UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al., **PLAINTIFFS,**

V. **MEMORANDUM OPINION AND ORDER**

MCCREARY COUNTY, KENTUCKY, et al., **DEFENDANTS.**

****

This matter is before the court on the plaintiffs' motion (DE 155) to alter or amend the court's memorandum opinion and order of September 28, 2007; the defendants' renewed motion for summary judgment (DE 159); and the plaintiffs' motion to strike the defendants' renewed motion for summary judgment (DE 164). The court, having reviewed the record and being otherwise sufficiently advised, will grant the plaintiffs' motion to alter or amend judgment, deny the plaintiffs' motion to strike, and direct that the plaintiffs respond to the defendants' motion, which the court will construe as a motion for relief from a final judgment.

I. Factual Background and Procedural History

In 1999, McCreary County and Pulaski County, Kentucky, each posted a copy of the Ten Commandments in their respective courthouses.[1] Various County orders and ceremonies surrounded the mounting of these initial displays. The

[1] The Ten Commandments were also posted in the Harlan County Schools.

173

American Civil Liberties Union of Kentucky, et al. ("ACLU") brought this action and sought a preliminary injunction requiring removal of the displays based on alleged violations of the Establishment Clause of the First Amendment to the United States Constitution. Prior to the resolution of the request for an injunction, the Counties altered their displays and passed resolutions authorizing those new displays. The new displays included documents other than the Ten Commandments, but the additional documents were largely religious in nature.[2] The resolutions authorizing the second displays included language emphasizing the importance of religion. Following the posting of the second displays, this court granted the plaintiffs' motion for a preliminary injunction against the second displays and ordered removal of the displays.

The Counties complied with the injunction by removing the second displays, but then posted new displays. Prior to posting these third displays, the Counties hired new lawyers and voluntarily dismissed an appeal from the initial preliminary injunction. The third displays consisted of nine documents of equal size, including

---

[2] "Specifically, the Courthouse displays were modified to consist of: (1) [the 'endowed by the Creator' passage] 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 . . . 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; (8) the Mayflower Compact." *McCreary County*, 354 F.3d at 442.

a copy of the Ten Commandments, and explanatory phrases to accompany each of the documents.[3] The collection of documents in the third displays is referred to as "The Foundations of American Law and Government Display" (hereinafter "Foundations Display").[4] At the time the third displays were erected, the Counties did not repeal the resolutions that authorized the second displays or pass new resolutions authorizing the third displays. This court, acting upon a motion by the ACLU, expanded the preliminary injunction to include the third displays, and then the defendants appealed.

The Sixth Circuit Court of Appeals upheld the preliminary injunction, *McCreary County*, 354 F.3d at 438, whereupon the United States Supreme Court granted the defendants' petition for certiorari. After oral argument, but before the

---

[3] In addition to the Ten Commandments, the third displays included: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

[4] The purpose of the Foundations Display was stated in the explanatory phrases accompanying its documents. The explanatory statement for the Ten Commandments reads:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

McCreary County, 545 U.S. at 856.

Supreme Court opinion was released, the Counties repealed and repudiated the resolutions authorizing the second displays.[5] *McCreary County*, 545 U.S. at 881. The Supreme Court, finding an unconstitutional religious motive in the posting of the third (Foundations) displays, saw the Counties' repeals of the 1999 resolutions as "acts of obviously minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n.19, and affirmed the Sixth Circuit and this court's preliminary injunction. The defendants took no action between the issuance of the Supreme Court opinion and the court's memorandum opinion and order of September 28, 2007, which is under reconsideration here.

On September 28, 2007, this court denied the parties' motions for summary judgment and partial summary judgment and dismissed the plaintiffs' claims against the defendants Harlan County School District and Don Musselman in his official capacity as Superintendent of the Harlan County Schools with prejudice.[6] The McCreary County and Pulaski County fiscal courts passed new resolutions on October 9, 2007, and October 10, 2007, respectively. The defendants, in their response to the motion to alter or amend judgment and their renewed motion for summary judgment, contend that these October 2007 resolutions "purge the taint"

---

[5] The United States Supreme Court held oral argument on March 2, 2005. On March 8, 2005, and March 10, 2005, McCreary and Pulaski Counties each adopted a resolution that repealed and rescinded the December 1999 resolution relating to the second displays.

[6] The court dismissed the claims against the Harlan County Schools and Musselman on the grounds that they had become moot.

of unconstitutional motive found by the Supreme Court.

