

CASE NO. 08-6069

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF
KENTUCKY, et al.
Plaintiffs-Appellees,

v

MCCREARY COUNTY, KENTUCKY, et al.
Defendants-Appellants

**On Appeal from the United States District Court
for the Eastern District of Kentucky
District Court Consolidated Case No. 99-507**

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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**CORPORATE DISCLOSURE STATEMENT
LOCAL RULE 26.1**

Appellants hereby state, pursuant to F. R. App. P. 26.1 that there is no parent corporation or publicly held corporation that owns 10 percent or more of their stock.

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Shakespeare, THE TRAGEDY OF MACBETH act 5, sc.1. 3

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral Argument is requested. This case involves complex issues regarding the Establishment Clause and its applicability to privately funded displays of historical documents, including the Ten Commandments, on public property. Oral argument will assist this Court in reaching a full understanding of the legal and factual issues in this case, including how this case should be analyzed in light of this Court's ruling in *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) and the United States Supreme Court's ruling related to the preliminary injunction in this case, *McCreary County v. ACLU*, 545 U.S. 844 (2005). In particular, oral argument will assist this Court in reaching a full understanding of the constitutionally significant events that have occurred since 2005 which change the conclusion reached in the Courts' previous consideration of the Foundations Displays.

Oral argument will also allow attorneys for both parties to address any outstanding legal or factual issues this Court deems relevant. Appellant believes that oral argument is appropriate.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the Plaintiffs' claims pursuant to 28 U.S.C. §1331 in that Plaintiffs alleged that Defendants' actions violated the Establishment Clause of the United States Constitution. The District Court was empowered to grant the Plaintiffs' request for permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

This Court has jurisdiction over Defendants' appeal pursuant to 28 U.S.C. §1292(a)(1). The District Court's Order granting Plaintiffs' Motion to Alter/Amend Judgment was entered on August 4, 2008. Defendants timely filed a Notice of Appeal of the District Court's Order on September 2, 2008, within the thirty day time period allowed for filing a Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(1)(A).

This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the District Court erred when it determined that the Defendants' Foundations of Law and Government Display ("Foundations Display") is unconstitutional because it continues to have a religious purpose due to an alleged religious "taint" attributable to prior historical displays despite the passage of more than seven years, changes in the governing bodies of Defendants and the passage of two resolutions renouncing the prior displays and confirming the educational purpose of the Foundations Display.
2. Whether the District Court erred when it issued a permanent injunction against Defendants' Foundations Display.
3. Whether the District Court erred when it effectively denied Defendants' Renewed Motion for Summary Judgment by *sua sponte* declaring it to be a motion for relief from judgment.
4. Whether the District Court abused its discretion when it denied what it termed to be a motion for relief from judgment on the grounds that it lacked jurisdiction to consider the motion because of the instant appeal.

STATEMENT OF THE CASE

According to the District Court, the religious “taint” on Defendants’ Foundations Display is as indelible as the blood stains on Lady Macbeth’s hands.¹ The United States Supreme Court said that what the plurality found to be the religious purpose of Defendants’ first two historical displays would not forever “taint” future displays. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 873-874 (2005). The District Court acknowledged that statement, but then ruled that the counties’ Foundations Displays still evinced a religious purpose despite the passage of seven years, changes in the composition of the fiscal courts and adoption of two resolutions by each court rescinding the two prior displays and affirming the educational purpose of the Foundations Display. (Memorandum Opinion and Order Denying Summary Judgment, “September 2007 Order,” Record Entry 153, at p. 11, Appellants’ Appendix, “App.” at 00162). Furthermore, after ruling that Plaintiffs were not entitled to a permanent injunction against the Foundations Displays, the District Court abruptly reversed course and granted Plaintiffs their requested relief even though there had not been any changes that could entitle Plaintiffs to the relief they sought.

¹ “Out, damned spot! out, I say!” “Here’s the smell of the blood still: all the perfumes of Arabia will not sweeten this little hand. Oh, oh, oh!” William Shakespeare, *THE TRAGEDY OF MACBETH* act 5, sc.1.

(Order granting Motion to Alter/Amend Judgment, “August 2008 Order,” Record Entry 173, at p. 12; App. at 0205).

The District Court’s judgment imposing a permanent injunction upon Defendants’ Foundations Display comes three years after the United States Supreme Court upheld preliminary injunctions first put in place more than seven years ago. *See McCreary County*, 545 U.S. at 873-874. The Supreme Court cautioned that its ruling should be read narrowly so as not to categorically preclude the integration of the Ten Commandments into a governmental display on law or American history nor to doom all future displays as forever tainted by the past. *Id.* Defendants, whose fiscal court members had changed, responded by enacting two separate resolutions specifically rescinding and repudiating the prior displays and confirming that they were secular, educational presentations. Without stating why these measures were insufficient or what measures would be sufficient, the District Court said these actions were not enough to “purge the taint” of religious purpose found to be present in the counties’ first two displays featuring copies of the Ten Commandments. (September 2007 Order, Record Entry 153, at p. 11, App. at 0162).

The first of those displays were stand-alone framed copies of the Decalogue placed on walls in the courthouses in McCreary and Pulaski counties in 1999. *Id.* at 851. Approximately one month after Plaintiffs filed the initial complaints on

November 18, 1999, Defendants’ fiscal courts enacted resolutions authorizing expanded displays that included eight other documents in smaller frames with the framed copy of the Ten Commandments. *Id.* at 852-853. The resolutions included statements that the Ten Commandments “are the precedent legal code upon which the civil and criminal codes of Kentucky are founded,” with references. *Id.* at 853. On May 5, 2000, the District Court entered preliminary injunctions ordering that the displays be removed from the courthouses immediately and that “no county official erect or cause to be erected similar displays.” *Id.* at 854. The District Court found that the first and second displays lacked any secular purpose because the Ten Commandments “are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God,” and the inclusion of the additional documents did not change the purpose because those documents incorporated specific references to Christianity. *Id.*

Defendants initially filed a notice of appeal with this Court, but then voluntarily dismissed the appeal. Defendants installed the Foundations of American Law and Government Display (“Foundations Display”).² The Foundations Display

² This is the same display that this Court previously found constitutional in *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) that the Seventh Circuit found constitutional in *Books v. Elkhart Co.*, 235 F.3d 292 (7th Cir. 2000) and which is the subject of the appeal in *ACLU of Kentucky v. Grayson County*, Case No. 08-5548, pending before this Court.

includes nine equally sized framed documents, including the Ten Commandments, Magna Carta, Declaration of Independence, National Motto, Mayflower Compact, Preamble to the Kentucky Constitution, the Bill of Rights, lyrics to the national anthem and a picture of Lady Justice, and a tenth explanatory document. *Id.* at 856. The District Court issued a supplemental preliminary injunction against the Foundations Display, finding that the “clear purpose” of the display, as evidenced by the history of the prior displays, was to post the Ten Commandments, not educate. *Id.* at 857. In a divided opinion, this Court upheld the District Court’s decision. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 449 (2003). A divided United States Supreme Court affirmed, but cautioned that its ruling should not be read as saying that Defendants’ past actions forever taint any effort to deal with the subject matter. *McCreary County v. ACLU*, 545 U.S. at 873-874.

