

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION

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JOHN DOE,	)	
	)	<u>Civil Action</u>
	)	
Plaintiff,	)	File No. 2:03-CV-0156-WCO
	)	
v.	)	
	)	
BARROW COUNTY, GEORGIA;	)	
	)	
Defendant.	)	

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**PLAINTIFF'S PRETRIAL BRIEF**

The Defendant currently displays a stand-alone framed copy of the Ten Commandments in its County Courthouse. This display violates the Establishment Clause of the First Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment of the United States Constitution; Article I, section II, paragraph VII of the Georgia Constitution; and Article I, section I, paragraph 3 of the Georgia Constitution. Accordingly, Plaintiff asks the Court to declare the display unconstitutional; enjoin the County from hanging this and similar Ten Commandments displays; and award the Plaintiff nominal damages of \$1.00.

## FACTUAL BACKGROUND

After a church meeting, Clay McDaniel, Commissioner William “Bill” Brown and others decided that a Ten Commandments plaque should be purchased and hung in the Barrow County Courthouse.<sup>1</sup> Clay McDaniel dep. at 7, 10-11; W. Brown dep. at 9-10; Hice dep. at 12. Mr. McDaniel donated money to the church secretary to purchase the display. McDaniel dep. at 7. Commissioner Bill Brown approached Chairman Elder to see if the Ten Commandments could be posted in the Courthouse. W. Brown dep. at 12; Ex. T (Admis. 3). Mr. Elder told Commissioner Brown that he could hang the display if the other Commissioners also approved. W. Brown dep. at 12; Ex. T (Admis. 3). Commissioner Brown contacted all of the Commissioners and all of them acquiesced to Commissioner Brown’s desire to hang the display. W. Brown dep. at 12-13; Ex. T (Admis. 6 & 7). Commissioner Brown then hung the Ten Commandments display in the “breezeway” of the Barrow County Courthouse. W. Brown dep. 10; Ex. T (Admis. 2); Ex. A (pictures of the “breezeway”).

The Barrow County Ten Commandments display depicts what is commonly referred to as the Protestant version of the Ten Commandments and conflicts with the versions commonly associated with the Catholic, Lutheran, and Jewish faiths.

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<sup>1</sup> This Pretrial Brief cites to the depositions in this case. These depositions will be filed with the Court before the trial date.

*See Glassroth v. Moore*, 335 F.3d at 1285, 1285 n.1, 1299 n.3 (11<sup>th</sup> Cir. 2003); Hice dep. at 11. The stand-alone display is not obscured because there are no other surrounding items, and the text of the Ten Commandments is plainly visible to those who pass by. V. Compl. at ¶ 9; Answer at ¶ 9. Any person who stands in front of or anywhere near the framed display is easily able to read the text. V. Compl. at ¶ 9. There are no other displays in the breezeway. *Id.*; Ex. A.

On June 15, 2003 the ACLU wrote to the Barrow County Commission to request that it remove the display. In response, the Board held a special meeting on June 30, 2003, at which “the Board of Commissioners voted unanimously not to remove the display.” V. Comp. ¶ 28; Ex. B (June 30, 2003 Press Release) (stating that “[u]pon receipt of the ACLU’s request, Chairman Elder and the Barrow County Board of Commissioners have called an open meeting tonight . . . to allow the Commission to reach a consensus on whether or not to remove the Commandments.”); Ex. C (Minutes of the June 30, 2003 Commissioner meeting); Ex. D (Letter from Currie Mingledorff to Maggie Garrett); Ex. E (Sept. 10, 2003 Press Release entitled “Barrow County Board of Commissioners Stand Firm Not to Remove Ten Commandments”).

After this decision three rallies were held to support the government display. One event that was advertised by the County was held by area churches and

featured Alan Keyes. Ex. F (Sept. 9, 2003 Press Release); Kelley dep. at 11-12; Hice dep. at 13, 15-16; Brasfield dep. at 15-16. Chairman Elder spoke at that event with the Commissioners by his side. Ex. T (Admis. 33); Brasfield dep. at 15-17; Wehunt dep. at 27-28; W. Brown dep. at 20-21. The second rally advertised by the County featured Judge Moore. Ex. G (Oct. 17, 2003 Press Release); Ex. H (Oct. 24, 2003 Press Release); Hice dep. at 15-16; Brasfield dep. at 17-18; Wehunt dep. at 29-30. The third rally was held jointly by the Ku Klux Klan and the House of Prayer. Hice dep. at 16-17.

After the June meeting, citizens asked the Commission if they could have displays posted in the Courthouse. At least two citizens approached the Commission or Chairman Elder. Ex. I (Oct. 30, 2003 Letter from Scott Harris); Ex. J (email from Scott Harris); Ex. K (Oct. 1, 2003 email from Robert Puckett); Ex. L (letter and documents from Robert Puckett). Neither was granted permission to post a display. Ex. T (Admis. 17 & 20). When one citizen posted the display anyway, it was promptly removed at the order of Chairman Elder. Ex. M (Jan. 12, 2004 email from Scott Harris); Ex. N (Jan. 2, 2004 memo. from Chairman Elder); Ex. T (Admis. 16); Brasfield dep. at 19-20; *see also* Ex. O (email from Lorin Sinn-Clark, offering to donate frames for Mr. Harris' display).

Also since the June meeting, other Ten Commandments displays have appeared in the Courthouse. Ex. P (El-Eita Aff.) (pictures of Ten Commandments displays). These displays state “We the citizens of Barrow County support the Ten Commandments.” *Id.* The Ten Commandments are then listed below. *Id.* These appear clearly to anyone who enters the Clerk’s office (3 posters) and the sheriff’s office, as well as other rooms in the Courthouse. *Id.*

John Doe regularly visits the Courthouse. V. Compl. at ¶ 4; Doe Aff. at ¶ 2 (filed Nov. 6, 2003); Doe dep. at 6, 53, 56, 57-58, 59, 78-79, 88, 90, 93, 100, 112. He has gone to the Courthouse for various reasons, including to vote via absentee ballot, to get a passport, and to get voter information. V. Compl. at ¶ 14; Doe dep. at 53, 76, 78-79, 88, 90, 93, 100, 112. He has also gone to the Courthouse to attend court proceedings. *Id.* at 106-07, 117-18.

