2002 WL 1558688
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al. Plaintiffs
v.
GRAYSON COUNTY, KENTUCKY; and Gary Logsdon, in his official capacity as Grayson County Judge Executive Defendants

No. Civ.A.4:01CV-202-M. | May 13, 2002.

Opinion

MEMORANDUM OPINION AND ORDER

MCKINLEY, J.

***1** This matter is before the Court upon a motion by Plaintiffs, American Civil Liberties Union of Kentucky, Raymond Harper, and Ed Meredith, for a preliminary injunction [DN 8]. This case challenges the inclusion of the Ten Commandments in a display entitled "Foundations of American Law and Government Display" located in the Grayson County Courthouse, Leitchfield, Kentucky. Plaintiffs seek a preliminary injunction enjoining Grayson County and its officials from continuing this display. Therefore, the issue before the Court is whether the display violates the Establishment Clause of the First Amendment of the United States Constitution. Fully briefed, this matter is now ripe for decision. For the reasons set forth below, the Court GRANTS Plaintiffs' motion for preliminary injunction.

I. Facts

In October of 2001, two private citizens requested approval from the Grayson County Fiscal Court to hang a display containing the Ten Commandments in the Grayson County Courthouse. The Grayson County Fiscal Court approved the request. The display was hung by private citizens and no county or other taxpayer funds were expended in the production, display or maintenance of the display.

The display is entitled "Foundations of American Law and Government Display" and is composed of ten frames consisting of nine different documents. The documents in the frames are the full text of the Mayflower Compact, the full text of the Declaration of Independence, the Ten Commandments, the full text of the Magna Carta, the full text of The Star Spangled Banner, the National Motto together with the Preamble to the Kentucky Constitution, the full text of the Bill of Rights, a picture of Lady Justice together with an explanation of its significance, and an explanation of each of the documents in the display. The explanation of the Ten Commandments reads as follows:
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.

Defendant's Response, Exhibit B.

II. Preliminary Injunction Standard

Plaintiffs move for entry of a preliminary injunction pursuant to Fed.R.Civ.P. 65(a). Plaintiffs seek to enjoin the Defendants, their employees, agents, successors and all others acting concert or participation with them from continuing the display of the Ten Commandments. A preliminary injunction is an extraordinary remedy that is used to preserve the status quo between the parties pending a final determination of the merits of the action. In determining whether to issue a preliminary injunction, the Court must consider four factors: (A) the likelihood of the movant's success on the merits; (B) the irreparable harm which could result to the movant without the relief requested; (C) the possibility of harm to others; and (D) the impact on the public interest. *Schenck v. City of Hudson,* 114 F.3d 590, 593 (6th Cir.1997); *Transamerica Ins. Finance Corp. v. North American Trucking Ass'n. Inc.,* 937 F.Supp. 630, 633 (W.D.Ky.1996). "It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *In re Eagle-Picher Industries, Inc.,* 963 F.2d 855, 859 (6th Cir.1992) (citations omitted). A party is not required to prove its case in full at the preliminary injunction stage. *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.,* 119 F.3d 393, 400 (6th Cir.1997). Therefore, the findings of fact and conclusions of law of a

district court are not binding at a trial on the merits. *Id.*

A. Likelihood of Success on Merits

***2** The Court must first consider whether Plaintiffs are likely to prevail on their claims against Defendants. Plaintiffs maintain that the display violates the Establishment Clause.

