the Ten Commandments as they were brought down from Mt. Sinai by Moses, was placed about 60 feet from the main entrance to City Hall, next to a large sign

proclaiming “City Hall.”¹ Inscribed in the center of the Ten Commandments monument in large, easy to read letters, are the following words:

THE TEN COMMANDMENTS

I AM the LORD thy GOD

Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the name of the Lord thy God in Vain.
Remember the Sabbath day to keep it holy.
Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor’s house.
Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.

The Ten Commandments are derived from the Old Testament, Exodus 20: 2-17 and Deuteronomy 5: 6-21. Jewish tradition believes that the Ten Commandments were given by God to Moses on Mt. Sinai. The Ten Commandments are therefore deemed to be sacred by many Christians and Jews. Although the Ten Commandments can be divided into groupings of commandments which concern belief in God and those which concern God’s code of conduct, true believers see the Ten Commandments as a unitary document, given to man by God, which is held

¹ The monument was one of numerous similar monuments that the Fraternal Order of Eagles donated to communities across the country in 1958. See, e.g., Books v. City of Elkhart, 235 F.3d 292, 294-96 (7th Cir. 2000) (holding that display of identical monument violates Establishment Clause). From the time the local aerie of the Eagles donated it to Grand Junction in 1958 until it was removed for construction of the new city hall in 1999, the monument stood in an inconspicuous location on the periphery of City Hall grounds, where it was obscured by shrubbery.

together by its initial pronouncement that “I AM the LORD thy GOD.”

In addition to the Ten Commandments, the monument contains inscriptions of various other items including Phoenician letters, the “all-seeing” eye of God, an American eagle grasping an American flag, two stars of David, two superimposed Greek letters, Chi and Rho, which form a symbol of the name “Jesus Christ,” and a scroll recognizing the gift of the monument in 1958 by the Fraternal Order of Eagles. In September 2000, there were no other monuments, statues or signs to give the Ten Commandments monument any context, other than the “City Hall” sign.

On September 6, 2000, the Grand Junction Sentinel published an article under the headline: "Tablet at City Hall of Ten Commandments is most Likely Illegal." (copy attached as Exhibit 1). The then-Mayor of Grand Junction, Gene Kinsey, was quoted as saying: "I hope we don't get sued because we'd probably lose." The article said that the ACLU Executive Director had no plans to sue, but it said she urged citizens to protest the monument and demand its removal. A number of citizens objected. Letters were written to the City and to the Grand Junction Sentinel expressing concern over the message that the Ten Commandments monument sends to community members who are not believers in the Judeo-Christian faith, or who are offended by having to confront a sacred religious text conspicuously displayed at the entrance to City Hall. Plaintiff Jeff Basinger wrote a letter to the City, but he did not receive a response.

On February 5, 2001, a group of concerned citizens, including the individual Plaintiffs, met informally with Mayor Kinsey to express their grave concern that the City's placement of the monument violated the Establishment Clause. They asked that City consider moving the monument across the street to the Methodist Church, which was willing to accept it. They also advised that a Complaint had been prepared and that they were ready to file suit if they were unable to persuade

the City to agree to an out-of-court resolution of the controversy. The Grand Junction Sentinel reported that the City had been threatened with a lawsuit, which unleashed a storm of public controversy. The Christian Coalition publicly announced that the American Center for Law and Justice would provide free legal services to the City to defend the City in any lawsuit challenging the Ten Commandments monument. Another informal meeting with the individual plaintiffs and most of the members of the City Council took place on February 26, 2001. Shortly afterward, the City Council announced that it would consider the request to move the monument, would conduct a special meeting to receive public input, and make its decision by March 21, 2001. The issue was discussed at several City Council meetings; a televised public hearing took place to receive public input, and numerous letters to the editor, editorials, columns and articles were published in the Grand Junction Sentinel debating the issue. The City Council heard and received the voters' strongly-expressed views that the Ten Commandments monument should be retained, in many cases for purely religious reasons, including that the monument expressed the religious views of the majority of citizens.

On March 19, 2001, by a vote of 5-2, the City Council passed Resolution No. 28-01, which resolved that:

- (1) The City of Grand Junction, in order to honor the cultural heritage of the United States of America, will retain the Ten Commandments monument on the grounds of City Hall;
- (2) The City will add a disclaimer to the Ten Commandments, similar to the one displayed in Pocatello, Idaho, which will make clear that the monument is not an endorsement of any religion or faith;
- (3) The City will add to the City Hall grounds other monuments to our cultural heritage which will enhance the public's recognition and appreciation of the

rule of law, democracy, freedom and independence;

- (4) The City will solicit and accept contributions for the disclaimer and additional monuments in order to prevent the expenditure of public funds which might be interpreted by some as an endorsement of a particular faith or religion.