John Doe objects to the display of the Ten Commandments because it is an unwelcome religious message. V. Compl. at ¶ 5; Doe Aff. ¶ 4; Doe dep. at 59, 74, 150, 154, 161-2. Furthermore, the display makes him feel like an outsider in the community and a second class citizen at the county courthouse. Doe Aff. ¶ 4; Doe dep. at 59, 74, 150, 154, 161-2. The display sends him the message that his religious beliefs play a role in how he will be treated by the government. Doe Aff. ¶ 4; Doe dep. at 59, 74, 150, 154, 161-2. Each time he goes to the County Courthouse, he is

affronted by the Defendant's overtly religious display and subject to the unavoidable and unwelcome religious message sponsored by the County. V. Compl. at ¶ 19; Doe dep. at 62-67, 69-70, 75-76, 78-81.

## ARGUMENT AND ANALYSIS

### I. The Plaintiff Has Standing.

A Plaintiff establishes standing in an Establishment Clause case by showing that he has been "subjected to unwelcome religious exercises or w[as] forced to assume special burdens to avoid them." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 n.22 (1982).

John Doe meets this standard. First, the Ten Commandments display is unwelcome to the Plaintiff.<sup>2</sup> V. Compl. at ¶ 5; Doe Aff. at 4; Doe dep. at 59, 74, 150,

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<sup>2</sup>In *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1107-08 (11th Cir. 1983), the plaintiffs were found to have standing where the "underlying motivations of the plaintiffs . . . can be described as either a spiritual belief or a commitment to separation of church and state" and where they are also "subjected to unwelcome religious exercise or were forced to assume special burdens to avoid them." Thus, in *Rabun County*, one plaintiff was held to have standing where he "suffer[ed] spiritual harm" from being forced to view "unwanted religious symbolism." *Id.*; see also *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (finding standing where the plaintiffs were offended by receiving stationary that had a seal with the word "Christianity" on it, even though the word was not legible on the documents because they had "direct contact with the offensive conduct."); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1145 (4<sup>th</sup> Cir. 1991) ("By placing its imprimatur on the particular kind of belief embodied in any prayer, the state necessarily offends the sensibilities not only of nonbelievers but of devout believers among the citizenry who regard prayer 'as a necessary private experience.'").

154, 161-62. Second, the Plaintiff has “demonstrate[d] that [he has] been forced to encounter the offensive displays.” *Turner v. Habersham County*, 290 F. Supp. 2d 1362, 1367 (N.D. Ga. 2003); *Harvey v. Cobb County*, 811 F. Supp. 669, 673 (N.D. Ga. 1993).<sup>3</sup> John Doe has had multiple unwelcome encounters with the religious display at the Barrow County Courthouse. Doe dep. at 53, 76, 78-79, 88, 90, 100; Ex. R. John Doe has encountered the Ten Commandments at the Courthouse when he has gone to: (1) get a passport application, Doe dep. at 88, 90, 93; (2) submit the passport application, *id.*; Ex. R; (3) vote by absentee ballot in the August 2002 election, *id.* at 53; (4) vote by absentee ballot in the November 2002 election, *id.* at 6; (5) vote absentee ballot in the March 2004 election, *id.* at 78-79; (6) pick up voter registration information for his friends on two occasions, *id.* at 76, 112; and (7)

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<sup>3</sup> Contrary to the assertions of the Defendant, the Plaintiff need not show that he was obligated to go to the Courthouse because of an employment or educational obligation. In *American Civil Liberties Union v. Rabun County*, 698 F.2d 1098, 1108 (11<sup>th</sup> Cir. 1983), a plaintiff’s claim that a monument that deterred him from exercising his “right to use the state parks for camping purposes” was sufficient to demonstrate standing. Likewise, in *Habersham County*, 290 F. Supp. 2d 1362, 1367 (N.D. Ga. 2003), the Plaintiffs had standing because they had “had a *right to attend* [the] government buildings without being subjected to the allegedly offensive display.” See also *Buono v. Norton*, Civ. No. 03-55032, 2004 WL 1238143 at 4 (9<sup>th</sup> Cir. June 7, 2004) (“We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact.”); *Allen v. Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970) (“Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional.”).

inquire about an international driver's license, *id.* at 100.<sup>4</sup> John Doe has also gone to the courthouse to view court proceedings. *Id.* at 106-07; 117-18.

## **II. The Ten Commandments Display Violates the Establishment Clause of the First Amendment of the United States Constitution.**

The Establishment Clause of the First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. This "prohibition against the establishment of religion applies to the states through the Fourteenth Amendment."<sup>5</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. \_\_\_ (2005), No. 03-1693, 2005 WL 1498988 at \*6 (June 27, 2005); *King v. Richmond County*, 331 F.3d 1271 (11<sup>th</sup> Cir. 2003).

For a government religious display to survive Establishment Clause scrutiny, it must meet all three prongs of the *Lemon* test. *McCreary*, 2005 WL 1498988 at \*10-\*13; *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11<sup>th</sup> Cir. 2003) (holding a Ten Commandments display unconstitutional under *Lemon* and rejecting the Defendants' argument that the *Marsh* test applied); *Turner v. Habersham*, 290 F. Supp.

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<sup>4</sup>John Doe had gone to the Courthouse before the display was placed in the Courthouse. Doe dep. at 57-58 (assessor's office); *id.* at 56-57 (probate court); *id.* at 59 (restrooms).

<sup>5</sup>The Defendant asserts that the Fourteenth Amendment does not incorporate the Establishment Clause. Joint Prelim. Report & Disc. Plan 1 (b) at 4; Pretrial Order Att. D at 3. Such a finding would run contrary to 63 years of Supreme Court doctrine and countless Establishment Clause decisions. Furthermore, the Eleventh Circuit has expressly rejected such a claim. *Jafree v. Wallace*, 705 F.2d 1526, 1529 (11<sup>th</sup> Cir. 1983).

2d 1366, 1369 (N.D. Ga. 2003). Under *Lemon* “the challenged practice must have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion.” *Glassroth*, 335 F.3d at 1282; *Habersham*, 290 F. Supp. 2d at 1369. The Barrow County display violates the first two of the three *Lemon* test prongs and is thus unconstitutional. Indeed, a lone display of the Ten Commandments is “perhaps per se unconstitutional[.]” *Habersham*, 290 F. Supp. 2d at 1370.