The Establishment Clause of the First Amendment prohibits laws "respecting an establishment of religion." U.S. CONST. amend. I. This prohibition is applicable to the States and local governments through the Fourteenth Amendment. *Abington School District v. Schempp,* 374 U.S. 203 (1963). *See also ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska,* 186 F.Supp.2d 1024, 1025 (D.Neb.2002). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Under *Lemon,* the governmental action must first have a secular legislative purpose; "second, its principal or primary effect must be one that neither advances nor inhibits religion;" and finally, the governmental action "must not foster 'an excessive government entanglement with religion." *Lemon,* 403 U.S. at 612-613 (citation omitted). *See also American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board,* 243 F.3d 289, 306 (6th Cir.2001). In the last decade the Supreme Court has redefined the general principles laid out in *Lemon* so that under current interpretations the first two factors are characterized as an "endorsement" test. *Granzeier v. Middleton,* 173 F.3d 568, 573 (6th Cir.1999); *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky,* 96 F.Supp.2d 691, 697 (E.D.Ky.2000). Under the endorsement test, the Court focuses on whether the governmental action "has the purpose or effect of conveying a message of endorsement or disapproval of religion." *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 770 (7th Cir.2001), *cert, denied,* 122 S.Ct. 1173 (2002).

a. Secular Purpose

Under the first prong of the *Lemon* test, the question is whether the Defendants' actual purpose in permitting the display is to advance or inhibit religion. Defendants state that the purpose of the display is "to educate the citizens of the counties about the foundation of our American law and government." Defendants' Response at 24. "The general rule when attempting to determine the purpose behind a governmental action is to consult and to defer to the stated purpose for the action." *Indiana Civil Liberties Union, Inc. v. O'Bannon,* 110 F.Supp.2d 842, 849 (2000), *aff'd,* 259 F.3d 766 (7th Cir.2001), *cert. denied,* 122 S.Ct. 1173 (2002) (citing *Edwards v. Aguillard,* 482 U.S. 578, 583 (1987). The secular purpose need not be the exclusive purpose for taking the action; however, "[t]he government's stated secular purpose ... must be sincere and not a mere sham" to avoid a potential Establishment Clause violation. *Coles v. Cleveland Board of Education,* 171 F.3d 369, 384 (6th Cir.1999). "Beyond assessing the purpose expressly articulated by the [government], [the Court ensures] that the stated secular purpose is legitimate by also examining the context and the content of the display." *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d at 771.

***3** Initially, Grayson County asserts that the display containing the Ten Commandments is constitutionally acceptable because the Ten Commandments are secular in nature. While recognizing that the Ten Commandments is a religious document, Grayson County argues that the majority of the Ten Commandments are secular. This argument has been foreclosed by the United States Supreme Court's holding in *Stone v.. Graham,* 449 U.S. 39 (1980):

> [t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Stone, 449 U.S. at 41-42. After the Supreme Court's decision in *Stone,* it is not likely that Grayson County's attempt to characterize the Ten Commandments as secular will prevail.[1]

[1] Additionally, the Defendants argue that under the Supreme Court's decision in *Marsh v. Chambers,* 463 U.S. 783 (1983) and the Sixth Circuit's decision in *ACLU v. Capitol Square Review and Advisory Bd.,* 243 F.3d 289, 300 (6th Cir.2001), the display of the Ten Commandments does not violate the Establishment Clause because the practice of displaying the Ten Commandments has become a part of the "fabric of our society." Unlike legislative prayers, the national motto, or the Ohio state motio, the display of the Ten Commandments has not become a "ceremonial deism," and those cases do not aid the Defendants' likelihood of

success on the merits.

However, the display of a religious symbol may under certain circumstances have a secular purpose. Courts have recognized that the Ten Commandments " 'can no doubt be presented by the government as playing ... a role in our civic order." ' *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d at 771 (quoting *Books v. City of Elkert Indiana* 235 F.3d 292, 302-303 (7th Cir.2000), *cert. denied,* 532 U.S. 1058 (2001)). Similarly, courts have recognized the secular nature of the frieze on the wall of the United States Supreme Court depicting Moses holding the Ten Commandments along side other "great lawgivers." The frieze contains depictions of other religious figures, "Confucius and Mohammed, but it also includes Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall." *Books,* 235 F.3d at 302-03. Justice Stevens has said that the placement of all of these historic figures together in the frieze signals a respect for great lawgivers, not great proselytizers. *Id.* Additionally, the Supreme Court in *Stone* recognized the secular use of the Ten Commandments in public schools to study history, "civilization, ethics, comparative religion, or the like." *Stone,* 449 U.S. at 42.