In March 2005, after the Supreme Court heard oral argument but before it issued its decision, Defendants’ fiscal courts enacted resolutions that repealed and repudiated the December 1999 resolutions approving the second displays. (Exhibit E to the Declaration of Darrell Beshears, “Beshears Dec.,” Record Entry 119, App. at 0089; Exhibit A to the Declaration of Blaine Phillips, “Phillips Dec.,” Record Entry 118, App. at 0098). The March 2005 resolutions also confirmed that the Foundations Display is educational in nature and not intended to endorse religion. (Beshears Dec.,

Exhibit E, Record Entry 119, App. at 0091; Phillips Dec., Exhibit A, Record Entry 118, App. at 0100). In a footnote, the Supreme Court plurality acknowledged the resolutions, but said that they were of minimal significance in light of the evolution of the evidence to that point. *McCreary County v. ACLU*, 545 U.S. at 872 n.19.

After the Supreme Court decision the parties filed cross-motions for summary judgment. The District Court did not conduct a hearing on the motions, but on September 28, 2007 issued a Memorandum Opinion and Order denying both motions. (September 2007 Order, Record Entry 153, App. at 0152-0165). The District Court said, “Since it is possible to purge the taint of the impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not ‘continuing’ as required by the standard for a permanent injunction.” (September 2007 Order, Record Entry 153, at p. 10, App. at 0161). “Therefore, the court will deny the plaintiffs’ motion for summary judgment, which seeks to permanently enjoin the third displays, because they are not entitled to a permanent injunction as a matter of law.” (September 2007 Order, Record Entry 153, at p. 11, App. at 0162). The District Court also denied the Defendants’ motion, finding that the counties had not “purged the taint” of the first two displays and therefore were not entitled to judgment as a matter of law. (September 2007 Order, Record Entry 153, at p. 13, App. at 0164). The District Court further ruled that a trial would be unavailing because no triable

issues of fact exist for resolution by a jury. (September 2007 Order, Record Entry 153, at p. 13 App. at 0164). The District Court then ordered the parties to participate in a settlement conference. (September 2007 Order, Record Entry 153, at p. 14, App. at 0165).

Almost immediately, Plaintiffs filed a Motion to Alter or Amend the District Court's September 28, 2007 order, asking the Court to, *inter alia*, reverse itself and enter a permanent injunction invalidating the Foundations Displays. (Motion to Alter Judgment, Record Entry 155, App. at 0166-0173). Meanwhile, on October 9, 2007, Defendants' fiscal courts enacted resolutions regarding the Foundations Displays. (Exhibits A and B to Renewed Motion for Summary Judgment, Record Entry 159, App. at 0186, 0188). On October 22, 2007, the parties participated in a settlement conference, but no agreement was reached. (Minute Entry, Record Entry 156).

Defendants then submitted the new resolutions to the District Court as part of a renewed Motion for Summary Judgment and response to Plaintiffs' Motion to Alter/Amend Judgment. (Renewed Motion for Summary Judgment, Record Entry 159, App. at 0174-0190). On August 4, 2008, the District Court granted the Plaintiffs' Motion to Alter/Amend Judgment. (August 2008 Order, Record Entry 173, App. at 0194-0206). The District Court issued a permanent injunction against all three displays and declared that all of the displays were unconstitutional. (August 2008

Order, Record Entry 159, at p. 12, App. at 0205).^{3,4} The District Court also, *sua sponte*, transformed Defendants' Renewed Motion for Summary Judgment into a Motion for Relief from Final Judgment, and directed the parties to file response and reply briefs in accordance with the local rules. (August 2008 Order, Record Entry 159, at p. 13, App. at 0206). Plaintiffs filed their memorandum in response on August 19, 2008. (Record Entry 176).

The court also ruled that the order is final and appealable. (August 2008 Order, Record Entry 159, at p. 13, App. at 0206). That being the case, Defendants had to file their Notice of Appeal with this Court on or before September 3, 2008 pursuant to Fed. R. App. P. 4. The Notice of Appeal was filed on September 2, 2008. (Notice of Appeal, Record Entry 177, App. at 0209).

On September 30, 2008, the District Court dismissed what it had deemed to be Defendants' Motion for Relief from Judgment, without prejudice, on the grounds that the court had lost jurisdiction over the motion when the appeal was filed. (September

³ In its September 28, 2007 order, the District Court had determined that Plaintiffs' claims against the first and second displays were moot in light of the Defendants' subsequent actions. (September 2007 Order, Record Entry 153, at p. 6, App. at 0157). However, without any new evidence before it, the District Court abruptly reversed that decision and declared those displays unconstitutional.

⁴ The Court also changed its earlier ruling dismissing Plaintiffs' claims against Harlan County with prejudice to a dismissal without prejudice. (August 2008 Order, Record Entry 159, at p. 12, App. at 0205).

30, 2008 Order, Record Entry 187, at pp 1-2, App. at 0207-0208). The court noted that a response brief had been filed by the Plaintiffs, but that “instead” of filing a reply brief the Defendants filed their notice of appeal of the August 4, 2008 order. (September 2008 Order, Record Entry 187, at p.1, App. at 0207). The District Court did not explain its use of the word “instead,” particularly in light of the fact that it had emphasized that its August 4, 2008 order was **FINAL** and **APPEALABLE**. (August 2008 Order, Record Entry 173, at p. 13, App. at 0206, emphasis in original), which meant that Defendants had to file an appeal within 30 days or lose the right to do so. Defendants did not have a choice between and appeal and filing a reply to the motion.

The District Court’s actions in issuing a final and appealable order while a motion for relief from the order was pending, and then dismissing the motion when the final and appealable order was appealed have made the legal labyrinth of Establishment Clause challenges even more tortuous. This Court demonstrated that the path is not nearly so convoluted when it upheld Mercer County’s Foundations Display against the ACLU’s Establishment Clause claims. *ACLU v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), *Accord, Books v. Elkhart Co.*, 235 F.3d 292 (7th Cir. 2000)(upholding the identical Foundations Display). The relevant facts establish that Defendants’ Foundations Displays are constitutional.

