UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 01 - D - 685

KATHRYN CHRISTIAN, JILL HAVENS, JEFF BASINGER, CLARE BOULANGER, SARAH SWEDBERG, and AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC.,

Plaintiffs,

v.

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

Defendant.

ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Preliminary Injunction filed June 11, 2001. A hearing on this Motion was held Thursday, June 21, 2001. For the reasons stated herein and on the record at the hearing, the request for preliminary injunction is DENIED.

BACKGROUND

In 1958, the Fraternal Order of Eagles ("FOE") of Colorado gave Defendant City of Grand Junction a granite monument containing the Ten Commandments along with phoenician letters, an eye within a triangle similar to that depicted on the U.S. one-dollar bill, an American Eagle grasping an American flag, two stars of David, two superimposed Greek letters, Chi and Rho, and a scroll recognizing the dedication of the

monument by the FOE of Colorado.[1] This monument has been displayed in four locations at the City Hall in Grand Junction between 1958 and the present. Defendant's Exhibit G. Plaintiffs complain that they are "subjected to the religious message of the Ten Commandments regularly" and that this message is unwelcome and offensive.

After the Plaintiffs complained, Defendant held a City Council meeting at which time it received public input on the issue. On March 19, 2001, the City Council passed Resolution 28-01 which resolved that the City would retain the Ten Commandments monument, add a disclaimer to make clear that the monument is not an endorsement of any religious faith,[2] and ultimately include five additional monuments[3] with the Ten Commandments monument in a display called the "Cornerstones of Law and Liberty." The proposed Cornerstones display will include a "keystone" which states

> The City Council dedicates this display for us all, to remind us of our heritage, to empower us to fight for our liberty and freedom. Without

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[1] This monument is similar, or identical to, the monuments considered by the 10th Circuit in Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973), the Supreme Court of Colorado in Colorado v. The Freedom from Religion Foundation, 898 P.2d 1013 (Colo. 1995), Cert. denied, 1996 U.S. LEXIS 948 (Feb. 20, 1996), and the 7th Circuit in Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), cert. denied 2001 U.S. LEXIS 4120 (May 29, 2001).

[2] The disclaimer, modeled after a disclaimer in Albanese v. Bannock County, No. 93-0115-E (D. Idaho, Sept. 7, 1995), reads:

> 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.

[3] The five additional monuments would include all, or portions of, the text from the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the Constitution, and the Bill of Rights.

> knowledge of our past, we cannot protect our future. As Thomas Jefferson said in 1816: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Defendant's Exhibit J. When the Cornerstones display is completed, Defendant plans to remove the disclaimer currently in front of the Ten Commandments monument and replace it with a contextual explanation similar to the following:

> The monument in Site 1 teaches a secular message along with its spiritual content: It is a first Code of Laws, a fundamental example of our American legal system: We are a nation of laws. It was the desire to remind our nation's youth of basic civilized rules that led the Fraternal Order of Eagles to present the monument to the City in 1958.
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> The European pilgrims who founded this country tried to live according to the Ten Commandments. In addition, the early English settlers brought with them the English common law, first complied in one place in Blackstone's *Commentaries* (1765). The English common law is still basic to most of our states. Settlers from the rest of Europe had been subject to laws based on the first compilation of Roman law, the code of Justinian (565), which is still the foundation for the laws of Louisiana and for most of modern Europe.

Defendant's Exhibit J.

Plaintiffs' Complaint asserts only one claim for relief, violation of the Establishment Clause of the First Amendment. The pending Motion for Preliminary Injunction seeks two specific forms of relief: (1) to have the Ten Commandments monument removed immediately and (2) to have the Ten Commandments monument removed prior to completion of, and not included in, the planned "Cornerstones of Law and Liberty" display.

STANDARD

"A party seeking a preliminary injunction must show that four conditions are met: (1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a

substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest." ACLU v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999). In the context of a First Amendment case, the first, third and fourth requirements of a preliminary inunction are satisfied:

> First, the irreparable harm that plaintiffs would suffer if the Court denies injunctive relief is self-evident. As the Supreme Court has aptly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Similarly, since plaintiffs' fundamental First Amendment rights are at stake, it is clear that their threatened injury outweighs whatever speculative damage the proposed injunction may cause defendants. Finally, as far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone's best interest.