**A. The Ten Commandments Display is Government Sponsored and a Government Message.**

The fact that a citizen donated either the money to purchase the Ten Commandments or donated the display itself does not insulate the Government from the Constitutional mandate of the Establishment Clause. See *Glassroth*, 335 F.3d at 1282 (where the Chief Justice of the Alabama Supreme Court claimed to have donated the display in his “personal capacity”); *Habersham*, 290 F. Supp. 2d at 1366 (“It is clear the county did not use any of its own funds to purchase the copies of the Ten Commandments.”).<sup>6</sup>

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<sup>6</sup>See also; *O’Bannon*, 259 F.3d 766 (donated by the Fraternal Order of the Eagles); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (same); *Mercier v. City of LaCrosse*, 276 F. Supp.2d 961 (W.D. Wis. 2003) (same); *Kimbley v. Lawrence*, 119 F. Supp. 2d 856 (S.D. Ind. 2000) (donated by a state representative); *Harvey*, 811 F. Supp. 669 (donated by the Gardner Family).

Even if the Court were to find that the display represents the speech of Mr. McDaniel, the man who paid for the display,<sup>7</sup> or that Commissioner Bill Brown hung the display in his personal capacity,<sup>8</sup> the speech would still violate the Establishment Clause: “The Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's *support and promotion* of religious communications by [private parties].” *Allegheny*, 492 U.S. at 600 (1989) (emphasis added).<sup>9</sup> In *Allegheny*, where a crèche was unconstitutionally displayed in the courthouse, the court held:

The Grand Staircase [of the courthouse] does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche in that location for over six weeks would then not serve to associate the government with the

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<sup>7</sup> Mr. McDaniel merely donated money to his church secretary to buy the display. McDaniel dep. at 7. He did not choose the version of the Ten Commandments that was hung and he had never seen the display before he saw it hanging in the Courthouse. *Id.* at 11-13. In fact, he does not know whether the display hanging in the Courthouse is the one that was purchased with his money. *Id.* at 11.

<sup>8</sup>It is highly unlikely that, even if citizens were allowed to place private displays in the Courthouse, a citizen would be given permission to physically drive nails into the wall to hang it. It is more likely that Mr. Brown hung it in his role as a Commissioner. W. Brown dep. at 9-11.

<sup>9</sup> See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student initiated prayer at public high school football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (clerical prayer at public school graduation); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (private group display of a crèche inside the courthouse); *Engel v. Vitale*, 370 U.S. 421 (1962) (private prayer in public school); *Knights of Columbus Council v. Lexington*, 2001 WL 1512414 (1st Cir. 2001) (state legislation prohibiting a private display of crèche on public land did not violate plaintiff's free exercise rights).

crèche. Even if the Grand Staircase occasionally was used for displays other than the crèche it remains true *that any display located there fairly may be understood to express views that receive the support and endorsement of the government*. In any event, the county's own press releases made clear to the public that the county associated itself with the crèche. Moreover, the county created a visual link between itself and the crèche.

*Id.* at 600 n.50 (emphasis added).

These factors from *Allegheny* are also all present in this case. The Barrow County display is permanently displayed inside the Courthouse, where no one else has been permitted to place a display.<sup>10</sup> Moreover, it is the only display in the “breezeway”<sup>11</sup> and people who enter the area cannot avoid seeing it,<sup>12</sup> and the display was “authorized” by the Commissioners before it was hung,<sup>13</sup> that approval was reaffirmed by the Board at the June 30, 2003 board meeting,<sup>14</sup> and public tax

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<sup>10</sup>Mr. Puckett wrote to the Commissioners on more than one occasion to get approval for his display. Ex. K; Ex. L; Ex. S (Admis. 21, 22, 23). Permission was not granted. After asking for permission, Ex. S (Admis. 17), but not receiving it, Ex. M, Scott Harris placed his display in the “breezeway” and it was promptly removed by Chairman Elder. Ex. I; Ex. J; Ex. M; Ex. N; Ex. O; Brasfield dep. at 19-20.

<sup>11</sup>V. Compl. at ¶ 9; Answer at ¶ 9; Ex. A.

<sup>12</sup>V. Compl. at ¶ 9; Answer at ¶ 9.

<sup>13</sup>King dep. at 18 (stating he “authorized it”); see also Ex. S (Admis 3 & 4); Kelley dep. at 8-9; Caldwell dep. at 11. All displays must get approval from the Chairman of the Commission or the Commission as a whole, Ex. S (Admis. 24); Caldwell, dep. at 16-17, King dep. at 16, or the Board as a whole, Ex. S (Admis. 27); Brasfield dep. at 21; W. Brown dep. at 17; Caldwell dep. at 17.

<sup>14</sup>V. Comp. ¶ 28; Ex. B; Ex. C; Ex. E.

money pays for the maintenance of the display.<sup>15</sup> Finally, the County's own press release, which was entitled "Barrow County Board of Commissioners Stand Firm Not to Remove the Ten Commandments," made clear that the County supports and endorses the display. Ex. E; *see also Allegheny*, 492 U.S. at 600 n. 50. Even if this were private expression, the distinction between private expression and government expression has become unconstitutionally blurred, and thus, the Establishment Clause applies. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality).

**B. \_\_\_The Commissioners Lack a Secular Purpose.**

Recently, the Supreme Court in *McCreary County v. ACLU of Ky*, 545 U.S. \_\_\_ (2005), No. 03-1693, 2005 WL 1498988 at \*27 (June 27, 2005), struck down a Ten Commandments display because of the religious purpose behind the display. When analyzing the purpose prong, the Court must look through eyes of an "objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *Id.* at \*11 (internal citations omitted). The Court must ask whether openly available data supports a commonsense conclusion that a religious objective permeates the government's action. *Id.* Such data may include public comments of legislators or simply the action itself. *Id.*

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<sup>15</sup>Ex. S (Admis. 12).

According to the Court in *McCreary*, the action of posting a lone Ten Commandments display itself evidences a religious purpose: “When the government initiates an effort to place [the Ten Commandments] alone in public view, a religious object is unmistakable.” *McCreary*, 2005 WL 1498988, at \*15; *id.* at \*34 (Scalia, J, dissenting) (“In the Court’s view, the impermissible motive was apparent from the initial displays of the Ten Commandments all by themselves. . .”). The Ten Commandments are an “unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.” *Id.* at \*15.<sup>16</sup> Lone displays have “no context that might have indicated an object beyond the religious character of the text” of the Ten Commandments. *Id.*

Previous Supreme Court and lower courts have reached the same conclusion. See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (finding that “Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose”); *Habersham*, 290 F. Supp. 2d at 1370 (noting the

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<sup>16</sup> The Ten Commandments are an “undeniably religious text.” *Stone v. Graham*, 449 U.S. at 42; *Glassroth*, 335 F.3d at 1297; *Habersham*, 290 F. Supp. 2d at 1369; *Harvey*, 811 F. Supp. at 671. Indeed, the Commissioners agree that the Ten Commandments are a religious text. Commissioner Norma Jean Brown, stated that the Ten Commandments are “the Word of God” and that the “Word should be in public buildings.” N. Brown dep. at 25-26. Other Board Members share her belief. Caldwell dep. at 7 (the Ten Commandments are the “Word of God”); Withers dep. at 21 (the Ten Commandments were “handed down by God”). Commissioner William Brown described the Ten Commandments as “Christian principles to live by.” W. Brown dep. at 15; 30-31.