Attached to the Resolution is a document entitled “Suggested Process for the Plaza,” which concludes with the statement: “The Council shall attempt to accomplish all this in time for the new Cultural Heritage Plaza to be dedicated on July 2, 2001.” A “disclaimer” was placed, that afternoon, in front of the Ten Commandments monument, which states:

“This display is not meant to endorse any particular system of religious belief. As Thomas Jefferson stated, our democracy is premised upon the belief that government should not intrude into matters of religious worship. Still, as a historical precedent, the Ten Commandments represent some of man’s earliest efforts to live by the rule of law. Many of these ancient pronouncements survive in our jurisprudence today.”

Mayor Kinsey, who had voted against retaining the monument, was voted out of office on April 3, 2000. Contemporaneous articles published in Denver and Grand Junction newspapers attributed Mayor Kinsey’s likely defeat to a letter-writing campaign conducted by the Christian Coalition, which targeted Kinsey for his vote on the Ten Commandments.

This lawsuit was filed on April 16, 2001. On May 24, 2001, five days before the City filed its Answer to the Complaint, the City moved the Ten Commandments monument from one side of the main entrance to City Hall (away from the “City Hall” sign) to the other side of the main entrance, and announced its intention to display five other textual monuments in a semi-circle with the Ten Commandments monument. The City announced that the area would not be called a "Cultural Heritage Plaza" as previously announced but instead would be named “Cornerstones of

Law and Liberty.” The “Cornerstones” are identified as The Ten Commandments, the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the Constitution and the Bill of Rights.

The individual Plaintiffs are residents of Mesa County and the City of Grand Junction.² They are active in politics and the community. They frequently go to City Hall to attend public meetings, and to attend to other matters, both civic and personal. They intend to continue to do so. The individual Plaintiffs strongly object to the display of the Ten Commandments monument on City Hall grounds, as it stood from September 2000 to May 2001 (both before and after placement of the “disclaimer”), and as it stands now, where the City plans to include it in the Cornerstones Plaza, which will convey the City’s view that a straight line of influence can be traced from the Ten Commandments to our Bill of Rights. The individual Plaintiffs believe that the previous, the current and the planned display of the Ten Commandments by the main entrance to City Hall endorses religion in general, and Judeo-Christian religion in particular, in violation of the Establishment Clause of the First Amendment to the United States Constitution. Accordingly, the individual Plaintiffs are forced either to come into frequent direct and unwelcome contact with the Ten Commandments monument, or to change their normal activities to avoid coming into contact with the monument, in the course of exercising their rights and duties as citizens of Grand Junction, and

² The American Civil Liberties Union of Colorado is also a plaintiff acting in a representative capacity on behalf of its members. The facts will show that the ACLU has members, including individual plaintiffs, who have standing on their own to challenge the Ten Commandments display. They will also show that the subject matter of this lawsuit is germane to the ACLU’s purpose, which is to protect and defend the civil liberties and constitutional rights of Colorado residents. Finally, neither the claim asserted nor the relief requested in this case requires that the organization’s members participate personally in the lawsuit. See Hunt v. Washington State Apple Advertising Comm’n., 432 U.S. 333, 343 (1977).

in the course of their everyday activities. The Plaintiffs cannot avoid being subjected to the monument and its message without being caused undue burden.

As Plaintiffs will demonstrate, they are entitled to preliminary injunctive relief. Neither the disclaimer currently attached to the solitary monument nor the planned addition of five additional monuments can cure the ongoing violation of the Establishment Clause. This Court should issue a mandatory injunction directing that the Ten Commandments monument be removed (as it was momentarily before the Answer was filed) and stored (as it was during construction of the new City Hall) during the pendency of this action.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

The standard for granting a preliminary injunction in the Tenth Circuit is clear:

[T]he moving party bears the burden of showing (1) the injunction, if issued, would not adversely affect the public interest, (2) irreparable harm would occur unless the injunction issues, (3) the threatened injury outweighs any harm an injunction may cause the opposing party, and (4) the party has a substantial likelihood of success on the merits.

Kansas v. United States, 2001 U.S. App. LEXIS 8159, at *33 (10th Cir. May 4, 2001) (citing ACLU v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999)). Where the first three factors have been shown, “the Tenth Circuit has applied a more liberal standard to the likelihood of success prong, stating that ‘it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.’” S.W. Shattuck Chemical Co., Inc. v. City and County of Denver, 1

F.Supp.2d 1235, 1238 (D. Colo. 1998) (quoting Otero Savings & Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981)). Although part of the temporary injunction sought in this case is mandatory in nature – removal of the monument from City Hall grounds – the injunction can be undone simply and easily, and therefore no heightened burden applies. Shattuck, 1 F.Supp.2d at 1238.