Local Organizing Committee, Denver Chapter, Million Man March v. Cook, 922 F.Supp. 1494, 1500-01 (D. Colo. 1996). As a result, only the second requirement is at issue here.

The Tenth Circuit's definition of the "substantial likelihood of success on the merits" requirement differs depending upon whether the injunction sought would preserve, or alter, the status quo. When an injunction would preserve the status quo, the Tenth Circuit liberally defines the "substantial likelihood of success on the merits" requirement, i.e., when the other three requirements are satisfied, "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." Otero Savings and Loan Ass'n v. Federal Reserve Bank of

Kansas City, Mo., 665 F.2d 275 (10th Cir. 1981); Resolution Trust Corporation v. Cruce, 972 F.2d 1195, 1199 (10th Cir. 1992). By contrast, "a preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had. . . .Thus, in order to prevail on a motion for preliminary injunction where the requested injunction [will alter the status quo], the movant must show that on balance, the four factors weigh heavily and compellingly in his favor." SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991)(citations omitted); GTE Corp. v. Williams, 731 F.2d 676, 679 (10th Cir. 1984).

In this case, Plaintiffs' first request for relief, to have the Ten Commandments monument removed immediately, seeks to alter the status quo. Plaintiffs' second request for relief, to have the Ten Commandments monument removed prior to completion of the planned "Cornerstones of Law and Liberty" display, also seeks to alter the status quo.[4] I will therefore evaluate each of Plaintiffs requests using the applicable Tenth Circuit definition of the "substantial likelihood of success on the merits" requirement discussed above.

ANALYSIS

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court established a three-part test for determining whether government action offends the Establishment

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[4] At the June 22, 2001, hearing, Plaintiffs stated that their only challenge to the proposed Cornerstones display surrounds inclusion of the Ten Commandments monument. If included, the Ten Commandments monument would remain in its current location. Accordingly, a injunction preventing inclusion of the Ten Commandments monument in the Cornerstones display would require that the monument be removed from its current location. Such removal would effectuate a change in the status quo.

Clause. According to the Lemon test, government action does not offend the Establishment Clause if it (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. See id. at 612-13. In a concurring opinion in a later decision, Justice O'Connor attempted to clarify the Lemon test, opining that "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." Bauchman ex rel. Bauchman v. West High Sch., 132 F.3d 542, 551 (10th Cir. 1997) (summarizing Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring)) (quotation omitted). In order to avoid "the uncertainty surrounding" the scope of the appropriate Establishment Clause analysis, the 10th Circuit in Bauchman concluded "a violation of any part of [the Lemon and Lynch] analysis" constitutes a violation of the Establishment Clause. 132 F.3d at 552-53.

(1) Secular Purpose

A key issue raised by Plaintiffs' Motion is whether the 10th Circuit's decision in Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973), is still controlling law. In Anderson, the 10th Circuit applied the Lemon test to hold that a monument identical to the one in this case did not violate the Establishment Clause. Specifically, while the monument clearly "reflected the religious nature of an ancient era," the Court determined that it was "presented primarily for its historical significance" and that "a historically important monument with both secular and sectarian effects" does not necessarily violate Lemon's "secular purpose" prong. See State of Colorado v.

Freedom from Religion Foundation, Inc., 898 P.2d 1013, 1022 (Colo. 1995), cert. denied 1996 U.S. Lexis 948 (Feb. 20, 1998)(discussing Anderson).