“perhaps per se unconstitutionality” of lone Ten Commandment displays); *Harvey* 811 F. Supp. at 678 (noting that the display was unconstitutional in part because it “stands alone in the alcove, and there are no countervailing secular passages or symbols.”); *see also Doe v. Harlan County*, 96 F. Supp. 2d 667, 674 (E.D. Ky. 2000) (“In their original form, the Ten Commandments displays, consisting of only the Ten Commandments unaccompanied by any other documents, lack any secular purpose.”); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 866 (S.D. Ind. 2002) (stating that in *Stone* there was no attempt to “mitigate the religious nature of the Ten Commandments”).

The application of *McCreary* to this case, which involves a lone Ten Commandments display, therefore, can only result in a finding that the display is unconstitutional.

The *McCreary* Court also called for the consideration of public comments by the legislators and the historical context in which the Ten Commandments display arose. *McCreary*, 2005 WL 1498988 at \*11, \*14. The public comments made by the Barrow County Commissioners reinforce the religious purpose of the display. *See ACLU of Tennessee v. Rutherford County*, 209 F. Supp. 2d 799, 806 (M.D. Tenn. 2002) (finding a religious purpose after “reviewing the history of this litigation, particularly the videotapes of the Commissioner meetings,” at which “both the

Commission’s discussion and the public comment period was exclusively on the Ten Commandments”). At the June 30, 2003 Barrow County Board of Commissioners special meeting to determine the fate of the Ten Commandments display, the Commissioners treated the Ten Commandments issue as a religious issue. V. Compl. at ¶¶ 24, 26; Audio CD of meeting, Ex. D of Doe Aff. (Hereinafter “audio CD”). First, the Board gave Christian clergy special treatment in the debate by inviting only “pastors in the audience to speak” during the public comment period. V. Compl. at ¶¶ 24, 26; Audio CD. Non-clergy were allowed to speak only after all pastors were given the opportunity to address the Board and after it was determined that “there is something that hadn’t been said or something that needs to be said that hasn’t already been said.” V. Compl. at ¶¶ 24, 26; Audio CD. Before opening the floor to others, the Chair asked: “Is there any other pastor that would like to come forward at this time?” V. Compl. at ¶¶ 24, 26; Audio CD.

Commissioner Norma Jean Brown called upon the pastors again at the end of the meeting. After referencing the church hymn, “I Won’t Walk Without Jesus and I Won’t Talk Without Jesus,” she asked the pastors and “men and women of God” in the audience to join the Commissioners as they, “in the name of God,” “pray[ed] over” a letter that the Commission planned to send to potential legal counsel because “the power of prayer is more than anything.” V. Compl. at ¶ 26;

Audio CD.

Indeed, the message that the Commissioners intended to send to the citizens of Barrow County at the meeting was religious: **“I hope there’s one thing that we have sent a message [about] . . . Don’t come to Barrow County and mess with our families or mess with our God.”** V. Compl. at ¶ 25; Audio CD.

The Commissioners further emphasized their religious purpose in their September 10, 2003 Press Release. In addition to “challeng[ing] every citizen to burn these Commandments into their minds, memories, and hearts,” and “urg[ing] every resident and business owner to display the Commandments prominently in their homes and places of business . . . ,” the Commissioners invited Barrow County residents to a rally that was organized by “area churches.” Such public behavior by the Commissioners at official meetings and in press releases makes their religious purpose unquestionable, thus violating the first prong of the *Lemon* test.

**C. The Ten Commandments display has the effect of advancing or inhibiting religion.**

The effects prong of the *Lemon* test asks whether “the ‘principal or primary effect’ of a challenged law or conduct is to ‘advance or inhibit religion.’” *See King v. Richmond County*, 331 F.3d 1271, 1278 (11<sup>th</sup> Cir. 2003). According to the Eleventh Circuit: “The effects prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed reasonable

observer.” *Glassroth*, 335 F.2d at 1297. Factors the Court may consider when determining the effect on a reasonable observer include: the legislative history, the appearance of the display itself, the location and setting of the display, and the statements made by those who authorized the display. *Id*; *Habersham*, 290 F. Supp. 2d at 1372. Because the County has displayed a religious document in the halls of its judicial building and the Commissioners have emphasized the religious aspects of the monument, a reasonable observer would find that the monument endorses religion. *Glassroth*, 335 F.2d at 1297.

*Van Orden*, 545 U.S. \_\_\_ (2005), No. 03-1500, 2005 WL 1500276 (June 27, 2005), a recent Supreme Court Ten Commandments decision, also supports using this analysis. In *Van Orden*, the religious purpose was not as obvious as it was in *McCreary*, or in this case. *Id.* at \*13 (Breyer, J., concurring). Thus the Court looked further than the purpose prong and looked at the physical setting of the display to see if it endorsed religion.

No opinion commanded a majority of the vote in *Van Orden*. The critical fifth vote was provided by Justice Breyer, who agreed with the plurality in judgment but explicitly disagreed with the plurality’s analysis. *Van Orden*, *Id.* at \*15 (Breyer, J., concurring). Furthermore, Breyer signed onto the majority opinion in *McCreary* and stated his agreement with Justice O’Connor’s “statement of principles in *McCreary*

County.” *Id.* Thus, it is Breyer’s opinion in *Van Orden* that should guide the Court in its analysis of the second prong.

In *Van Orden*, Breyer held that to “determine the message that the text here conveys, we must examine how the text is used. And, that inquiry requires us to consider the context of the display.” *Id.* at \*13. The context included “the circumstances surrounding the display’s placement . . . and its physical setting.” *Id.* First, Breyer noted that the Eagles, who were responsible for the display were a secular organization, the tablets prominently displayed that they were donated by the Eagles, and the text of the Ten Commandments was developed by the Eagles to be a “non-sectarian text.” *Id.* at \*13. Second, Breyer emphasized that the monument was in a park containing 17 monuments and 21 historical markers. *Id.* And, the “determinative” factor was that the display had been in the park for forty years. *Id.* at \*14.