II. Motion to Amend or Alter Judgment

A. Legal Standard

Rule 59(e) governs a motion to alter or amend judgment. *Trident Int'l Corp. v. Kentucky*, 395 F. Supp. 2d 521, 523 (E.D. Ky. 2005). The court will reconsider a ruling under Rule 59(e) if it has committed legal error; if there has been an intervening change in controlling law; if there is newly discovered evidence; or if necessary to prevent manifest injustice. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

Rule 60(a) provides for corrections based on "a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Rule 60(b) provides for relief from a final judgment, order, or proceeding due to (1) "mistake, inadvertence, surprise, or exusable neglect"; (2) "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by the opposing party"; (4) the judgment being void; and (5) the judgment having been "satisfied, released or discharged" or if "it is based on an earlier judgment that has been reversed or vacated" or if "applying it prospectively is no longer equitable"; or (6) "any other reason that justifies relief." "[R]elief under Rule 60(b) is 'circumscribed by public policy favoring finality of judgments and termination of

litigation.'" *Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Waifersong Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)).

B. Dismissal of the Harlan County Action

Though in agreement that the Harlan County action should be dismissed, the parties dispute whether that dismissal should be with prejudice.

"A dismissal for lack of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily such a dismissal is 'without prejudice.'" *Korvettes, Inc. v. Galories Anspach, Inc.*, 617 F.2d 1021, 1024 (3d Cir. 1980). *See also Landers v. Curran & Connors, Inc.*, 2006 U.S. Dist. LEXIS 15770, at *5 (N.D. Cal. 2006). Moreover, "'[s]ome cases – mainly involving private plaintiffs as well as private defendants – find that discontinuance has mooted the action; even then it may be noted that a new action can be filed if the conduct should be resumed.'" Wright & Miller, *Federal Practice and Procedure*, § 3533.5 (2d Supp. 2005). *See also id.* (2d Supp. 2007) ("[C]laims of mootness may be rejected more readily in an action to protect broad public interests rather than specific private interests."). In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), an Establishment Clause challenge to the hanging of a portrait of Jesus Christ in a public school was not dismissed as moot even though the plaintiff had graduated "because the portrait does not affect students only – it potentially affects any member of the public who attends an event at the school." *Id.* at 683; *see also id.*

at 682 ("The relevant inquiry in this case is similar to that in any 'public facility' case: whether the individual plaintiff uses the facility and suffers actual injury."). Consequently, the court will alter its previous judgment and dismiss the Harlan County action without prejudice because Jan Doe's case is not moot, in that it affects any member of the public, not just the plaintiff, and because there is no certainty that the prohibited conduct would not be resumed.

C. The Second Displays

The plaintiffs contend that it was not appropriate for the court to decline to invalidate the second displays on the grounds that they "are no longer involved in the case" and that instead the court should have made its first preliminary injunction, which enjoined the second displays, permanent. Specifically, the plaintiffs contend that the court implicitly and improperly concluded that the displays were moot in dismissing the plaintiffs' challenge, while the defendants contend the judgment should not be altered as to these displays because the issue is moot.

"A plaintiff's voluntary cessation of allegedly unlawful conduct does not suffice to moot a case," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000), and "[t]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003).

In a case regarding a display in Garrard County identical to the second displays at issue in this case, the court stated as folows:

> Because there is nothing to stop Garrard County from erecting the 1999 Display again at any point in time, a live controversy still exists. Further, the county continues to maintain a display that includes the Ten Commandments, and it is this to which the plaintiffs object. Because the Ten Commandments continue to be part of the current display, the plaintiffs' objections and offense are presumed to continue.

ACLU v. Garrard County, Kentucky, 517 F. Supp. 2d 925, 940 (E.D. Ky. 2007). Earlier in their case, the defendants in *Garrard County* had removed their version of the second displays and replaced it with a version of the Foundations Displays while a motion for a preliminary injunction was under consideration, and the second displays were never temporarily enjoined. *Id.* at 928-29. Moreover, courts regularly decline to declare a challenge to discretionary conduct moot despite significantly changed circumstances. *See, e.g.*, *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (finding challenge to Michigan Department of Corrections ("MDOC") rule not to be moot because "the promulgation of work rules appears to be solely within the discretion of the MDOC [and] there is no guarantee that MDOC will not change back to its older, stricter Rule as soon as this action terminates"); *Amnex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003) (In dismissing an action against the Michigan Attorney General as moot after he withdrew his notice of intended action, "it was not proper for the district court to rely on the mootness doctrine, inasmuch as the Attorney General's withdrawal did

not make it absolutely clear that the allegedly wrongful conduct could not be reasonably expected to recur."); *Cam I, Inc. v. Louisville/Jefferson County Metro Gov't*, 460 F.3d 717, 719-20 (6th Cir. 2006) ("[A] controversy does not cease to exist by mere virtue of a change in the applicable law. . . . In other words, where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination." (Internal quotation marks and citations omitted.)) In light of this judicial precedent, there is no guarantee that the second displays will not be posted again. Therefore, pursuant to Rule 59(e), the court will alter its judgment that the controversy over the second displays is moot, to correct a legal error and prevent manifest injustice.