STATEMENT OF THE FACTS

Nearly ten years have passed since first framed copies of the Ten Commandments were first hung in the hallways of the courthouses in McCreary and Pulaski counties and Plaintiffs filed suit. With the passage of time have come significant changes to the displays, personnel changes on the fiscal courts and passage of two separate resolutions repudiating the prior actions and affirming the educational and historical purposes behind the Foundations Display (which itself is obviously dissimilar to the original framed copy of the Ten Commands). Nevertheless, according to Plaintiffs and the District Court, the hallways of the courthouses remain haunted by the specter of “religious purpose.” The District Court proclaims that the “taint” will not last forever, but fails to explain why it remains or what is required to remove it. (August 2008 Order, Record Entry 173, App. at 0194-0206).

I. PRIOR RULINGS

In their prior rulings addressing Defendants’ displays, both this Court and the Supreme Court plurality pointed to the genesis and evolution of the displays as critical factors in their finding that the displays had an impermissible, predominant religious purpose. *ACLU v. McCreary County*, 354 F.3d at 454-458, *McCreary County v. ACLU*, 545 U. S. at 856-858. “The displays’ content, particularly when

viewed in light of Defendants’ past attempts to display the Ten Commandments in a blatantly religious manner, showed that Defendants’ predominate purpose for the displays was religious.” *ACLU v. McCreary County*, 354 F.3d at 449. Similarly, the Supreme Court plurality said that the original text of the Ten Commandments as initially posted “is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.” *McCreary County v. ACLU*, 545 U.S. at 869. “When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.” *Id.* The Supreme Court also found the second display had an impermissible religious purpose even though the Ten Commandments were not hung in isolation:

The display’s unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government’s objective was enhanced by serial religious references and the accompanying resolution’s claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

Id. at 870.

With regard to the Foundations Displays, the Supreme Court focused on the fact that they were erected without new resolutions and without repealing the resolutions associated with the second displays. *Id.* The Court noted that, while Defendants cited several new purposes for the Foundations Displays, those statements

were not part of any authorizing action by the governing boards. *Id.* at 871. Therefore, the Supreme Court saw those statements as merely “litigating positions.” *Id.* The Supreme Court also placed particular emphasis on the fact that the resolutions for the second displays were not repealed or repudiated by Defendants before the Foundations Displays were installed. *Id.* at 871-872. While repealing the resolutions associated with the second displays would not have erased the resolutions from the record, the fact that they remained in effect and no new resolutions were enacted to memorialize the new stated purposes led the Supreme Court to conclude that Defendants had not adequately divorced the present from the past. *See, id.*

II. THE 2005 RESOLUTIONS

Defendants responded to the Supreme Court’s concerns and enacted resolutions that repealed the December 1999 resolutions, repudiated the prior actions and confirmed the educational and historical purposes behind the Foundations Displays. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0089; Phillips Dec., Exhibit A, Record Entry 118, App. at 0098). The McCreary County Fiscal Court enacted the resolution on March 8, 2005 (Phillips Dec., Exhibit A, Record Entry 1118, App. at 0101) and Pulaski County Fiscal Court enacted the resolution on March 10, 2005. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0092)(Hereinafter, collectively referred to as the “2005 Resolutions”). Each resolution specifically provides: “[T]his

Resolution hereby repeals the 1999 Resolution, completely abandons the second display and the 1999 Resolution, and repudiates both.” (Beshears Dec., Exhibit E, Record Entry 119, App. at 0091, Phillips Dec., Exhibit A, Record Entry 118, App. at 0100). In addition, each resolution states that “the Foundations of American Law and Government display is educational in nature and is not intended to endorse religion.” (Beshears Dec., Exhibit E, Record Entry 119, App. at 0091, Phillips Dec., Exhibit A, Record Entry 118, App. at 0100). The 2005 Resolutions were enacted following oral argument at the Supreme Court, but before issuance of the decision, and were presented to the Supreme Court. The plurality made note of the resolutions in a footnote , but said that in light of the evolution of the displays up to that time, they viewed the resolutions as only “minimally significant” to their determination regarding the preliminary injunction. *McCreary County v. ACLU*, 545 U.S. at 872 n. 19.

However, in terms of discerning the purpose for the Foundations Display from 2005 forward, the 2005 Resolutions are extremely significant. That is true not only because of their specific repudiation of the prior actions and resolutions, but also, in the case of *McCreary County*, because they were enacted by a different panel of magistrates (Declaration of Judy Redden “Redden Dec.”, Record Entry 120, at p. 4, App. at 0105). The Judge Executive who had first posted the Ten Commandments

in 1999, Jimmie Greene, had been replaced by Blaine Phillips when the 2005 Resolution was enacted. (Redden Dec., Exhibit B and E, Record Entry 120, App. at 0132, 0140). In addition, two of the four magistrates who had signed the 1999 resolution were no longer on the fiscal court. (Redden Dec., Exhibits B and E, Record Entry 120, App. at 0132, 0140). Consequently, three of five – a majority – of the signatories on the 2005 Resolution were not part of the fiscal court that had approved the first two displays for which the courts had found a religious purpose. (Redden Dec., Exhibits B and E, Record Entry 120, App. at 0132, 0140).

III. THE SIGNIFICANT DIFFERENCES BETWEEN THE FOUNDATIONS DISPLAYS AND THE EARLIER DISPLAYS

The content and context of the Foundations Display is also significantly different from the content and context of the first two displays found to have an impermissible religious purpose. The first display consisted of a large gold-framed copy of an abridged text of the King James version of the Ten Commandments, including a citation to Exodus. *McCreary County v. ACLU*, 545 U.S. at 851. The second display retained the large copy of the Ten Commandments and added eight other documents in smaller frames. *Id.* at 853. On December 8 and 14, 1999, respectively, the McCreary County and Pulaski County fiscal courts adopted resolutions authorizing the second displays. (Beshears Dec., Exhibit B., Record Entry

119, App. at 0076, Redden Dec., Exhibit B, Record Entry 120, App. at 0124)(Hereinafter collectively the “1999 Resolutions”). The 1999 Resolutions contained the following preamble:

A RESOLUTION encouraging County-Judge Executive Darrell Beshears [Jimmie W. Greene] to read or post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded; and to also display any excerpts or portions of other Kentucky and American historical documents such as the National anthem; the pledge of allegiance, the National Motto “In God We Trust;” the preamble to the Kentucky Constitution; the Declaration of Independence; the Mayflower Compact; the writings, speeches, documents, and proclamations of the found fathers and Presidents of the United States; United States Supreme Court decisions; and acts of the United States Congress including the published text of the Congressional Record, without censorship because of any Christian or religious references in these writings, documents and historical records.