In contrast, the idea of the Barrow display was hatched by a Commissioner and other parishioners after a church meeting, and the display was purchased by a church. McDaniel dep. at 7, 10-11; W. Brown dep. at 9-10; Hice dep. at 12. It is a lone display, and not one accompanied by 38 other monuments or markers. Ex. A. And, finally, the monument is a new monument, rather than a 40 year old monument. McDaniel dep. at 7, 10-11; W. Brown dep. at 9-10; Hice dep. at 12. Thus

the display in not saved by *Van Orden*. To the contrary, *Van Orden*, which was considered a borderline case demonstrates that the case before us is not a close case at all. *Van Orden*, 2005 WL 1500276 at \*13 (Breyer, J., concurring). Instead, it is clearly unconstitutional.

Similarly, the display in *Cobb County v. Harvey*, is nearly identical to the display in *Barrow County*. In *Harvey* the Court found that a stand-alone Ten Commandments display endorsed religion:

“Nothing in the context of the display detracts from the [panel’s] religious message.” Moreover, the display is located in the Cobb County State Court Building, a seat of judicial authority in the county. Although the panel is not located in the most prominent part of the building, it is, nonetheless, located high on the wall, above a marble bench, near the Clerk’s Office and the Traffic Court courtrooms. “No viewer could reasonably think that it occupies this location without the support and approval of the government.”

811 F. Supp. at 678 (internal citations omitted). Similarly, the Barrow display stands alone in the judicial seat of the county, and there are no secular symbols or messages to countervail the “undeniably sacred text” of the Ten Commandments. *Stone*, 449 U.S. at 41; *McCreary*, 2005 WL 1498988 at \*14 (the Ten Commandments are an “instrument of religion.”). The appearance of the display itself, therefore, endorses religion.

Barrow County’s endorsement of religion is further enhanced by the fact that it has chosen to display a uniquely Protestant representation of the Ten

Commandments. Hice dep. at 11; *Glassroth*, 335 F. 3d at 1285, 1285 n.1, 1299 n.3; *Habersham*, 290 F. Supp. 2d at 1373. The differences between the versions of the Ten Commandments are “extraordinarily important.” *Habersham*, 290 F. Supp. 2d at 1373. And, “[b]y choosing any one” of the different versions of the Ten Commandments, the County is “making a statement about the substance of the text it chooses.” *Id.*; *McCreary*, 2005 WL 1498988 at \*28 (Scalia, J., dissenting) (stating that “[t]he Establishment Clause would prohibit for example, government endorsement of a particular version of the Decalogue as authoritative.”). Because the display employs a Christian-specific image, it implicates core Establishment Clause concerns. *City of St. Charles*, 794 F.2d at 271 (“[T]he more sectarian the display, the closer it is to the original targets of the [Establishment] Clause, so the more strictly is the clause applied”).

The Commissioners’ religious statements also add to the endorsing effect of the display. *See Glassroth*, 335 F.3d at 1297 (finding that a reasonable observer would be aware of Judge’s Moore’s speeches). As explained above, the Commissioners emphasized the religious aspects of the Ten Commandments in their meetings, press releases, and public statements. *See infra*, I, A. 1.

“The display violates two of *Lemon’s* three prongs. It violates the Establishment Clause.” *Glassroth*, 335 F.3d at 1297.

## II. The Display Violates Article I, Section II, Paragraph VII of the Georgia Constitution.

Article I, section II, Paragraph VII of the Georgia Constitution states: “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.” Although the County asserts that it did not purchase the display, it must now maintain the display. Ex. S (Admis. 12). (“Defendant’s ‘maintenance’ of the Courthouse and the Courthouse annex and their contents extends to the wall on which the picture of the Ten Commandments is hung, including the picture itself . . .”); *Harvey*, 811 F. Supp. at 676 (“[T]he panel has been dusted by a night cleaning crew consisting of Cobb County inmates and a supervisor employed by Cobb County several times during the past twenty-five years. These actions by a supervisor and by Cobb County inmates, who were housed, fed, and transported by Cobb County at Cobb County's expense, constitute the use of tax revenues, however small and indirect, on the panel.”). Because the Constitution mandates that “No money” may “directly or indirectly” aid religion, the use of county employee resources to maintain the Protestant version of the Ten Commandments display violates the Constitution. See *Glassroth*, 335 F.3d at 1285 n.1, 1299 n.3; V. Compl. at ¶ 11; *Harvey*, 811 F. Supp. at 676.

### III. The Display Violates Article I, Section I, Paragraph 3 of the Georgia Constitution.

The Georgia Constitution also provides that “[e]ach person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience.” Ga. Const. Art. I, § I, ¶ 3. The Ten Commandments display serves as government approval and promotion of a certain way to worship God (i.e. acknowledging one God, observing the Sabbath, honoring your parents, etc.) and as a disapproval of other ways of worship. By explicitly offering approval to one way of worship, the government causes John Doe to feel as though his choice of whether and how to worship is not free. The government is forcing John Doe to venerate on the unwelcome religious display each time he enters the Courthouse to perform civic duties, controlling and interfering with his right to decide whether or not to honor and revere the religious code. *Stone v. Graham*, 449 U.S. 39, 194 (1981). Furthermore, it makes John Doe feel as though failure to believe as the County apparently prefers he would believe, makes him a lesser member of the County and that his rights in the Courthouse may suffer unless he adheres to the government’s beliefs. Indeed, “[w]hen the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual’s decisions about whether and how to worship.” *McCreary*, 2005 WL

1498988 at \*22 (O'Connor, J., concurring). This, again, interferes with John Doe's freedom to control his own conscience.