An identical display has been challenged in the Eastern District of Kentucky in *American Civil Liberties Union of Kentucky v. McCreary County,* 145 F.Supp.2d 845 (E.D.Ky.2001). The District Court in *McCreary* found that one of the county's articulated purposes-"to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government"-was "facially secular in that [it does] not single out the Ten Commandments," *Id.* at 848-849. The district court, however, found the articulated purpose a sham because of the history of the displays. According to the court, in light of the history of the displays, the defendants' purpose, while facially secular, was clearly religious in nature; to display the Ten Commandments. The original display contained only the Ten Commandments and it was altered only after a lawsuit was filed to include excepts from historical documents referencing Christianity. After the district court entered the first injunction, the county then modified the display to include the full text of the historical documents along with the Ten Commandments. According to the parties, the final display at issue in *McCreary* is exactly the same display at issue in the present case.

***4** Unlike the display in *McCreary,* no history of this display exists. In the present case, there is no evidence in the record identifying those who donated the display, Grayson County's intent when it accepted the donation of the display, or what exactly occurred at the fiscal court meeting when the county accepted the display. At this stage of the litigation, the Plaintiffs have presented no evidence concerning the history of this particular display that would indicate that the Defendants' articulated purpose is religious in nature.[2] Therefore, with no information to the contrary, the Court will defer to the Defendants' stated purpose for the display and based on the record at this preliminary stage of the litigation, the Court believes it likely that the Defendants can succeed in articulating a secular purpose for the display and therefore, will satisfy the first prong of the *Lemon* test.

[2] Plaintiffs argue that the history of the Ten Commandments displays posted by other counties throughout the state should be considered when addressing Grayson County's articulated purpose. However, for purposes of the preliminary injunction, the Court limits its inquiry to Grayson County's intent and the history behind Grayson County's display.

b. Primary Purpose or Effect

Under the second prong of the *Lemon* test, the question is whether the display has "the principal or primary effect of advancing [or inhibiting] religion." *O'Bannon,* 110 F.Supp.2d at 853. "Under this test, '[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." ' *Freedom from Religion Foundation, Inc. v. City of Marshfield, Wis.,* 203 F.3d 487, 493 (7th Cir.2000) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984)). " 'An important concern of the effects test is ... whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." ' *O'Bannon,* 259 F.3d at 772 (quoting *Books,* 235 F.3d at 305). A district court is therefore "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." *Books,* 235 F.3d at 304 (citing *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573, 597 (1989)).

In order to determine whether Plaintiffs will likely prevail on their claim that the display in question has the principal or primary effect of advancing religion, a review of current case law is helpful. As noted above, the District Court in the Eastern District of Kentucky in *American Civil Liberties Union v. McCreary County,* 145 F.Supp.2d 845, recently held that an identical display located in the McCreary and Pulaski County Courthouses, as well as the Harlan County schools, violated the Establishment Clause .[3] In addressing the effect of the display under the

Lemon test, the District Court found that

[3] The Defendants fail to address *ACLU v. McCreary County,* 145 F.Supp.2d 845 (E.D.Ky.2001).

> [t]he composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

***5** *McCreary,* 145 F.Supp.2d at 851. Despite the counties' stated secular purpose, the District Court in *McCreary* found that "[t]he counties ha[d] not erected the type of 'appropriate educational display' which might 'try to include all the various moral, historical, and political influences on our legal system' such as the Code of Hammurabi, the Code of Justinian, and passages from early English cases." ' *Id.* (quoting *Harvey v. Cobb County,* 811 F.Supp. 669, 678 (N.D.Ga.1993)). Additionally, the District Court found that the location of the display in the courthouse or school also had the effect of advancing religion. *Id* . at 852.