(Beshears Dec., Exhibit B., Record Entry 119, App. at 0076, Redden Dec., Exhibit B, Record Entry 120, App. at 0124) The 1999 Resolutions made numerous references to religious statements and enactments made by former presidents and other dignitaries. (Beshears Dec., Exhibit B., Record Entry 119, App. at 0077-0083; Redden Dec., Exhibit B, Record Entry 120, App. at 0124-0131). The eight documents placed with the Ten Commandments pursuant to the 1999 Resolutions were: (1) an excerpt from the Declaration of Independence containing the phrase “endowed by their Creator;” (2) the Preamble to the Constitution of Kentucky; (3) the national

motto of “In God We Trust”; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible” reading, “The Bible is the best gift God has ever given to man.”; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible and (8) the Mayflower Compact. *ACLU v. McCreary County*, 354 F.3d at 442. It was those resolutions and documents that were the subject of the District Court’s original May 5, 2000 preliminary injunction, and which were removed from the county courthouses pursuant to that injunction. (September 2007 Order, Record Entry 153, at p. 2, App. at 0153).

By contrast, the Foundations Displays originally erected in October 2000 did not include resolutions describing religious statements and enactments throughout history. (Beshears Dec., Exhibit C, Record Entry 119, App. at 0085; Redden Dec., Exhibit C, Record Entry 120, App. at 0133). Instead, incorporated into the displays was a document identifying the other documents in the display and their significance to the nation’s history. (Beshears Dec., Exhibit C, Record Entry 119, App. at 0085; Redden Dec., Exhibit C, Record Entry 120, App. at 0133). Instead of a preamble

discussing religious and Christian references, the Foundations explanatory document contained the following introductory paragraph:

The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government. The Display contains (1) The Mayflower Compact; (2) The Declaration of Independence; (3) The Ten Commandments; (4) the Magna Carta; (5) The Star Spangled Banner; (6) the National Motto of the United States of America; (7) The Preamble to the Kentucky Constitution; (8) the Bill of Rights to the United States Constitution, and: (9) A picture of Lady Justice.

(Beshears Dec., Exhibit C, Record Entry 119, App. at 0085; Redden Dec., Exhibit C, Record Entry 120, App. at 0133). The remainder of the document contains brief descriptions of the documents and their significance to American law and government. (Beshears Dec., Exhibit C, Record Entry 119, App. at 0085-0086; Redden Dec., Exhibit C, Record Entry 120, App. at 0133-0134). The following description is offered for the Ten Commandments:

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

(Beshears Dec., Exhibit C, Record Entry 119, App. at 0085; Redden Dec., Exhibit C, Record Entry 120, App. at 0133). The descriptive document and nine other

documents were mounted in **equal-sized frames** and hung on the walls of the county courthouses. (Beshears Dec., Exhibit D, Record Entry 119, App. at 0088; Redden Dec., Exhibit D, Record Entry 120, App. at 0136). There were no ceremonies or public statements made when the Foundations Displays were erected. (Beshears Dec., Record Entry 119, at p. 3, App. at 0058).

While the copy of Ten Commandments was a prominent feature of the first and second displays – being the only document in the first display and the largest in the second – in the Foundations Display, it was one of ten identically sized and mounted documents. (Beshears Dec., Exhibit C, Record Entry 119, App. at 0085; Redden Dec., Exhibit C, Record Entry 120, App. at 0133). Visitors to the McCreary and Pulaski county courthouses during the time that the first display was in place would have encountered a large, gold-framed copy of the Ten Commandments with no surrounding documents on that wall⁵ nor any explanation for why the Decalogue was posted. (Beshears Dec., Record Entry 119, at p. 2, App. at 0057; Redden Dec. Record

⁵ There were displays of other historical documents and photographs on other walls in the courthouse hallways, but the Ten Commandments was the only document on the wall in question. (App. at 0057, 0103). The Pulaski County fiscal court, as part of its 200th anniversary of the County, posted a number of historical documents in the Judge’s office, in the waiting room, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. (App. at 0057; 0063-0074). The McCreary County courthouse likewise has dozens of photographs and commemorative documents posted throughout the public areas. (App. at 0103-0104; 0109-0123).

Entry 120, at p. 2, App. at 0103). When the second displays were hung in December 1999, visitors to the courthouse would see other documents mounted with the Ten Commandments, but the Decalogue would be the largest of the documents. *See McCreary County v. ACLU*, 545 U.S. at 853 (describing the second displays). Visitors would also see that the surrounding documents included excerpts that emphasized the state and country's religious heritage. *See, id.*; 1999 Resolutions, App. at 0077-0083, 0124-0131). All of those documents were removed in May 2000 following a very public court ruling granting a preliminary injunction. (Beshears Dec., Record Entry 119, at pp. 2-3, App. at 0057-0058; Redden Dec., Record Entry 120, at p. 3, App. at 0104; September 2007 Order, Record Entry 153, at p. 2, App. at 0153).

On October 10, 2000, the fiscal courts voted to display entirely new sets of historical documents, the Foundations Displays. (Beshears Dec., Record Entry 119, at p. 3, App. at 0058, Redden Dec., Record Entry 120, at p. 3, App. at 0104). The fiscal courts did not adopt resolutions describing the religious history of the United States as was done in 1999. (Beshears Dec., Record Entry 119, at p. 3, App. at 0058, Redden Dec., Record Entry 120, at p. 4, App. at 0105). Instead, they mounted as part of the Foundations Display an overview of the origin and significance of each document. (Beshears Dec., Exhibit C, Record Entry 119, App. at 0085-0086; Redden

Dec., Exhibit C, Record Entry 120, App. at 0133-0134). Unlike the second display, the Foundations Display featured documents in equal sized frames displayed in three rows of three documents each, with no document being featured any more prominently than another. (Beshears Dec., Record Entry 119, Exhibit D, App. at 0088; Redden Dec., Record Entry 120, Exhibit D, App. at 0136). Therefore, while visitors viewing the first or second displays would have seen the Ten Commandments as a prominent or the only thing on the courthouse wall, visitors viewing the Foundations Display would see a grouping of nine equally sized documents, one being the Ten Commandments., with the Explanatory Document posted alongside. (Beshears Dec., Exhibit D, Record Entry 119, App. at 0088; Redden Dec., Exhibit D, Record Entry 120, App. at 0136) Consequently, the Foundations Displays were wholly different displays from the two displays enjoined by the District Court in May 2000. (Beshears Dec., Record Entry 119, at p. 3, App. at 0058, Redden Dec., Record Entry 120, at pp. 3-4, App. at 0104-0105).