Regarding the substance of the second displays, the defendants do not question the court's finding that the second displays are unconstitutional (DE 153, 9). Consequently, the court is compelled to alter its judgment under Rule 59(e), declare the second displays unconstitutional, and enter a permanent injunction against the second displays.

D. The First Displays

For the sake of clarity and completeness, the court will also declare unconstitutional and permanently enjoin the first displays, even though they were removed and replaced by the second displays before the court issued its preliminary injunction against the second displays. All that is said above with regard to the

second displays pertains with equal force to the first displays.

E. The Third Displays

The plaintiffs contend that the court should make permanent its preliminary injunction enjoining the third displays because the court found that the conduct of the defendants "is unlawful on the undisputed facts" and, therefore, the plaintiffs "are entitled to prevail under Rule 56" (DE 155, 4).

Regarding the Foundations Displays that McCreary County and Pulaski County propose to post, this court found that "[t]he only remaining issue is whether the defendants have taken actions since the Supreme Court decision that demonstrate a predominantly secular purpose for posting the Foundations Displays and that are sufficient to purge the taint of their impermissible religious purpose" (DE 153, 13). After finding the taint had not been purged, the court denied all of the motions for summary judgment because "[n]o triable issues of fact exist for resolution by a jury" (DE 153, 13).

The court will not alter its findings that the displays evidenced an unconstitutional purpose and that this taint had not been purged as of the date of its memorandum opinion and order. The court concluded that it must find the taint had not been purged because "the Supreme Court found the taint inadequately purged" and all of the actions pointed to by the defendants "were taken by the Counties prior to the decision of the Supreme Court and they were not enough to purge the religious taint" (DE 153, 13).

Importantly, the Supreme Court found that "new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards" and "the sectarian spirit of the common resolution found enhanced expression in the third display, which quotes more the purely religious language of the Commandments." *McCreary County*, 545 U.S. at 871-72. Moreover, the Supreme Court noted that "[f]ollowing argument in this case, in which the resolutions were discussed, the McCreary and Pulaski County Boards did repeal the resolutions, acts of obviously minimal significance in the evolution of the evidence." *Id.* at 872 n.19. Consequently, the court will alter its judgment under Rule 59(e), declare the Foundations Displays at issue in this case unconstitutional because the taint had not been purged as of the date of the court's memorandum opinion and order of September 28, 2007, and permanently enjoin these third displays.

III. The Defendants' Renewed Motion for Summary Judgment and the Plaintiffs' Motion to Strike

As the Supreme Court noted, it is possible that the defendants might purge the taint of unconstitutional purpose and be able to post the third displays. In fact, the defendants contend that they have already done so with their resolutions of October 9-10, 2007. At issue here, however, is the court's memorandum opinion and order of September 28, 2007, which predates the new resolutions. Moreover, the defendants' renewed motion for summary judgment, which was filed on October 30, 2007, is also untimely because the deadline for dispositive motions in

this case was November 3, 2006.

Given that the deadline for dispositive motions has passed, but recognizing this court's obligation to review the Counties' new resolutions to determine whether they have purged the taint, the court will construe the defendants' renewed motion for summary judgment as a motion for relief from a final judgment under Rule 60(b) and will deny the plaintiffs' motion to strike. The court will also direct that the plaintiffs respond to the defendants' motion, with the time for filing their response to run in accordance with the Local Rules from the date of the entry of this order.

IV. Conclusion

Accordingly,

IT IS ORDERED that the plaintiffs' motion to alter or amend judgment (DE 153) is **GRANTED**.

IT IS FURTHER ORDERED that the dismissal of the Harlan County case is **WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the first displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED**.

IT IS FURTHER ORDERED that the second displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED**.

IT IS FURTHER ORDERED that the third displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED**.

IT IS FURTHER ORDERED that the plaintiffs' motion to strike (DE 164) is **DENIED.**

IT IS FURTHER ORDERED that the plaintiffs shall respond to the defendants' renewed motion for summary judgment (DE 159), which the court will construe as a motion for relief from a final judgment, with the time for the filing of the response to run in accordance with the Local Rules, beginning from the date of entry of this order. The time for the defendants to file a reply brief, if desired, shall also run in accordance with the Local Rules.

There being no just cause for delay, this order is **FINAL** and **APPEALABLE.**

This matter shall be **STRICKEN** from the active docket because the only remaining issue in this matter is the defendants' motion for relief from a final judgment, which is a post-judgment motion.

Signed on August 4, 2008

Jennifer B. Coffman

JENNIFER B. COFFMAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCY