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' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR AND MEMORANDUM BRIEF IN SUPPORT OF ISSUANCE OF A PRELIMINARY INJUNCTION

Plaintiffs, through undersigned counsel, hereby submit their Reply to Defendant's Response to Plaintiff's Motion for and Memorandum Brief in Support of Issuance of a Preliminary Injunction.

I. CONTRARY TO DEFENDANT'S ARGUMENT, PLAINTIFFS ARE NOT REQUIRED TO SATISFY A HEIGHTENED BURDEN OF PERSUASION

According to Defendant, Plaintiffs seek a mandatory injunction that would alter the status quo and they must therefore satisfy a heavier burden of persuasion. On the contrary, the requested preliminary injunction would preserve the status quo.

It is frequently said that the function of preliminary injunctive relief is to preserve the status quo pending a determination of the action on the merits. The status quo to be preserved is "the last uncontested status which preceded the pending controversy." Litton Systems, Inc. v. Sundstrand Corp., 750 F.2d 952, 961 (Fed. Cir. 1984). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to 'the last uncontested status which preceded the pending controversy.'" Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199

1210 (9th Cir. 2000)(quoting Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963)). This definition of "status quo" articulated by the Federal and Ninth Circuits has been uniformly accepted or acknowledged by all the federal circuit courts of appeal.[1]

In this case, the controversy began when Grand Junction placed the Ten Commandments monument in a prominent location at the entrance to the new City Hall. The last uncontested status which preceded the controversy refers to the period of time during construction of the city hall building, when the monument was in storage.

Defendant also contends that a temporary injunction would provide Plaintiffs with a

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[1] See Aoude v. Mobil Oil Corp., 862 F.2d 890, 893 (1st Cir. 1988) ("By removing the trespasser, the court in effect restored the status quo, that is, 'the last unconstested status which preceded the pending controversy.'"); Larouche v. Kezer, 20 F.3d 68, 74 n.7 (2d Cir. 1994) ("'status quo' to be preserved by a preliminary injunction is the last actual, peaceable uncontested status which preceded the pending controversy," citing to Black's Law Dictionary 1410 (6th ed. 1990)); United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976) ("Neither did the recall order operator pendente lite to preserve the status quo, i.e., 'the last actual uncontested status which preceded the pending controversy.'"); Federal Leasing, Inc. v. Underwriters at Lloyd's, 487 F.Supp. 1248, 1259 (D.Md. 1980), affirmed, 650 F.2d 495 (4th Cir. 1981) ("The status quo has been consistently defined as the last uncontroverted status preceding the pending litigation."); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1194 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976) ("We agree with the Eighth Circuit that the status quo to be preserved 'is the last uncontested status which preceded the pending controversy.'"); Blaylock v. Cheker Oil Co., 547 F.2d 962, 965 (6th Cir. 1976) ("[t]he district court went far beyond freezing the parties in their positions at the time this action was commenced. The 'last, uncontested status preceding commencement of the controversy,'"); Westinghouse Electric Corp. v. Free Sweing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958) ("The status quo is the last uncontested status which preceded the pending controversy."); Minnesota Mining and Manuf. Co. v. Meter, 385 F.2d 265, 273 (8th Cir. 1967) ("The status quo is the last uncontested status which preceded the pending controversy."); SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1100 n.8 (10th Cir. 1991) (comparing with approval, the court's definition of "status quo" in Stemple v. Bd. of Education of Prince George's County, 623 F.2d 893 (4th Cir. 1980) as "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing."); Mack v. Air Express Int'l., 471 F.Supp. 1119, 1124 (N.D.Ga. 1979) ("The status quo sought is the 'last uncontested status which preceded the pending controversy,'" citing Minnesota Mining & Manuf. Co. v. Meter, 385 F.2d 265, 273 (8th Cir. 1967)); Consarc Corp. v. United States Treasury Dep't, 71 F.3d 909, 913 (D.C. Cir. 1995) ("Judicial precedent confirms that 'the status quo is the last uncontested status which preceded the pending controversy.")

substantial part of the requested relief on the merits and therefore, Defendant contends, Plaintiffs' burden in this motion is "especially heavy." (Defendant's brief, at 4.) As the court explained in S.W. Shattuck Chemical Co., Inc. v. City and County of Denver , 1 F.Supp.2d 1235, 1238 (D. Colo. 1998), however, the legal principle that Defendant invokes applies only when the temporary relief cannot be "undone" by a final judgment on the merits. In this case, the requested temporary relief can easily be undone. If full consideration of the merits later reveals that the Ten Commandments display is constitutional, the monument can be returned to its current location. Similarly, a temporary order barring the City from including the monument in its planned Cornerstones plaza can be undone, if necessary, when the Court issues a final ruling on the merits.

Accordingly, Plaintiffs are not required to satisfy a heightened burden of persuasion in this proceeding.

II. THE 1972 DECISION IN ANDERSON IS NOT A BINDING PRECEDENT BECAUSE IT HAS BEEN SUPERSEDED BY SUBSEQUENT SUPREME COURT AND TENTH CIRCUIT AUTHORITY

Contrary to Defendant's argument, this Court is not bound by the Tenth Circuit's decision in Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1972).

The principle of stare decisis holds that courts must follow binding precedent. All federal courts must be guided by the binding precedents of the Supreme Court. In addition, this Court's decisions are governed by binding decisions of the Tenth Circuit in the same manner that three-judge appellate panels are bound to follow the binding precedents of prior panels. A three-judge panel "is bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." United States v. Nichols, 160 F.3d 1255, 1261 (10th Cir. 1999).

The Tenth Circuit's decision in Anderson is not binding precedent. It has been superseded by later Supreme Court authority, as the Tenth Circuit itself acknowledged in Summum v. Callaghan, 130 F.3d 906, 910 n.2. (10th Cir. 1997) ("Since Anderson was decided, however, more recent cases, including a Supreme Court case [Stone v. Graham, 449 U.S. 39 (1980)] casts doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature.").

Defendant erroneously deems it significant that in Summum, the Tenth Circuit declined the plaintiff's invitation to overrule expressly the 1972 Anderson holding. Contrary to the Defendant's implied suggestion, however, a court need not reach out and expressly overrule a past decision that has lost its precedential authority. E.g., Levine v. Hoffernan, 864 F.2d 457, 461 (7th Cir. 1988) ("the [Supreme] Court . . . does not have to explicitly state that it is overruling a prior precedent in order to do so"). This is especially true in the Summum case, because the issues before the court did not require it to decide formally whether Anderson remained binding precedent.

Thus, contrary to Defendant's suggestion, a case can lose its binding effect even though it has not been expressly overruled. Precedents are no longer binding if their "rationale is overruled, implicitly or expressly, by the Supreme Court or [a] court en banc." In re Solowski, 205 F.3d 532, 534-35 (2d Cir. 2000) (emphasis added). See also, United States v. Short, 181 F.3d 620, 624 (6th Cir. 1999), cert. denied, 528 U.S. 1091 (2000) ("Because this panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent, we are bound by our decision..."); Turker v. Ohio Dep't of Rehabilitation and Corrections, 157 F.3d 453, 458-59 (6th Cir. 1998) ("The prior decision remains controlling authority unless an inconsistent decision of the United State Supreme Court

requires modification of the decision.").

In Anderson, the court concluded that the Ten Commandments were primarily secular in nature. The United States Supreme Court soundly rejected that view in Stone v. Graham, 449 U.S. 39 (1980), when it explained 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." Id. at 42. The Supreme Court's decision in Stone rejected the reasoning and rationale of Anderson and implicitly overruled its holding. Accordingly, it is no longer a binding precedent.

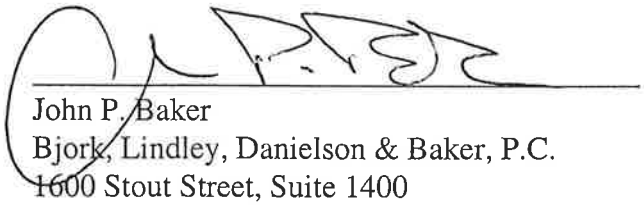
III. THE DECISION OF THE COLORADO SUPREME COURT SUPPORTS PLAINTIFFS' ARGUMENT THAT THE CURRENT DISPLAY VIOLATES THE CONSTITUTION

Defendant relies on the decision of the Colorado Supreme Court in State v. Freedom From Religion Foundation, 898 P.2d 1013 (Colo. 1995). (Defendant's brief, at 8.) The Ten Commandments monument at issue in that case was displayed in Lincoln Park, across the street from the capitol building. Unlike the Grand Junction monument, it was not displayed at the entrance of a building that serves as the seat of government. Moreover, it was one of many diverse monuments dispersed throughout Lincoln Park.

Although the court upheld the display of the monument in Lincoln Park, it is clear that the Colorado Supreme Court would not have approved the monument as it currently stands in Grand Junction: "[T]he text of the Ten Commandments affixed to a monument would not be appropriately placed on state property standing alone." Id. at 1025.

Dated: June 11, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2001, a true and correct copy of **PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR AND MEMORANDUM BRIEF IN SUPPORT OF ISSUANCE OF A PRELIMINARY INJUNCTION** was served upon opposing counsel by: 1) EMAIL; 2) facsimile; and 3) depositing a copy thereof in the United States mail, postage prepaid, addressed as follows:

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