However, the District Court agreed with Plaintiffs that the Foundations Display was so similar to the first two displays that it was to be included in the preliminary injunction and removed from the courthouse walls. (September 2007 Order, Record Entry 153, at p. 3, App. at 0154). Defendants removed the documents and filed the appeal that culminated in the Supreme Court decision *McCreary County v. ACLU*,

545 U.S. 844 (2005).

IV. POST 2005 EVENTS

By the time that the Supreme Court announced its decision in *McCreary County*, the fiscal courts had already addressed the Court's concerns that the 1999 Resolutions had not been repealed nor new resolutions adopted by enacting the 2005 Resolutions. Those resolutions not only rescinded the 1999 Resolutions and repudiated the accompanying actions taken by the fiscal courts, but also reiterated that Defendants' purpose in erecting the Foundations Display was, as stated in the display, educational. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0089-0092; Phillips Dec., Exhibit A, Record Entry 118, App. at 0098-0101). In particular, the 2005 Resolutions provided: "[T]he 1999 Resolution never applied to the subsequent Foundations of American Law and Government display." (Beshears Dec., Exhibit E, Record Entry 119, App. at 0091; Phillips Dec., Exhibit A, Record Entry 118, App. at 0100). In addition, "[T]he Foundations of American Law and Government [display] contains the Foundations Document which stated the purpose of the display as follows 'The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government,' and this display with its stated purpose superceded any prior display or resolution." (Beshears Dec., Exhibit E, Record Entry 119, App. at 0091; Phillips

Dec., Exhibit A, Record Entry 118, App. at 0100).

THEREFORE BE IT RESOLVED that the 1999 Resolution, and the second display to which the 1999 Resolution applied, which was enjoined by the federal district court, are explicitly and expressly repealed, abandoned and repudiated;

BE IT FURTHER RESOLVED that the county's purpose regarding the Foundations of American Law and Government display was stated in the Foundations Document contained in the display and was not intended to endorse religion.

(Beshears Dec., Exhibit E, Record Entry 119, App. at 0092; Phillips Dec., Exhibit A, Record Entry 118, App. at 0101). Both fiscal courts adopted the 2005 Resolutions unanimously. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0092; Redden Dec., Exhibit E, Record Entry 120, App. at 0101). As discussed more fully above, in the case of McCreary County, three of the five signatories, including the County Judge Executive were new to the fiscal court. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0092; Redden Dec., Exhibit E, Record Entry 120, App. at 0101). Shortly after the 2005 Resolutions were adopted, elections in Pulaski County resulted in the election of a new County Judge Executive and four new magistrates to the fiscal court, which was reduced from seven to five members. (Renewed Motion for Summary Judgment, Exhibit B, Record Entry 159, App. at 0188). As a result, only one of the signatories on the 1999 and 2005 Pulaski County resolutions was still in office at the time that the District issued its September 28, 2007 decision denying

both parties' motions for summary judgment. (Renewed Motion for Summary Judgment, Exhibit B, Record Entry 159, App. at 0188). In response to the District Court's ruling, and in particular, the statement that Defendants had to show "genuine changes in constitutionally significant conditions" that demonstrate 'a predominantly secular purpose,' (September 2007 Order, Record Entry 153, at p. 12, App. at 0163), Defendants adopted a second set of resolutions on October 9, 2007. (Renewed Motion for Summary Judgment, Exhibits A and B, Record Entry 159, App. at 0186, 0188). The 2007 resolutions contain the following provisions:

[T]he purpose of McCreary [Pulaski] County in desiring to display the Foundations of American Law and Government display is educational and historical, to educate the citizens of McCreary [Pulaski] County about some of the historical documents and symbols that played a role in the foundation and development of the system of law and government in McCreary [Pulaski] County, the State of Kentucky and the United States of America;

BE IT FURTHER RESOLVED that McCreary [Pulaski] County expressly disclaims any purpose to endorse religion in its desire to display the Foundations of American Law and Government display and expressly repeals, repudiates and disavows any public statements or testimony that may be mistakenly construed to the contrary;

BE IT FURTHER RESOLVED that this Resolution and the Resolution passed by the McCreary [Pulaski] County Fiscal Court on March 8, 2005 [March 10, 2005], shall be and hereby are the only statements of the purpose of the Foundations of American Law and Government display. Should there be any other statements, official or otherwise, from this body or any other governmental official of McCreary [Pulaski] County, that claim to state the purpose of the Foundations of American Law and Government display, they are hereby overruled, superceded, repealed and replaced by this Resolution.

(Renewed Motion for Summary Judgment, Record Entry 159, Exhibit A, App. at 0187 and Exhibit B, App. at 0189). Of the thirteen original signatories on the 1999 and 2005 Resolutions, only three were signatories on the October 2007 resolutions. (Beshears Dec., Exhibits B and E, Record Entry 119, App. at 0084, 0092; Redden Dec., Exhibits B and E, Record Entry 120, App. at 0132, 0140; Renewed Motion for Summary Judgment, Exhibits A and B, Record Entry 159, App. at 0187, 0190). Consequently, ten of the thirteen people who engaged in the conduct that the courts said created a “religious purpose” were not part of the fiscal courts which adopted the most recent resolutions setting forth the educational purpose of the Foundations Display. Nevertheless, the District Court refused to find that the “religious taint” had been removed.

STANDARD OF REVIEW

The District Court’s August 4, 2008 order granting Plaintiffs’ Motion to Alter/Amend the Judgment resulted in the granting of Plaintiffs’ request for a permanent injunction against Defendants’ historical displays. In evaluating a district court’s granting of a permanent injunction, this Court reviews its factual findings under a clearly erroneous standard, its legal conclusions de novo and the scope of injunctive relief under an abuse of discretion standard. *Women’s Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

Applying that mixed standard to this case, it is apparent that the District Court's conclusion that Defendants' Foundations Displays had an impermissible religious purpose was in error. In addition, the District Court abused its discretion when it issued a permanent injunction against the Foundations Displays.