Anderson has not been explicitly overruled. In Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997), the 10th Circuit recognized, however, that "[s]ince Anderson was decided 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." Id. at 910 n.2. Ultimately, however, the Court in Summum, declined to overrule Anderson because "[w]e are not at liberty to overrule or disregard the precedent of an earlier panel [in Anderson] absent en banc reconsideration or a superseding contrary decision of the United States Supreme Court." Id. at 913 n.8. While the 10th Circuit clearly expressed some doubt as to Anderson's continued viability, implicit in Summum's holding is the determination that Stone is not a "superseding contrary decision" which permitted Anderson to be overruled absent en banc reconsideration. I am bound to follow the 10th Circuit's determination of this issue and on this basis alone could conclude that the monument in this case does not violate the effects prong of the Lemon/Lynch analysis.

Plaintiffs nevertheless urge me to conclude that Stone, read in context with other Supreme Court decisions, such as County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984), does overrule Anderson.[5] In Stone, the Supreme Court considered whether the posting of the Ten

[5] I note that both County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984), were decided prior to, and were therefore available for consideration by, the 10th Circuit's 1997 decision in Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997), and the Colorado Supreme

Commandments in a school classroom pursuant to a Kentucky state statute violates the Establishment Clause. Analyzing the "secular purpose" prong of the Lemon test, the Court determined that "the pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature." 449 U.S. at 41. Stone has been cited by other districts and circuits to support a conclusion that a monument like the one at issue in this case has a religious, or non-secular, purpose and therefore violates Lemon's "secular purpose" prong. See Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), cert. denied 2001 U.S. Lexis 4120 (May 29, 2001); ACLU v. Pulaski County, 96 F.Supp.2d 691 (E.D. KY 2000).

There is, however, some suggestion that "[t]he differences between the Anderson monument and the Stone and Ring [v. Grand Forks Pub. Sch. Dist. No. 1, 483 F.Supp. 272, 274 (D.N.D. 1980)] displays are significant." State, 898 P.2d at 1023. This is because "where the display . . . concerns public schools – where young and impressionable minds are in need of greater protection – [] courts have been less tolerant of the potential to inappropriately persuade or coerce students by religious views." Id. at 1022; see Books v. City of Elkhart, 2001 U.S. Lexis 4120, *6-*7 (May 29, 2001)(Rehnquist, J., dissenting) (arguing that Stone's holding is limited to a school setting and stating that "Stone's finding of an impermissible purpose is hardly controlling here. In Stone, the posting effectively induced schoolchildren to meditate upon the Commandments during the school day. We have been 'particularly vigilant' in monitoring compliance with the Establishment Clause in that context, where the State

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Court's decision in State of Colorado v. Freedom from Religion Foundation, Inc., 898 P.2d 1013, 1022 (Colo. 1995), cert. denied 1996 U.S. Lexis 948 (Feb. 20, 1998).

exerts 'great authority and coercive power' over students through mandatory attendance requirements. Those concerns are absent here, where the Ten Commandments monument stands outside the city's Municipal Building." (quotations omitted)); see also ACLU of Kentucky v. Wilkinson, 895 F.2d 1098, 1105 (6th Cir. 1990).

Moreover, that courts have recognized the religious significance of the Ten Commandments does not foreclose a finding that their display has a secular purpose as required by the Lemon test. Specifically, government action has no secular purpose only if "there [is] no question that the [display] or activity was motivated wholly by religious considerations" Lynch, 465 U.S. at 680 (emphasis added). The City acts neutrally if it acts for some purpose other than advancing religion. See Rosenberger v. Rector of Univ. of Virginia, 515 U.S. 819, 839-40 (1995).

Here, the 10th Circuit previously found, and I take judicial notice of the fact, that the FOE is not a religious organization. See Anderson, 475 F.2d at 33. Moreover, the FOE donated this monument, along with many other monuments to cities across the United States "as part of the National Youth Guidance Program whose purpose was secular in nature. Such secular intent . . . is logical in light of the historical fact that the Ten Commandments has served over time as the basis for our national law." State, 898 P.2d at 1024; see Suhre v. Haywood County, 55 F. Supp. 2d 384, 399 (W.D.N.C. 1999)(looking to the history of the dedication of a Ten Commandments monument to find that its intent was to "honor and respect the development of the judicial system"); see also Stone, 449 U.S. at 45 (Rehnquist, J., dissenting) (citing Anderson as properly recognizing that while the Ten Commandments is "'undeniably a sacred text,' it is equally undeniable . . . that the Ten Commandments have had a significant impact on