#### IV. 42 U.S.C. § 1983 is a Proper Vehicle for this Suit.

The Defendant argues that 42 U.S.C. Section 1983 does not apply in this case because it "protects only Plaintiff's civil rights of life, liberty, and property, and not Plaintiff's political standing with the county government."<sup>17</sup> Joint Prelim. Report & Disc. Plan (1) (b) at 5; Pretrial Order, Att. D at 2. To the contrary, Section 1983 is used in this case to protect liberty - religious liberty - which is the goal of the Establishment Clause and is one of our fundamental liberties. *McCreary*, 2005 WL 1498988 at \*21 (O'Connor, J., concurring) ("The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions - one protecting the free exercise of religion, the other barring establishment of religion."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

42 U.S.C. §1983 is the primary vehicle used to obtain relief from state and local officials who violate the Constitution. *Monroe v. Pape*, 365 U.S. 167 (1961). The

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<sup>17</sup>The two requirements to bring a Section 1983 action, are: (1) that the acts were done under the "color of law" and (2) that there was a "state action." When a Section 1983 lawsuit involves a violation of the Bill of Rights by a state or local official carrying out his duties, these two requirements collapse into one another and both are met. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). In the case at bar, John Doe satisfies both the "color of law" and the "state action" requirements because the Ten Commandments display was placed with the approval of a County Commissioner in the Barrow County Courthouse. The Defendant does not appear to question that this test has been met.

purpose of Section 1983 is to “enforce the provisions of the Fourteenth Amendment of the Constitution of the United States.” *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). The Fourteenth Amendment protects a person’s “life, liberty or property,” and serves to make the First Amendment, including the Establishment Clause, applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1990); *Hollman v. Harland*, 370 F.3d 1252, 1284 (11<sup>th</sup> Cir. 2004). Indeed, “[t]he word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.” *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (internal quotations omitted).

To fully enforce the Fourteenth Amendment, therefore, Section 1983 must be allowed to be a vehicle for Establishment Clause challenges. *Monroe*, 365 U.S. at 171. This conclusion is supported by the numerous Supreme Court and Eleventh Circuit cases that have employed Section 1983 in Establishment Clause cases. *See e.g.* *McCreary*, 2005 WL 1498988 at \*6; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *aff'g* 168 F.3d 806, 811 (5<sup>th</sup> Cir. 1999); *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Allegheny*, 492 U.S. 573 *aff'g* 842 F.2d 655, 656 (3d Cir. 1989); *King v. Richmond County*, 331 F.3d 1271 (11<sup>th</sup> Cir. 2003); *Glassroth v. Moore*, 335 F.3d 1282 (11<sup>th</sup> Cir.2003).

Furthermore, the Plaintiff does not merely allege that his lawsuit is based upon the effect the Ten Commandments display has on his *political* standing. John

Doe asserts that the Ten Commandments display causes several injuries, including being forced to have unwelcome contact with a religious message; being made to feel like an outsider not just politically, but socially, on religious matters and in the court system; and being offended because the Ten Commandments display trivializes religion. Therefore, it is inaccurate to state that the Plaintiff's only claim is that his political standing in the community has been damaged.

**V. Requiring Removal of the Ten Commandments Display Would Not Violate the Free Exercise Clause.**

The Defendant has also argued that an order requiring the removal of the Ten Commandments would violate the free exercise clause, Joint Prelim. Report & Disc. Plan 1(b) at 5 and Pretrial Order, Att. D at 3-4, but that argument fails: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. . . . *But. . . that [] distinction disappears whenever private speech can be mistaken for government speech.*" *Pinette*, 151 U.S. at 766. (emphasis added). The Court has emphasized that, "while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *School Dist. v. Schempp*, 374U.S. 203, 226 (1963).

The First Amendment protects the free exercise of religion where it “(1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.” *Pinette*, 515 U.S. at 770. This display has none of these characteristics. First, the speech is not purely private. The Commissioners were instrumental in hatching the idea of the display, hanging the display, and twice granting approval for the display. W. Brown dep. at 12-13, 17; Ex. S (Admis. 7 & 8); Wehunt dep. at 31; Ex. C; Ex. D; Ex. E; Ex. F. The citizen who stated that he donated the money for the display does not even know if the display is the one for which he paid. McDaniel dep. at 11. Second, the Courthouse is not a traditional public forum, *United States v. Gilbert*, 920 F.2d 878, 886 (11<sup>th</sup> Cir. 1991), nor has it been opened as a designated public forum. As explained above, no other citizen displays appear inside the Courthouse. In fact, other citizens who sought to hang religious messages in the “breezeway” were denied access or had their displays removed.<sup>18</sup> Because no citizens are permitted to put any religious or non-

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<sup>18</sup>If the Courthouse were actually a public forum, the County would be violating the Free Speech Clause of the First Amendment, because the County has no clear standards for judging what can and cannot be displayed in the Courthouse. *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951). When asked the standards and procedures for how a citizen could place something in the Courthouse, the Commissioners themselves knew of none and the County admits that there are no written standards. Caldwell dep. at 17; Dyer dep. at 15-16; King dep. at 17; Brasfield dep. at 17; W. Brown dep. at 23; Ex. S (Admis. 29).

religious symbols in the “breezeway” of the Courthouse, disallowing the Ten Commandments display does not violate the Free Exercise Clause or discriminate against Christians. *Demmon*, 279 F. Supp. 2d at 698. Third, the person who may have donated the display is not even a party to this case. In accordance with *Pinnette*, therefore, the speech is government speech, not private speech.

Similarly, in *Allegheny*, the Supreme Court explained that the display of a crèche in the courthouse could not be “justified as an accommodation of religion.”

*Allegheny*, 492 U.S. at 601 n. 51. The court stated:

Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion. The display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity. Christians remain free to display crèches in their homes and churches. To be sure, prohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.

*Id.* at 601 (internal citations omitted); see also *Moeller v. Schrenko*, 251 Ga. App. 151, 155 (2001). Similarly, displaying the Ten Commandments does not remove any burdens on Christianity. Indeed, no Ten Commandments case has ever embraced a free exercise defense. See e.g., *Stone v. Graham*, 449 U.S. at 42; *Glassroth*, 335 F.3d at 1297; *Habersham*, 290 F. Supp. 2d at 1369; *Harvey*, 811 F. Supp. at 671. A Barrow

County citizen can still hang the Ten Commandments in his or her house or church or carry a personal copy with him or her; the display just cannot be a fixture within the courthouse:

[T]he Ten Commandments are not in peril. They may be displayed in every church, synagogue, temple, mosque, home, and storefront. They may be displayed on lawns and in corporate board rooms. Where this precious gift cannot, and should not, be displayed as a religious text is on government property.

*Harvey*, 811 F. Supp. at 671.