SUMMARY OF ARGUMENT

The District Court committed both substantive and procedural errors when it granted Plaintiffs request for a permanent injunction as to Defendants' Foundations Displays. Substantively, the District Court disregarded ten years of history, changes in political leadership, two separate resolutions rescinding prior resolutions and repudiating the past and statements of purpose to conclude that Defendants' Foundations Displays retain a religious purpose and therefore are unconstitutional. The District Court acknowledged the Supreme Court's determination that the Foundations Displays were not forever "tainted" by religious purposes found in prior displays and actions, but then disregarded the Supreme Court's analysis of the question of how the "taint" might be removed.

Procedurally, the District Court effectively dismissed Defendants' Renewed Motion for Summary Judgment because it was filed after the dispositive motion deadline, and then "construed" it as a motion for relief from final judgment, even though there was no final judgment from which to seek relief. The District Court then

granted Plaintiffs' request to alter/amend a final judgment even though there was no final judgment to alter and no presentation of new evidence or intervening controlling authority sufficient to support the motion. These substantive and procedural errors compel a reversal by this Court.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT DEFENDANTS' FOUNDATIONS DISPLAYS EVINCE A RELIGIOUS PURPOSE IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. Defendants' Foundations Displays Satisfy The Secular Purpose Test.

In the 37 years since the "secular legislative purpose" test was enunciated in *Lemon v. Kurtzman*, 403 U.S. 602(1971), the Supreme Court has rarely found it to have been violated. *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005). An examination of Defendants' Foundations Displays under the *McCreary* court's secular purpose analysis demonstrates that this is not one of those rare instances.

As the *McCreary* plurality held, the purpose inquiry looks to whether the governmental activity "was motivated wholly by religious considerations." *Id.* at 865 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). "Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose **only if it is beyond purview that endorsement of religion or a**

religious belief ‘was and is the law's reason for existence.’” *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring, citing *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968))(emphasis added). Governmental purpose is not viewed in isolation, but “every government practice must be judged in its unique circumstances....” *Lynch v. Donnelly*, 465 U.S. 668, 693-694 (1984) (O’Connor, J., concurring). As a result, “Establishment Clause doctrine lacks the comfort of categorical absolutes.” *McCreary v. ACLU*, 545 U.S. at 860n. 10. Consequently, in the course of 37 years, the Court had found that an illegitimate purpose invalidated a governmental action only four times prior to its earlier decision in *McCreary County v. ACLU*. *See, id.* at 859-860.

In each of those cases, “the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective **permeated** the government’s action.” *Id.* at 863. (emphasis added). In *Stone v. Graham*, 449 U.S. 39,41 (1980) (per curiam), the Supreme Court found that a Kentucky statute mandating the posting of the Ten Commandments on classroom walls violated the purpose test. The *Stone* court noted that the case was not an instance in which the Ten Commandments were being integrated into the school curriculum where the Bible may be used as part of a study on history, ethics, or comparative religion. *Id.* Instead, the Decalogue was to be posted in isolation on the

classroom walls. *Id.* The Court found that the posting of the Decalogue had no educational function. *Id.* Based upon that, the Court found that the purpose of Kentucky statute was pre-eminently religious. *Id.*

An Alabama statute that prescribed a one-minute period of silence for meditation or voluntary prayer at the beginning of each school day was also invalidated on the ground that it had no secular purpose. *Wallace*, 472 U.S. at 55. The *Wallace* court based its conclusion on the fact that the language of the statute was changed to more specifically include prayer and on the statement placed in the legislative history by its sponsor that the statute was intended to return voluntary prayer to public schools. *Id.*

Similarly, the Court found an impermissible purpose when a school district adopted a policy it called “**Prayer** at Football Games.” *Santa Fe Independent School Dist. v. Doe* 530 U.S. 290, 314- 315(2000)(emphasis added). The Court emphasized that its finding was based upon the fact that plain language of the policy showed that the district was heavily involved in electing the speaker, directing the content of the message and in specifying that the message had to be a religious invocation. *Id.* Rather than being a content-neutral policy creating a limited public forum for student speech, the policy was a vehicle for encouraging the delivery of a prayer at school events. *Id.* at 317. Consequently, it did not have a secular purpose. *Id.*

Finally, the Court found a predominant religious purpose in a Louisiana law mandating the teaching of creation science. *Edwards v. Aguillard*, 482, U.S. 578, 591 (1987). “The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.” *Id.* “The term ‘creation science’ was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act.” *Id.* “Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.” *Id.* at 593. The *Edwards* court was careful to point out, as was the *Stone* court, that it was not implying that the legislature could never require that scientific critiques of prevailing scientific theories be taught, but just that in that particular case, the law was not carefully drafted to reflect a sincere secular purpose. *Id.* at 594.

As the Court said in *McCreary County v. ACLU*, these cases represented unusual instances where a government agency’s asserted purpose was determined to be a sham or secondary to a predominantly religious purpose. *McCreary County*, 545 U.S. at 865. The Court made the same finding with regard to Defendants’ earlier displays, based in large part on the fact that the initial display was a stand alone copy of the Ten Commandments. *Id.* at 869.

This is not to deny that the Commandments have had influence on civil

or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view a religious object is unmistakable.

Id. Therefore, Defendants' first displays were like the displays found unconstitutional in *Stone* in that they were not integrated into educational displays or materials that could be found to have a secular purpose, but were placed in isolation on the walls of a public building. *See, id.* ("The display in *Stone* had no context that might have indicated an object beyond the religious character of the text, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the postings at issue in *Stone*").

The Court found that the second display retained this religious purpose in that it kept the large copy of the Ten Commandments as a predominant feature and added documents that highlighted references to God and a resolution that discussed various religious references and the embodiment of ethics in Jesus Christ. *Id.* at 870. Therefore, as the Court found with the policy in *Santa Fe*, it found that the second displays were merely a continuation of a prior policy to encourage religious observance in public. *See, id.* ("Together the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.")

The Court held that as of the time of its decision the Foundations Displays had not purged the “taint” of religious purpose because the 1999 Resolutions found to contain explicit religious purpose statements had not been repealed or replaced with subsequent resolutions describing educational purposes for the Foundations Displays. *Id.* at 870. The Court found that the educational purposes propounded by Defendants were merely litigating positions because the fiscal courts had not yet reduced those purposes to writing nor taken any other “authorizing action” to memorialize them. *Id.* at 871. Since the March 2005 Resolutions were adopted after briefing and oral argument, the Court did not fully analyze their context or effectiveness in purging the “taint,” but merely mentioned in a footnote that in light of the evolution of the evidence over the prior six years repealing the 1999 Resolutions was of minimal significance to the Court’s analysis of the preliminary injunction. *Id.* at 872 n.19.