II. GRANTING THE INJUNCTION IS IN THE PUBLIC INTEREST

“As far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone’s best interests.” Local Organizing Committee, Denver Chapter, Million Man March v. Cook, 922 F.Supp. 1494, 1501 (D. Colo. 1996). In evaluating similar requests to enjoin government displays of the Ten Commandments, courts have recognized that preliminary injunctive relief serves the public interest. See, e.g., Indiana Civil Liberties Union, Inc. v. O’Bannon, 110 F. Supp. 2d 842, 858-59 (S.D. Ind. 2000); ACLU of Ky. v. Pulaski County, 96 F. Supp. 2d 691, 702 (E.D. Ky. 2000); Kimbley v. Lawrence County, 119 F.Supp.2d 856, 875 (S.D. Ind. 2000) (preliminary injunction mandating removal of monument is “fully consonant with the public interest”).

III. THE ONGOING VIOLATION OF THE ESTABLISHMENT CLAUSE CAUSES IRREPARABLE HARM

Without a preliminary injunction the Plaintiffs will suffer irreparable injury for which there is no adequate remedy at law. The violation of the First Amendment, for even “minimal periods of time” is “unquestionably . . . irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976); see Million Man March, 922 F.Supp. at 1500. Courts have recognized that government displays of the Ten Commandments cause irreparable injury for which preliminary injunctive relief is warranted.

See, e.g., Kimberly v. Lawrence County, Indiana, 119 F. Supp. 2d 856, 873-74 (S.D. Ind. 2000) (mandating removal of monument); ACLU of Kentucky v. McCreary County, 96 F. Supp. 2d 679, 690 (E.D. Ky. 2000) (ordering removal of display).

IV. THE BALANCE OF HARMS FAVORS THE PLAINTIFFS

If a preliminary injunction is granted, the City of Grand Junction will be forced to remove the Ten Commandments from the City Hall grounds during the pendency of this case. It is difficult to see how removing the monument, which was removed and stored for a year during construction of the City Hall and which has been in its present location for less than two weeks, is going to injure the City of Grand Junction. At the hearing, the evidence will show that when the City moved the monument on May 24, 2001, it did so using the donated services of a local crane company. Any injury the City will face pales by comparison to the irreparable harm that the First Amendment violation is causing Plaintiffs.

V. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

As the previous sections demonstrate, the Plaintiffs easily satisfy the first three factors -- public interest, irreparable harm, and balance of harms -- required for issuance of a preliminary injunction. Accordingly, the Plaintiffs need only raise “questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.” Shattuck, supra, 1 F.Supp.2d at 1238 (quoting Otero, supra, 665 F.2d at 278). The Plaintiffs satisfy not only this standard, but also the more demanding standard of “substantial likelihood of success.”

A. Applying the Lemon Test and the Endorsement Test, Numerous Courts Have Enjoined Government Displays of the Ten Commandments

Traditionally, challenges to governmental practices under the Establishment Clause are judged under the tripartite standard first expressed in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon test, state action which involves the government with religion is constitutional only if: 1) it has a secular purpose; 2) its principal effect neither inhibits nor advances religion, and 3) it does not foster excessive government entanglement with religion. Lemon, supra, 403 U.S. at 611-12. Governmental action violates the Establishment Clause if it fails to satisfy any of these prongs. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

To satisfy the first prong of the Lemon test, the government must articulate a sincere secular purpose for the challenged policy. E.g., Edwards, supra, 482 U.S. at 586-87. (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such a purpose be sincere and not a sham”). As the Court reiterated last term:

When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts “to distinguish a sham secular purpose from a sincere one.”

Santa Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000).

The Lemon test remains valid, but its first two prongs are often recast and articulated as the “endorsement” test that was first proposed in Justice O’Connor’s concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 687 (1984). See County of Allegheny v. ACLU, 492 U.S. 573, 595-97 (1989) (adopting Justice O’Connor’s approach). The endorsement test reformulates the first two prongs of the Lemon test as follows:

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 (O'Connor, J., concurring).³ When the full Court adopted Justice O'Connor's approach, it agreed that any governmental endorsement of religion violates the Establishment Clause because 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, supra, 492 U.S. at 595 (quoting Lynch, supra, 465 U.S. at 688 (O'Connor, J., concurring)).

To determine whether a challenged governmental display has the purpose or effect of endorsing religion, a court must evaluate its context. Id. at 595. The relevant context is not limited to what is visible in the display itself. "In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools.'" Santa Fe. Ind. Sch. Dist. v. Doe, supra, 530 U.S. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

Applying the Lemon test and later the endorsement test, courts in recent years have

³ Courts analyzing the entanglement prong of the Lemon test sometimes address the question whether a challenged government activity causes "political divisiveness." Lynch, supra, 465 U.S. at 689 (O'Connor, J., concurring). Although political divisiveness by itself is not sufficient for a finding of excessive entanglement, it is nevertheless "an evil addressed by the Establishment Clause," and "[i]ts existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." Id. The community uproar that preceded the filing of this lawsuit is evidence that a sizable portion of the Grand Junction community regarded the Mayor's vote to remove the monument as a vote against their strongly-held religious beliefs.