The Seventh Circuit has adopted similar reasoning in two recent cases involving the display of the Ten Commandments. In *Books v. City of Elkhart, Indiana,* 235 F.3d 292 (7th Cir.2000), the Seventh Circuit concluded that the city's display of a monument inscribed with the Ten Commandments on the front lawn of the city's municipal building had the primary effect of advancing or endorsing religion, and therefore violated the Establishment Clause under the *Lemon* test. The monument contained the text of the Ten Commandments along with an eye within a pyramid-an all seeing eye, an American Eagle grasping the American flag, and two small stars of David. Specifically, the Seventh Circuit found that the "placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of endorsement; rather it specifically links religion ... and civil government." *Id.* at 307. Additionally, the Seventh Circuit noted that "the seat of government 'is so plainly under government ownership and control' that every display on its property is marked implicitly with governmental approval." *Id.* at 306 (quoting *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 128 (7th Cir.1987)).

Similarly, in *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir.2001), the Seventh Circuit determined that a monument including the text of the Ten Commandments, the Bill of Rights, and the Preamble to the 1851 Indiana Constitution to be placed on Statehouse grounds violated the Establishment Clause. In examining the monument under the effect prong of the *Lemon* test, the Seventh Circuit held that permanence, content, design, and context of the monument amounts to the endorsement of religion by the state. *Id.* at 773. Specifically, the Seventh Circuit found that "an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. That would signal that the state approved of such a link, and was sending a message of endorsement." *Id.* at 773.

In May of 2001, the Supreme Court declined to review the Seventh Circuit's decision in *Books v. City of Elkhart,* 235 F.3d 292 (7th Cir.2000), *cert. denied,* 532 U.S. 1058 (2001), over the strong dissent of Chief Justice Rehnquist, joined by Justices Scalia and Thomas. Just over two months ago, the Supreme Court also denied the petition of writ of certiorari in *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, *cert. denied,* 122 S.Ct. 1173 (2002).

***6** Based on the Supreme Court's denial of certiorari in both *Books* and *O'Bannon,* along with the District Court's decision in *McCreary* addressing an identical display, the Court believes that it is likely that the Plaintiffs will be successful in their argument that this display has the primary or principal effect of advancing or endorsing religion, and therefore, will violate the second prong of the *Lemon* test.

For the reasons set forth above, the Court determines thatPlaintiff's have shown a likelihood of success on the merits of their Establishment Clause claim.[4]

[4] Because the Court concludes that Grayson County's display will likely fail to satisfy the second prong of the *Lemon* test, the Court need not reach the third prong.

B. Irreparable Harm

The second factor the Court must consider is whether Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction. A First Amendment violation "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). The Court concludes that the irreparable harm factor weighs in favor of Plaintiffs.

C. The Possibility of Harm to Others

The third factor in determining whether to issue a preliminary injunction is "whether the injunction would harm others." This factor is most commonly examined in terms of the balance of hardship between the parties. If an injunction is issued, removal of the display requires very little effort and expense and if Defendants are successful at a trial on the merits, it will not require much effort or expense to restore the display. Balancing the hardship of the parties, the Court finds that this factor weighs in favor of Plaintiffs.

D. Public Interest

The final factor the Court must consider is whether the public interest will be served by the preliminary injunction. "[T]he protection of First Amendment rights and vindication of constitutional violations is always in the public's interest." *American Civil Liberties Union v. Pulaski Co.* 96 F Supp.2d 691, 702 (E.D.Ky.2000). The court concludes that the public interest factor weighs in favor of the Plaintiffs.

III. Conclusion

Upon consideration and balancing of the four factors, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED that the motion by Plaintiffs for a preliminary injunction [DN 8] is GRANTED. IT IS FURTHER ORDERED that the Ten Commandments display shall be removed from the Grayson County Courthouse within seven (7) days of the date of entry of this order.

IT IS FURTHER ORDERED that this case is stayed pending resolution of the appeal to the Sixth Circuit in *American Civil Liberties Union v. McCreary County,* 145 F.Supp.2d 845 (E.D.Ky.2001).