**VI. Removal of the Ten Commandments Picture from the Barrow County Courthouse Does Not Impose a Religious Test upon the Individual Members of the Board of Commissioners.**

Another of the Defendant's arguments is that removal of the Ten Commandments would be akin to creating a religious test for the Commissioners. Joint Prelim. Report & Disc. Plan 1 (b) at 5. The religious test clause contained in Article VI, clause III of the United States Constitution specifically instructs that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Here, the members of the Barrow County Board of Commissioners have not been required or asked to swear to or affirm any religious propositions in order to hold or retain their positions on the Board. Similarly, they have not been required or asked to refrain from any religious expression in the

course of their private conduct. That the Board may not constitutionally promulgate their private religious convictions by way of their public office does not equate to a religious test.

Although case law interpreting the religious test clause is sparse, it consistently regards religious tests as affirmative declarations of religious belief or faith as a qualification for office. For example, in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the plaintiff was denied a Maryland commission as a Notary Public because he would not, as required by Maryland law at the time, declare his belief in God.<sup>19</sup> *Torcaso* held that "neither a State nor the Federal Government can constitutionally force a person to *profess* a belief or disbelief in any religion." *Id.* at 495. Here, however, removal of the Ten Commandments, along with their absence from the courthouse, does not require the Board of Commissioners to profess any belief whatsoever. Denying the Commissioners the opportunity to exploit the machinery of the government to profess their personal religious beliefs does not require them to profess or declare any belief, or to profess or declare any absence of belief, and is therefore not a religious test required to hold office.

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<sup>19</sup> See also *Anderson v. Laird*, 316 F. Supp. 1081, 1093 (D.D.C. 1970) (holding that the imposition of religious tests are unconstitutional in that they prevent those who do not profess belief in the favored church or religion of the state from exercising the basic political and economic rights of holding office).

## VII. Laches Does Not Bar this Lawsuit.

Defendants next argue that the doctrine of laches bars this suit. Answer, Fifth Defense, at 15. The doctrine of laches is predicated on the unfairness of allowing a party to delay bringing an action when that party knows of all relevant facts and, as a result of the delay, is able to prejudice his adversary substantially. *Costello v. United States*, 365 U.S. 265, 282-283 (1961). To establish a defense of laches, the Defendant must demonstrate (1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *Kason Indus. v. Component Hardware Group*, 120 F.3d 1199 (11<sup>th</sup> Cir. 1997).

Courts, however, have routinely declined to apply laches to substantive Constitutional challenges.<sup>20</sup> As recognized by the former Fifth Circuit, “[l]aches is not an adequate bar to looking into the constitutional consequences of virtually admitted fact nor granting suitable relief. Antiquity cannot shield such horrendous practice.” *Hudson v. Alabama*, 493 F.2d 171, 173 (5<sup>th</sup> Cir. 1974).

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<sup>20</sup>*Olegario v. United States*, 629 F.2d 204 (2<sup>nd</sup> Cir. 1980); *Builder’s Ass’n of Greater Chicago v. Chicago*, No. A-01-CA-833-H, 2003 U.S. Dist. LEXIS 1896 (N.D. Ill. Feb. 7, 2003); *Wauchope v. U.S. Dep’t of State*, 756 F. Supp 1277, (N.D. Cal. 1991); *Baxter v. Secretary of the Navy*, 652 F.2d 181 (D.C. Cir. 1981); *Refrigerated Transport Co. v. United States*, 297 F. Supp. 5, 12 (N.D. Ga. 1969).

Even if the Court were to find that laches applies to an Establishment Clause case, the Defendant clearly fails the three prong test. Indeed, Establishment Clause challenges have routinely come about after much longer intervals than the present case.<sup>21</sup> For example, in *Van Orden v. Perry*, the Court rejected the defense of laches where a Plaintiff waited *six and a half* years to bring a Ten Commandments case. No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709 (W.D. Tex. Oct. 2, 2002); *aff'd*, 351 F.3d 173 (5<sup>th</sup> Cir. 2003), *aff'd* 545 U.S. \_\_\_ (2005), 2005 WL 1500276 (June 27, 2005). That Court reasoned that laches was not available because (1) the display had not changed over that period, and (2) the delay had not resulted in the loss of any pertinent evidence. *Id.* at \*9.

The same findings are true in the present case. The year long period between the unveiling of the Barrow County display and the ACLU sending a letter to the County asking them to remove the monument was not a delay, let alone an unreasonable delay.<sup>22</sup> Nor has the County suffered prejudice: the County was every

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<sup>21</sup>See *Books v. City of Elkhart*, 235 F.3d 292 (7<sup>th</sup> Cir. 2000) (40 years); *Robinson v. City of Edmond*, 68 F.3d 1226, (10<sup>th</sup> Cir. 1995) (28 years); *American Jewish Congress v. Chicago*, 827 F.2d 120 (7<sup>th</sup> Cir. 1987) (30 years); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004) (35 years).

<sup>22</sup>See *Van Orden*, no. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709 (W.D. Tex. Oct. 2, 2002) (**six** years not a delay); *Patrick Media Group v. City of Clearwater*, 836 F. Supp. 833 (M.D. Fla. 1993) (**seven** years); See also *Costello v. United States*, 365 U.S. 265 (1961) (**27** years); *Hudson v. Alabama*, 493 F.2d 171 (5<sup>th</sup> Cir. 1974) (**26** years).

bit as able to defend itself in court the day the case was filed as it would have been the day the display was placed in the County Courthouse. *See Law v. Royal Palm Beach Colony*, 578 F.2d 98, 100 (5<sup>th</sup> Cir. 1978).

Accordingly, this case is not barred by the doctrine of laches.

**VIII. Curing the Establishment Clause Violation By Removing the Display Itself Does Not Violate the Establishment Clause.**

Contrary to the assertions of the Defendants, an order requiring removal of the Ten Commandments display would be a valid enforcement of the Establishment Clause and not a “religiously discriminatory order” that violates the Establishment Clause. Answer, Sixth Defense, at 15.

In *McGinley v. Houston*, 361 F.3d 1328, 1333 (11th Cir. 2004), the Eleventh Circuit held that removal of a Ten Commandments display to cure an Establishment Clause violation did not itself violate the Establishment Clause nor was it discriminatory against the Judeo-Christian faith by favoring a non-theistic faith.<sup>23</sup> *McGinley* arose out of the court order to remove the Ten Commandments in the rotunda of the Alabama State Judicial Building. *Id.* at 1330. The court noted that if removal of the Ten Commandments display violated the Establishment Clause then

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<sup>23</sup> Additionally, the Eleventh Circuit held that primarily secular government actions neither conveyed government approval of secularism nor disapproval of theism. *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987).