However, the March 2005 Resolutions, and the political context in which they were adopted are of substantial significance to the question of whether the Foundations Displays should be permanently enjoined. Nevertheless, the District Court failed to even review the context and content of the resolutions, let alone accord them the kind of deference owed to official statements of purpose. As the Court said in *McCreary County v. ACLU*, findings of no adequate secular purpose are unusual. *Id.* at 865. A legislature’s stated reasons will generally get deference unless

they are determined to be a “sham.” *Id.* at 864. The “sham” label cannot be slapped upon a statement of purpose impulsively, but must follow a careful review of the evidence to determine whether it supports the stated purposes. *See, id.* As the Court said in *Lynch v. Donnelly*, the question is not whether there is some reference to religion, but whether “government activity was motivated wholly by religious considerations.” *Lynch*, 465 U.S. at 680. “A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief.” *Wallace*, 472 U.S. at 69-70 (O’Connor, J., concurring). “Chaos would ensue if every such statute were invalid under the Establishment Clause.” *Id.* at 70. “For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing.” *Id.* “The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.” *Id.* If a legislature expresses a plausible secular purpose for a statute in either the text or the legislative history, or if the statute disclaims an intent to encourage religious expression, then courts should generally defer to that stated intent. *Id.* at 74-75. “If there is arguably a secular value to a particular enactment, then courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency

suggests it has the primary purpose of endorsing religion.” *Id.* at 75. Neither the Foundations Display nor Defendants’ actions, especially those since 2005, fall within that limited exception to judicial deference to legislative purpose.

Justice O’Connor’s use of the term “particular enactment” is especially noteworthy in this case in that it points to the need to engage in a contemporaneous, not merely retroactive, review of the specific governmental policy or enactment under consideration. While the historical context of a display or policy is of some relevance to a determination of legislative purpose, it should not be dispositive, as it was for the District Court. Instead of looking at the substance of the Foundations Displays, the content of the March 2005 resolutions and changes in the fiscal courts between 1999 and 2005, the District Court took the Supreme Court’s “litigating position” and “minimal significance” statements out of context and applied them, with no review or analysis, to Defendants’ efforts to create a new historical display that included a copy of the Ten Commandments. (September 2007 Order, Record Entry 153, at p. 12, App. at 0163). The *McCreary* Court used the term “litigating position” to refer to Defendants’ unwritten statements regarding the purpose for the Foundations Display. *McCreary County*, 545 U.S. at 871-872.

The Counties’ new statements of purpose were presented only as a litigating position, there being no further authorizing resolutions by the Counties’ governing boards. And although repeal of the earlier county

authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second displays passed just months earlier were not repealed or otherwise repudiated.

Id. Read in context, it is apparent that the Court regarded unofficial, unwritten statements issued without repealing the prior statements of purpose merely a “litigating position” rather than a sincere statement of secular legislative intent. The Court’s statement was clearly premised on the facts as they existed at the time, before the 2005 Resolutions (and 2007 Resolutions) were adopted. The Court did not indicate, as the District Court implied, that the purpose statements would forever remain merely litigating positions. Similarly, the *McCreary* court’s notation that the passage of the 2005 Resolutions after oral argument were of “minimal significance in the evolution of the evidence” was made in the context of the Court’s review of the granting of a preliminary injunction issued before the resolutions were adopted. *Id.* at 872 n.19. Since the 2005 Resolutions were adopted after the District Court entered the preliminary injunction in 2001, there were “obviously of minimal significance” to a determination of whether the preliminary injunction was proper. That does not mean, as the District Court held, that the resolutions were of minimal significance to the determination of whether a secular legislative purpose was present in 2005 so as to prevent issuance of a permanent injunction.

The District Court's discussion of the resolutions reveals the conundrum in which it placed itself by taking the *McCreary* Court's statements out of context and refusing to analyze the evidence submitted by Defendants. The District Court asked the question "If defendants' past actions are insufficient to purge the taint, what will suffice?" but then could not provide an answer. (September 2007 Order, Record Entry 153, at p. 12, App. at 0163). Instead, the District Court recited portions of generalized statements from *McCreary County, ACLU v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) and other cases which discussed "genuine changes in constitutionally significant conditions." (September 1997 Order, Record Entry 153, at p. 12, App. at 0163). The District Court did not explain what those "genuine changes" would be, but just said that Defendants had not yet satisfied them. (September 2007 Order, Record Entry 153, at p. 12, App. at 0163). The only hint offered by the District Court was its reference to the *McCreary County* and *Mercer County* courts' statements that such changes could include a demonstration of a "predominantly secular purpose." (September 2007 Order, Record Entry 153, at p. 12, App. at 0163, citing *McCreary County*, 545 U.S. at 874; *Mercer County*, 432 F.3d at 632-633).

Since the purpose inquiry is to be "deferential but limited," and even a plausible secular purpose is to be given deference unless there is a pre-eminent

religious purpose, *Wallace*, 472 U.S. at 74-75, Defendants’ adoption of new resolutions and political changes in the fiscal courts would constitute such a demonstration. The 2005 Resolutions explicitly state: “The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government, and this display with its stated purpose superceded any prior display or resolution.” (Beshears Dec., Exhibit E, Record Entry 119, App. at 0091; Phillips Dec., Exhibit A, Record Entry 118, App. at 0100). Furthermore, the fiscal courts expressly resolved “that the 1999 Resolution, and the second display to which the 1999 Resolution applied, which was enjoined by the federal district court, are explicitly and expressly repealed, abandoned and repudiated. . . .” (Beshears Dec., Exhibit A, Record Entry 119, App. at 0092; Phillips Dec., Exhibit A, Record Entry 118, App. at 0101). The resolutions were officially enacted by the fiscal courts, and in the case of McCreary County, by a different group of magistrates. (Redden Dec., Record Entry 120, at p. 4, App. at 0105). The statement of purpose could hardly be any clearer. Furthermore, even after the District Court questioned whether Defendants’ measures were adequate, the fiscal courts enacted a second set of resolutions reiterating the repeal of the 1999 actions and the educational nature of the Foundations Display. By this time, the political composition of both fiscal courts had changed significantly. Still, this was not enough for the

District Court.