consistently ruled that various governmental displays of the Ten Commandments violate the Establishment Clause. See Stone v. Graham, 449 U.S. 39 (1980) (holding that Ten Commandments is a religious text and Kentucky had no secular purpose for posting it on classroom walls); Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) (Ten Commandments monument on city hall grounds had purpose and effect of endorsing religion), cert. denied, 2001 U.S. Lexis 4120 (May 29, 2001); Kimbley v. Lawrence County, 119 F.Supp.2d 856 (S.D. Ind. 2000) (preliminary injunction issued to remove monument from courthouse lawn); Indiana Civil Liberties Union, Inc. v. O'Bannon, 110 F.Supp.2d 842 (S.D. Ind. 2000) (preliminary injunction issued against planned erection of monument on state capitol grounds); Adland v. Russ, 107 F.Supp.2d 782 (E.D. Ky. 2000) (permanent injunction issued against planned monument on state capitol grounds); ACLU of Kentucky v. McCreary County, 96 F.Supp.2d 679 (E.D. Ky. 2000) (preliminary injunction issued against posting of Ten Commandments inside courthouse); ACLU of Kentucky v. Pulaski County, 96 F.Supp.2d 691 (E.D. Ky. 2000) (same); Doe v. Harlan County School Dist., 96 F.Supp.2d 667 (E.D. KY. 2000) (preliminary injunction issued against posting of Ten Commandments in schools); Harvey v. Cobb County, 811 F.Supp. 669 (N.D. Ga. 1993) (framed panel in courthouse unconstitutional). But see Suhre v. Haywood County, 55 F.Supp.2d 384 (W.D.N.C. 1999) (display on courthouse wall next to large bas relief of lady of justice constitutional); State v. Freedom From Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995) (Ten Commandments monument in public park, situated among more than 20 other larger monuments and statues, was constitutional) (4-3 decision); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1972).

B. In a case with nearly identical facts, the Seventh Circuit held that a Ten Commandments monument on the grounds of city hall violates the

Establishment Clause

The Seventh Circuit's decision in Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) illustrates how the legal analysis applies in a case with facts that are nearly identical to the facts of this case. At issue in Books was an Eagles-donated granite monument that was identical to the one in Grand Junction. Like the Grand Junction monument, it stood by itself on the lawn of the Elkhart municipal building. And as Grand Junction attempted to do in this case, the City of Elkhart made an effort to forestall court intervention by proclaiming -- just before the lawsuit was filed -- a purported secular purpose that is very similar to the avowed secular purpose currently proclaimed on the "disclaimer" in Grand Junction. According to the City of Elkhart's last-minute resolution, "the monument and the symbols on its face recognize the historical and cultural significance of the Ten Commandments." Books, *supra*, 235 F.3d at 296. The resolution further stated that "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization." *Id.* Finally, the city's resolution contended that it was proper to display the monument because it "is a historical and cultural monument that reflects one of the earliest codes of human conduct." *Id.* The Seventh Circuit held that the city's display of the monument had both the purpose and effect of endorsing religion, and it directed the district court to enter summary judgment against the city. *Id.* at 307. The Supreme Court declined review. City of Elkhart v. Books, 2001 U.S. LEXIS 4120 (May 29, 2001).

1. The Ten Commandments monument itself is religious, not secular

The Books court began by analyzing the monument itself, and it concluded that it was clearly religious in nature:

As a starting point, we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document. Indeed, the Supreme Court made this point clear in Stone v. Graham, 449 U.S. 39 (1980), when it noted that a simple reading of the Ten Commandments does not permit us to ignore that they transcend

arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. 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.

____ Id. at 41-42. Indeed, when one goes beyond the text itself and regards this particular display, the religious nature of the document is emphasized by the very format of the monument. Notably, the prefatory words "I am the Lord thy God" are set out in large lettering at the top of the text. This religious format is enhanced, not detracted from, by the etchings at the bottom of the tablet of the Stars of David and Chi Rho symbol, a distinctive Christian symbol. It cannot be doubted, therefore, that this monument bearing the Ten Commandments possesses a religious nature.

Books, 235 F.3d at 302. An identical analysis applies to the Grand Junction monument.

2. The Books court found that the City's avowed secular purpose was not sincere

In analyzing whether the City had advanced a sincere secular purpose for displaying the religious monument, the Books court declined to credit the City's last-minute attempt to justify the monument. The court concluded that the City's purpose was not secular, and that the display therefore violated the Establishment Clause:

The City's resolution, issued on the eve of this litigation and proclaiming a secular purpose for the monument's presence by recognizing the historical and cultural significance of the Ten Commandments, ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in Stone [v. Graham], 449 U.S. 39 (1980). In Stone, the Kentucky statute required the following language at the bottom of each Ten Commandments display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United

States.” 449 U.S. at 41. The Supreme Court responded to this statement of purpose by stating that “such an avowed secular purpose is not sufficient to avoid conflict with the First Amendment.” Id.; see also Santa Fe Indep. Sch. Dist. [v. Doe], [530 U.S. 290], 120 S.Ct. at 2278 (reiterating that a governmental entity’s professed secular purpose for an arguably religious policy is entitled to some deference but that it is the duty of the courts to ensure that the purpose is sincere); . . . Similarly, we hold that the City of Elkhart’s avowed secular purpose of recognizing the historical and cultural significance of the Ten Commandments, issued on the eve of litigation, “is not sufficient to avoid conflict with the First Amendment.” Stone, 449 U.S. at 41.