the development of secular legal codes of the Western World."). Representatives of the City of Grand Junction testified at the hearing that their purpose in displaying the monument is not to endorse a religious message, but instead, to memorialize the rule of law. This purpose is further evidenced by the disclaimer presently posted in front of the monument. The disclaimer clearly states that "this display is not meant to endorse any particular system of religious belief." While Plaintiffs argue that this disclaimer articulates a "sham" purpose, no evidence presented at the hearing supports such a conclusion and I find credible Defendant's testimony at the hearing as to the purpose of the disclaimer.

Based on the evidence presented to the Court as part of the preliminary injunction hearing, I find that the monument at issue in this case is primarily secular in nature. Plaintiffs are therefore unable to show a substantial likelihood of success in proving that the monument has an impermissible purpose under Lemon/Lynch.

(2) The Primary Effect

The "primary effect" prong of the Lemon test asks whether the monument's "primary effect is to advance or inhibit religion, or, in endorsement test terms, whether it conveys or attempts to convey the message 'that religion or a particular religious belief is favored or preferred.'" Robinson v. City of Edmond, 68 F.3d 1226, 1229-30 (10th Cir. 1995) (quoting Allegheny, 492 U.S. at 593). "The effect component . . . should evaluate whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." Bauchman, 132 F.3d at 551-52.

The disclaimer posted in front of the monument distinguishes my "effects" analysis from other FOE monument cases and any other case cited to this Court. Specifically, the 6th Circuit recognized that once a clear disclaimer is in place, there is

> a contextual change of some significance . . . . Whether or not the disclaimer is effective as a matter of law, it is unambiguous as a matter of English. As long as our "reasonable observer" can read the language, and assuming that the observer is not a complete doubting Thomas as far as governmental pronouncements are concerned, the [City] has given the observer a plain and straightforward answer to the question whether the display constitutes an endorsement of any religion or religious doctrine. The answer is no: "This display [is not meant to endorse any particular system of religious belief]."

ACLU of Kentucky v. Wilkinson, 895 F.2d 1098, 1104 (6th Cir. 1990); see also Albanese v. Bannock County, No. 93-0115-E, slip op. 23 (D. ID. September 7, 1995)(analyzing the same disclaimer used in this case to conclude that the message conveyed by the Ten Commandments display with disclaimer is not an endorsement of religion). Of significance is the fact that the City's disclaimer is prominent, in large type, and placed directly in front of the monument. Thus, I find that no observer could look upon the monument without first seeing the disclaimer. In addition, the face of the monument reveals that it was donated in 1959 by the FOE, which provides history and context to an observer who might not otherwise be aware of its historical presence in the City or its origin.

As for the proposed Cornerstones display, I am also unable to conclude that when placed in context with the other monuments and proposed explanations, a reasonable observer would understand the City to endorse the Ten Commandments. Along these lines, other courts that have found a Ten Commandments monument to violate the Establishment Clause when standing alone have suggested that a different

result might follow if the monument were accompanied by "other historical documents evidencing the myriad of influences that shaped our current body of law," a Ten Commandments monument might not violate the Establishment Clause. Adland v. Russ, 107 F. Supp. 2d 782, 785 (E.D. KY 2000). Placing the Ten Commandments monument in such a context is precisely what the Cornerstones display proposes to do.

(3) Excessive Entanglement

No evidence was presented at the hearing that the monument or Cornerstones display implicates the "excessive entanglement" prong of the Lemon test.

CONCLUSION

Because I find that Plaintiffs have not met their burden of showing a substantial likelihood that they will ultimately prevail on the merits of their First Amendment challenge, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction filed June 11, 2001, is DENIED.

DATED at Denver, Colorado, this 26th day of June, 2001.

BY THE COURT:

Wiley Y. Daniel
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-685

CERTIFICATE OF MAILING

I hereby certify that a copy of the above Order was mailed to the following on June ~~26~~ 27, 2001:

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