“an Establishment Clause violation could never be cured because every time a violation is found and cured by the removal of the statute or practice that cure itself would violate the Establishment clause by leaving behind empty space.” *Id.* at 1332. A conclusion to the contrary would result in individuals racing to improperly place religious items in government buildings, as they would know that once in place, the items could never be removed. Such conditions would eviscerate the Establishment Clause, leaving no remedy available for the mounting violations.

The case at bar is nearly identical to *McGinley*. The Ten Commandments display in the Barrow County Courthouse violates the Establishment Clause. The only remedy to cure the violation is to remove the display. Removal is not hostile or discriminatory but done to ensure that no religion is favored or disparaged, allowing all religions the opportunity to thrive. Indeed, “[w]hen we enforce these restrictions, we do so for the same reason that guided the Framers - respect for religion’s special role in society.” *McCreary*, 545 U.S. \_\_\_ (2005), slip. op. at 3 (O’Connor, J., concurring). The relief sought by the Plaintiff, therefore, is appropriate and lawful.

**IX. The Eleventh Amendment Does Not Bar this lawsuit.**

Defendants assert that “because the only governmental activities that occur in the Barrow County Courthouse and courthouse annex are mandated by the State, any County activity, and policies related thereto, specifically the alleged ‘ratification’ by Barrow County of the hanging of the Ten Commandments picture in this case, would be action taken by the County as an ‘arm of the State.’” Joint Prelim. Report & Disc. Plan 1(b) at 5; Pretrial Order, Att. D at 2. Defendants overlook the fact that the neither the County nor its officials were mandated by the state to post the Ten Commandments in the Courthouse. The County’s decision to post the Ten Commandments in the Courthouse was independent of any state mandate and independent of any of the state activities that take place in the building. Regardless of what other activities are taking place in the Courthouse, the County, and according to the record only the County, had the authority to post the Ten Commandments in the Courthouse.

The County is not constitutionally immune from suit because Eleventh Amendment sovereign immunity does not apply to counties.<sup>24</sup> The Supreme Court

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<sup>24</sup>The Eleventh Amendment of the United States Constitution states, “ The Judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.” U.S. Const., amend. XI.

has held that, although sovereign immunity extends to states, it does not extend to counties, cities, towns, and other similar municipal corporations. *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (“A local school board such as the petitioner is more like a county than it is like an arm of the state. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.”); *Edelman v. Jordan*, 415 U.S. 651, 668, n. 12 (1974); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). In *Lincoln County*, the Supreme Court stated that “the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established.” *Lincoln County*, 133 U.S. at 530. Furthermore, the county is a separate body, and as such is no more a part of the state than any municipal corporation. *Lincoln*, 133 U.S. at 530.

The Supreme Court held that the most significant factor in an “arm of state” immunity determination is the effect upon the State Treasury. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Citing *Hess*, the Fourth Circuit stated, “[a] finding that the State treasury will not be affected by a judgment against the governmental entity weighs against finding that entity immune.” *Cash v. Granville County Bd. Of Educ.*, 242 F. 3d 219, 224 (4th Cir. 2001).

In accordance with Georgia law, all expenses incurred by the superior courts are paid by the county and not the state:

any contingent expenses incurred in holding any session of the superior court, including lights, fuel, stationery, rent, publication of grand jury presentments when ordered published, and similar items, such as taking testimony in felony cases, etc., **shall be paid out of the county treasury** of such county upon the certificate of the judge of the superior court and without further order.

O.C.G.A. 15-6-24 (emphasis added). Because the court's expenses are paid by the county government, the Barrow County courthouse is not an arm of the state government.

Similarly, The Eleventh Circuit utilizes a four factor test to determine whether an entity is an "arm of the state" for Eleventh Amendment immunity purposes. This test examines: (1) how state law defines the entity; (2) the degree of control the state maintains over the entity; (3) from where the entity derives its funds; and (4) who must pay the judgments of the entity. *Manders v. Lee*, 338 F. 3d 1304, 1309 (11<sup>th</sup> Cir. 2003).

State law defines the county as a distinct governmental body separate from the state. The Georgia Constitution states that "Every county is a body corporate." Ga. Const. Art IX, Sec. 1, para. 1., and defines the county as a municipal corporation deriving its funds from non-state sources. See O.C.G.A. § 36-1-3.

The county's independence is also reflected in the state's lack of control or authority over the county governing bodies. State law permits the county to sue and be sued in any court. O.C.G.A. § 36-1-3. In addition, the county government is defined as a "board of county commissioners, the sole county commissioner, or the governing authority of a consolidated government." O.C.G.A. § 1-3-3(7). This autonomy demonstrates that the County is not an arm of the state.

As described above, the courthouse receives its funds from Barrow County, rather than state sources, pursuant to O.C.G.A. § 15-6-24. This satisfies the third prong of the Eleventh Circuit test.

Finally, County funds are used to satisfy judgments against the county. See O.C.G.A. § 36-11-7 ("Such judgment, if binding, shall be satisfied from money raised by lawful taxation."). Thus, under the both Georgia law and the Eleventh Circuit test, Barrow County would not be considered an arm of the state.

### **CONCLUSION**

Accordingly, the Plaintiff asks the Court to declare the display unconstitutional; enjoin the County from hanging this and similar Ten Commandments displays; and award the Plaintiff nominal damages of \$1.00.

DATED: This 8<sup>th</sup> day of July, 2005.

Respectfully submitted,

/s Margaret F. Garrett  
Gerald Weber  
(Georgia Bar No.: 744878)  
Margaret F. Garrett  
(Georgia Bar No.: 255865)

70 Fairlie Street, Suite 340  
Atlanta, GA 30303  
404-523-6201  
404-577-0181 (fax)

Frank Derrickson  
(Georgia Bar No.: 219350)

Maple Street Law Offices  
118 Maple Street  
Decatur, GA 30030  
404-373-5551  
404-373-0175 (fax)

Ralph Goldberg  
(Georgia Bar No.: 299475)

1776 Lawrenceville Hwy.  
Decatur, GA 30030  
404-377-4615  
404-320-1922 (fax)





DATED: This 8<sup>th</sup> day of July, 2005.

/s Margaret F. Garrett  
Margaret F. Garrett  
Email mgarrett@acluga.org

American Civil Liberties Union of Georgia  
70 Fairlie, Suite 340  
Atlanta, GA 30303  
404-523-6201  
404-577-0181 (fax) \_\_\_\_\_

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