Id. at 304. Because the avowed secular purpose was not sincere, the monument failed the first prong of the Lemon test and thus violated the Establishment Clause. Id.

3. The Books court found that a reasonable observer would conclude that the display of the monument endorsed religion

Although the conclusion that Elkhart’s display had no secular purpose was sufficient to hold it unconstitutional, the Books court nevertheless analyzed whether the display also had the unconstitutional effect of endorsing religion. “When employing this analytical approach, we are charged with the responsibility of assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion.” Id. at 304 (citing Allegheny, supra, 492 U.S. at 597).

The Seventh Circuit explained that when religious symbols are displayed at the seat of government, they must be analyzed with particular scrutiny, because it is ““a setting where the presence of government is pervasive and inescapable.”” Books, supra, 235 F.3d at 305 (quoting American Jewish Congress v. City of Chicago, 827 F.2d 120, 126 (7th Cir. 1987)). The effects test considers “the symbolic union of church and state” that is created by the challenged display, and whether it ““is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, or their individual religious choices.””

Books, supra, 235 F.3d at 305 (quoting American Jewish Congress, supra, 827 F.2d at 127 (quoting Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985))).

In holding that the Ten Commandments monument in front of the City of Elkhart’s municipal building violated the objective observer standard applicable to the effect prong of the endorsement test, the Seventh Circuit stated:

In assessing the situation before us, we must ask whether an objective observer familiar with the history and placement of the Ten Commandments monument would perceive it as a state endorsement of religion. We note first that the monument is displayed at the seat of government. As we have just explained, the seat of government “is so plainly under government ownership and control” that every display on its property is marked implicitly with governmental approval. Here, in front of the building that houses the governmental departments of the City, stands a religious message. This granite monument is a permanent fixture on the grounds of the seat of government. As viewed by the passer-by or by an individual approaching the building, the monument certainly cannot be fairly characterized as a component of a comprehensive display of the cultural heritage of the people of Elkhart. Rather, it stands . . . as a sole and stark reminder of the specific injunctions contained in the Commandments.

Books, supra, 235 F.3d at 306. The court further concluded that the Jewish and Christian symbols on the monument, in combination with the American Eagle holding the national colors, had the effect of linking the two religions with civil government:

The format of the monument itself hardly dilutes its religious message. Indeed, this monument impermissibly suggests that, in this community, there are “ins” and “outs.” The monument contains the Stars of David and the symbol of Christ, representing respectively Judaism and Christianity, two of the religions no doubt particularly represented in the Elkhart community, but by no means the total of all those who depend on the City of Elkhart as their local government. . . . In this regard, the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government.

Id. at 306-07 (citations omitted). As the court explained, “[t]he simultaneous endorsement of

Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.” Id. (quoting Allegheny, supra, 492 U.S. at 615). The court concluded that “the primary effect of the Ten Commandments monument on the property of the City of Elkhart's Municipal Building is to advance or endorse religion.” Id. at 307.

C. Grand Junction’s Display of the Ten Commandments Violates the Constitution

Grand Junction’s Ten Commandments monument -- whether it stands alone, stands alone with a "disclaimer," or whether it forms part of the planned "Cornerstones" display -- violates the Establishment Clause of the First Amendment to the United States Constitution.

1. In its current setting, the monument violates the First Amendment

The monument clearly is religious in nature. See Books, supra, 235 F.3d at 302. When this controversy first began, it stood by itself in a prominent location near the entrance to City Hall. From that time until March 20, 2001, the City made no attempt to disclaim a religious purpose or advance a secular purpose for maintaining it.⁴ In the absence of any attempt to mitigate or disclaim the monument’s religious nature, the display of the Ten Commandments lacks a secular purpose and has the effect of endorsing religion. See Id. at 302-04 (Eagles monument); Adland v. Russ, 107 F.Supp.2d 782, 784-85 (E.D. Ky. 2000) (Eagles monument) (“In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other

⁴ Indeed, City officials apparently understood that they could not establish a sincere secular purpose when they told the Grand Junction Sentinel, in September, 2000, that the City would probably lose a lawsuit. See Exhibit A hereto.

documents, lacks any secular purpose”).⁵

In an attempt to bolster its legal position in the face of threatened, imminent litigation, the City passed Resolution No. 28-01 on March 19, 2001, and it erected a sign in front of the monument purporting to disclaim a religious purpose. The monument, with its “disclaimer,” continues to stand alone, though it has now been moved to another spot on the city hall grounds.

Resolution No. 28-01 states that “the Ten Commandments is not only a religious monument, but also a part of our cultural heritage with intrinsic secular value to the community.” It states that the monument will be retained “to honor the cultural heritage of the United States.” Although it purports to state a secular purpose for keeping the monument, this Court has a duty “to distinguish a sham secular purpose from a sincere one.” Santa Fe Ind. Sch. Dist., *supra*, 530 U.S. at 308; ACLU v. Pulaski County, 96 F. Supp. 2d 691, 698 (E.D. Ky. 2000) (“[T]he 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”). In this case, the city’s purported secular purpose is an insincere sham. The city’s actual purpose, consistent with the overwhelming outpouring of religious sentiment from citizens who expressed their opinions, is to continue the public display of this

⁵ In Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1972), the Tenth Circuit considered a 3 by 5 foot granite Ten Commandments monument donated by the Eagles and erected on the city-county courthouse grounds. The court said that the Ten Commandments had “substantial secular attributes” and that the monument was “primarily secular and not religious in character” and therefore did not violate the Establishment Clause. *Id.* at 33, 34. The reasoning of this early decision cannot stand in light of the Supreme Court’s 1980 decision in Stone v. Graham, 449 U.S. 39 (1980), which specifically noted that the Ten Commandments is “undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” 449 U.S. at 42. In a later case, the Tenth Circuit acknowledged that Stone “called into question” the circuit’s earlier decision. *See* Sumnum v. Callaghan, 130 F.3d 906, 912 n.8 (10th Cir. 1997). Formal reconsideration of the earlier holding was unnecessary, however, and Sumnum was decided on other grounds.

religious monument.

The eve-of-litigation timing of Resolution 28-01 strongly suggests that it does not articulate a sincere secular purpose, nor does the last-minute “disclaimer” the City attached to the monument. In Books, the Seventh Circuit declared that “we shall not accept a stated purpose that merely seeks to avoid a potential Establishment Clause violation.” 235 F.3d at 304. Accordingly, it declined to credit the city’s last-minute resolution “issued on the eve of this litigation and proclaiming a secular purpose.” Id.; see also ACLU of Ky. v. Pulaski Cty, 96 F. Supp. 2d 691, 698 (E.D. Ky. 2000) (“That the display originally consisted solely of the Ten Commandments and that it was altered . . . only after this lawsuit was filed weigh heavily against the finding of a secular purpose”).

Moreover, the text of the City’s “disclaimer” continues to convey a message that the City endorses religion. By stating that the display “is not meant to endorse any particular system of religious belief,” the City conveys the message that it does intend to endorse religious belief in general. Such a governmental message violates the Establishment Clause. See Wallace v. Jaffree, 472 U.S. 38, 55 (1985); Lee v. Weisman, 505 U.S. 577, 627 (1992) (“State may not favor or endorse either religion generally over nonreligion or one religion over others”) (Souter, J., joined by Stevens, J., and O’Connor, J., concurring). The “disclaimer” also suggests that the Ten Commandments are displayed as a historical code of conduct the influence of which survives in our law today. The Supreme Court rejected a similar disclaimer in Stone v. Graham, 449 U.S. 39, 41-42 (1980). Thus, as it currently stands, even with its recently-added “disclaimer,” the Grand Junction monument violates the Establishment Clause.

2. The planned Cornerstones Plaza has the purpose and effect of endorsing religion, in violation of the Establishment Clause

Resolution 28-01 declared that the City would erect “other monuments to our cultural heritage which will enhance the public’s recognition and appreciation of the rule of law, democracy, freedom, and independence.” The current plan calls for five additional monuments to join the Ten Commandments monument in a plaza called “Cornerstones of Law and Liberty.” According to the City’s description:

The Ten Commandments will sit alongside the other monuments, which will be of similar size and materials, presenting text carved in stone from the Magna Carta, Mayflower Compact, Declaration of Independence, Preamble to the Constitution, and the Bill of Rights. A pole flying the American flag, visually situated between the Declaration of Independence and Preamble, will form a backdrop for this display. The display will include explanatory text describing how each of the monuments is significant to the founding of our country and legal heritage.

Motion to Dismiss, at 4. According to the City, the plaza “will further confirm the City’s secular purpose in recognizing that the Ten Commandments has intrinsic secular value. The monuments will serve as reminders to the City’s children and citizens of the earliest legal underpinnings of our system of law.” Id.

The City’s latest plan represents yet another “futile attempt to render constitutional the original Ten Commandments display.” American Civil Liberties Union of Ky. v. Pulaski County, 96 F. Supp. 2d 691, 693 n.2 (E.D. Ky. 2000). The City’s true purpose is to continue maintaining its religious monument. Because the City still has not articulated a sincere secular purpose, for that reason alone the planned display will violate the Establishment Clause.

The Cornerstones display will have the purpose and effect of endorsing religion. Contrary to the City’s suggestion, the display of the Ten Commandments does not become secular simply by

posting it next to documents that figure prominently in American legal history. Nor does the Ten Commandments become secular by asserting that it represents a “legal underpinning of our system of law.” Motion to Dismiss, at 4. This supposedly secular rationale distorts history and promotes a religious agenda: the Cornerstones plaza conveys the message that a line of influence can be traced directly from Mount Sinai to Philadelphia, from Moses to Madison, from the Ten Commandments to the Bill of Rights. As one court warned, “such a link between the religious values contained by the Ten Commandments and the principles embodied by the Bill of Rights is highly dubious.” Kimbley v. Lawrence County, 199 F.Supp.2d 856, 867 (S.D. Ind. 2000) (preliminarily enjoining display of Ten Commandments monument).

The City has not explained how it regards the Ten Commandments “significant to the founding of our country and our legal heritage.” As one federal court explained when dismissing a similar claim, it is irrelevant that the founders were familiar with the Ten Commandments or that some of them may have regarded it as sacred:

It is not enough to say that our nation’s framers personally believed in the Ten Commandments, assuming they did, and offer that as proof that our country has incorporated those principles into the structures of government and adopted those values into the life of the republic from its inception. To the contrary, the First Amendment stands as strong and clear testimony to the fact that, while the framers may very well have known of and been influenced by the Ten Commandments in their personal religious and spiritual lives, such personal religious influences were not allowed to preempt, negate, or otherwise supersede our national preference for secular governmental structures.

Indiana Civil Liberties Union v. O’Bannon, 110 F.Supp.2d 842, 852 (S.D. Ind. 2000) (granting preliminary injunction).

Indeed, the drafters’ decision to omit any religious references in the Constitution prompted a vigorous debate before the ratification vote about the role of religion in public life -- a debate won

by the advocates of secular government:

God and Christianity are nowhere to be found in the American Constitution, a reality that infuriated many at the time. The U.S. Constitution, drafted in 1787 and ratified in 1788, is a godless document. Its utter neglect of religion was no oversight; it was apparent to all. Self-consciously designed to be an instrument with which to structure the secular politics of individual interest and happiness, the Constitution was bitterly attacked for its failure to mention God or Christianity. Our history books usually describe in great detail the major arguments made against the federal constitution by its Anti-Federalist opponents; it meant death to the states and introduced an elitist Senate and a monarchical presidency. They seldom mention, however, the concerted campaign to discredit the Constitution as irreligious, which for many of its opponents was its principal flaw. . . . [T]his under documented and under remembered controversy of 1787-1788 over the godless Constitution was one of the most important public debates ever held in America over the place of religion in politics. The advocates of a secular state won, and it is their Constitution we revere today.

Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* 27-28 (1996) (citations omitted).

Nor can the Ten Commandments be described as “one of the earliest underpinnings of our system of law.” Motion to Dismiss, at 4. American law is based on English law which is derived from Roman, Anglo-Saxon, and Norman law, which in large part ignored Mosaic law as applying only to Jews. See Lawrence Friedman, *A History of American Law* 15 (1973); Bernard J. Meislin, *Jewish Law in American Tribunals* 1, 25-28 (1976); Max Radin, *Handbook of Anglo-American Legal History* 1-5 (1936). Indeed, Thomas Jefferson undertook to refute the misconception that the English common law was somehow based on Mosaic law in an essay entitled *Whether Christianity is a Part of the Common Law*, 1 Jefferson’s Reports 137 (1829).

Of course, some of the Ten Commandments prohibit conduct that is also forbidden by our criminal laws. But that overlap is not sufficient to suggest that the prohibitions of our criminal law derive from the Ten Commandments rather than, say, the Code of Hammurabi, the early (circa 2200

B.C.) compilation of Babylonian law that predates and influenced the Ten Commandments. See generally *The Hammurabi Code* (trans. Chilperic Edwards) (1904). Two dozen passages in Exodus are substantially identical to sections in the Code of Hammurabi. Id. at 123-30. Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and bearing false witness. Id. at 3, 6, 8, 21, 22, 129, 153, 206-07, 209-10, 259, 260.⁶ With its selective presentation of only one ancient code -- the one that is a sacred text to Jews and Christians, the Cornerstones plaza presents a religious message, not a historical one.

As courts have recognized, displays like the Cornerstones plaza, which portray the Ten Commandments with the assertion that it is critically significant to our cultural, legal, or political heritage, manifest both the purpose and effect of advancing religion. In Indiana Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842 (S.D. Ind. 2000), the state planned to display a large triangle-shaped monument. One side featured the Ten Commandments, another the Bill of Rights, and the third the preamble to the Indiana Constitution. The state contended that the Ten Commandments portion of the monument served as a secular "reminder of our nation's core values

⁶ The prohibitions of the Ten Commandments and the Code of Hammurabi are not unique. Other ancient codes of conduct prohibited murder, theft, adultery and perjury. See *The Hittite Laws* (E. Neufeld trans.) (1951) (Cuneiform fragments of Hittite laws, circa 1370 B.C.E., prohibit homicide, theft and adultery); Albert Kocourek & John H. Wigmore, *Source of Ancient and Primitive Law* 469-99 (1915) (The Laws of Manu (Hindu), circa 1100 B.C.E., prohibited murder, adultery, theft and perjury); Ilias Arnaoutoglou, *Ancient Greek Laws: A Sourcebook* 22-23, 70-73 (1998) (Athenian law of the 6th Century B.C.E. prohibited adultery, theft, murder and other forms of homicide); 1 *The Civil Law* 57-77 (S.P.Scott trans.) (1932), 11 *The Civil Law* 29-46 (Roman law prohibited murder, theft, perjury and adultery); A.F.P. Hulsewe, *Remnants of Ch'in Law* 120-131, 138-40, 146-49, 168-69 (1985) (Ch'in Dynasty, circa 7th Century B.C., prohibited theft, falsely denouncing someone as a criminal, killing without authorization and adultery). Indeed, it would be difficult to name a culture that had not developed similar prohibitions.

and ideals.” It claimed that the overall purpose of the monument was to “venerate important documents that reflect the history and ideals animating American government.” Id. at 851.

In its decision granting a preliminary injunction, the court noted that the state had been “unable to elucidate or cite any historical link between most of the commandments and ‘ideals animating American government.’” Id. It “was unable to provide any historical linkage between seven of the commandments and only weak historical links to three of them.” Id. at 851 and 10. The court held that the State’s articulated purpose “is not a valid secular purpose, but is in fact religious in nature.” Id. at 852; see also Kimbley v. Lawrence County, supra, 199 F.Supp.2d at 867 (labeling as “highly dubious” any asserted “link between the religious values contained by the Ten Commandments and the principles embodied by the Bill of Rights”).

By displaying the Ten Commandments with five documents that are important in American legal history (including the Magna Carta, which is recognized as a precursor to American common law), Grand Junction asserts a relationship between a religious text and American legal and political history, a relationship that simply does not exist, and thus improperly "links religion, or more specifically these two religions, and civil government." Books, supra, 235 F.3d at 307. By incorporating the American flag into this display at the seat of local government, Grand Junction fortifies this improper link. Displayed with the American flag and the other “Cornerstones,” in the wake of the massive outpouring of religiously-based community sentiment that retained the monument and ousted the mayor, the Ten Commandments monument will send the message that Judeo-Christians are the favored religious groups in the political community – that their sacred text is a basis of American law and liberty. Conversely, the message will be sent that those who do not share the preferred religious beliefs are outsiders, not welcome in their own government, a

government which sponsors the view that members of only one religious belief system have the inside track to law and liberty in Grand Junction.

Plaintiffs have demonstrated a substantial probability of success on the merits of their claims. At the very least, Plaintiffs have certainly raised serious, substantial, difficult questions addressing the merits of their First Amendment claim so as to make them “a fair ground for litigation and thus for more deliberate investigation.” Shattuck, supra, 1 F.Supp.2d at 1238. Accordingly, the requested injunction must be granted.

VI. THE INJUNCTION SHOULD ISSUE WITHOUT BOND

If the injunction is granted, the City of Grand Junction will be exposed to absolutely no monetary cost or liability; indeed, when the Ten Commandments monument was moved to its present location two weeks ago, a local crane company donated its services to accomplish the move. In the absence of the threat of such injury, no bond should be required. See e.g., Doctor’s Associates, Inc. v. Stuart, 85 F.3d 975, 983 (2nd Cir. 1996).

CONCLUSION

The Ten Commandments monument on City Hall grounds violates the First Amendment to the United States Constitution. An injunction must enter requiring the City to remove the monument from City Hall grounds, and ordering that the Ten Commandments monument not be included in the proposed “Cornerstones of Law and Liberty” plaza near the main entrance to City Hall. Because the City originally intended to complete the plaza by July 4, 2001, and now hopes to complete the project by the end of July 2001, a forthwith hearing is necessary so that an injunction can be obtained before the City commences construction on the plaza. No bond is required.

WHEREFORE, for the foregoing reasons, Plaintiffs pray that their motion for preliminary

injunction be granted, that an expedited evidentiary hearing be held to consider Plaintiffs' motion, and that a preliminary injunction be issued requiring Defendant to remove the Ten Commandments monument from City Hall grounds during the pendency of this case and to forebear from including the monument in the City's planned "Cornerstones of Law and Liberty" Plaza.

Dated: June 11, 2001