B. Any Alleged “Taint” Of Religious Purpose Was Purged By Political Changes And Legislative Action Taken By Defendants.

The Supreme Court emphasized that Defendants’ past actions should not be found to forever taint any effort on their part to integrate the Ten Commandments into a government display on law or American history. *McCreary County v. ACLU*, 545 U.S. at 874. *See, also, Van Orden v. Perry*, 545 U.S. 677, 690 (2005)(“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”). *McCreary* cautioned upholding the preliminary injunction should not be read too broadly. *McCreary*, 545 U.S. at 874.

We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.

Id. The Court did not expressly define what “constitutionally significant conditions” would “purge the taint.” *See, id.* The Court left that determination to the district courts, but provided considerable guidance in the form of its analysis of the counties’ three displays. *See, id.* at 871-872. Examining the conditions that the Court found critical to its determination that the displays evinced a religious purpose illuminates

the steps the Court sees as necessary to leave the past behind.

First, the Court pointed to the need to have the Ten Commandments fully integrated into a secular display instead of standing alone or being displayed prominently among a display of documents with religious overtones. *Id.* at 868. The *McCreary* Court noted that its only prior case dealing with the constitutionality of displaying the Ten Commandments struck down the displays as impermissibly advancing religion, but “did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government....” *Id.* at 867 (citing *Stone v. Graham*, 449 U.S. at 41). “*Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message.” *Id.* at 868. The display in *Stone* had no context that might have indicated an object beyond the religious character of the text of the Commandments and therefore communicated an unmistakable religious message. *Id.* at 869. The Court found that the counties’ initial stand alone Ten Commandments displays suffered from the same infirmity. *Id.* The second displays did not resolve the issue in the Court’s eyes because the Decalogue was not integrated into secular displays but placed amid smaller-sized documents which emphasized religious heritage. *Id.* at 870. In addition, the resolutions accompanying the displays made several religious references and discussed the embodiment of ethics in Christ. *Id.*

Together, the displays and resolutions continued to send a religious message. *Id.*

The Supreme Court found that the religious message was not sufficiently muted by the original posting of the Foundations Display because the counties had not taken any official action to repudiate the first two displays and because the posting of the Foundations Display happened so quickly after the second display was removed. *Id.* at 871-872. The Court noted that the Foundations Display was the third display erected by the fiscal court within a year. *Id.* at 855. It was erected in the courthouses in October 2000, only five months after the District Court's initial preliminary injunction and 10 months after the stand alone Decalogues were posted in December 1999. (*See* Defendants' Motion for Summary Judgment, Record Entry 117, at pp. 3-4, App. at 0046).

The Supreme Court also emphasized that the 1999 Resolutions, which made religious references and references to Christ, were not repealed, nor the prior actions repudiated by the fiscal courts prior to the Foundations Displays being erected. *Id.* at 870-872. In fact, during oral argument, the Court raised the fact that the resolutions had not been repealed. *Id.* at 871 n.19. In its ruling, the Court said that having those "extraordinary resolutions for the second display" still in place when the Foundations Displays were approved and erected meant that the religious purpose remained. *Id.* The Court found that to be particularly true in light of the fact that the fiscal courts

had not enacted any new resolutions or memorialized their purposes for the Foundations Display. *Id.* Since there were no further authorizing actions by the fiscal courts to repudiate the old purposes and memorialize the new, the Supreme Court found that the cited purposes for the Foundations Displays were merely “litigating positions” that did not sufficiently distance the counties from the initial displays. *Id.* at 871.

Consequently, while the Supreme Court did not present the District Court with a definitive test for “purging the religious taint” from a Ten Commandments display, it did provide an outline from which the District Court could make the determination. That outline includes the erection of a fully integrated display featuring documents on the subject of law or American history, one of which could be the Ten Commandments. In addition, there should be the passage of something more than a few months between the “tainted display” and the integrated display. The governing body should expressly rescind any prior resolutions and repudiate any prior acts that led to the prior displays being “tainted.” Finally, the governing body should memorialize in writing the educational or other secular purpose for mounting the display. While there might be other relevant factors in other circumstances, the Supreme Court’s discussion of the preliminary injunction indicates that these factors would be constitutionally significant in determining that the McCreary and Pulaski

county Foundations Displays did not have the religious purpose apparent in the earlier displays.

Defendants provided evidence of each of those factors, and more, to the District Court. In particular, nearly ten years have passed from the time that the second display was erected in 1999 to the present. All but three of the thirteen fiscal court members who had participated in approving the first two display are no longer on the court, further distinguishing the earlier actions from the present. (Beshears Dec., Exhibits B and E, Record Entry 119, App. at 0084, 0092; Redden Dec., Exhibits B and E, Record Entry 120, App. at 0132, 0140; Renewed Motion for Summary Judgment, Exhibits A and B, Record Entry 159, App. at 0187, 0190). Two separate resolutions were enacted two years apart by each fiscal court specifically rescinding the 1999 Resolutions and accompanying displays and expressly stating that the Foundations Display has an educational purpose as spelled out in the Explanatory Document. (Beshears Dec., Exhibit E, Record Entry 119, App. at 0089; Phillips Dec., Exhibit A, Record Entry 118, App. at 0098; Renewed Motion for Summary Judgment, Exhibits A and B, Record Entry 159, App. at 0187, 0190). Again, with the exception of three people, all of the fiscal court members who enacted the resolutions were elected after the initial displays were approved and this lawsuit filed. The Foundations Display consists of nine equally sized framed documents, one of which

is the Ten Commandments, along with an Explanatory Document that explains the importance and interrelationship of the documents.(September 2007 Order, Record Entry 153, at pp. 2-3, App. at 0153-0154).

Defendants demonstrated that all of the issues that troubled the Supreme Court and led to its conclusion that the Foundations Display retained the “taint” of the earlier displays have been resolved or eliminated. Of further note is the fact that Justice Alioto, who replaced Justice O’Connor on the Supreme Court, has articulated that he does not share his predecessor’s views on the “taint” issue. In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU filed suit to declare a holiday display containing a creche unconstitutional. In 1995, the District Court enjoined the display and “any substantially similar scene or display.” *Id.* at 96. After the injunction was entered, the City erected a modified display that included the original elements and also included Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id.* The ACLU, as in this case, moved to hold the City in contempt and also sought a preliminary injunction against the modified display. *Id.* The District Court denied both motions. *Id.* Justice Alioto, speaking for the Third Circuit, addressed the exact situation Plaintiffs asserted in this case before the District Court:

The suggestion seems to be that, even if Jersey City could have properly

erected the modified display in the first place, the City’s initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to the one that would be permissible in other nearby cities, counsel for the plaintiffs insisted that Jersey City’s “prior history” would have to be taken into account, at least until the time came when it could be considered to be “purged” of the “prior constitutional taint.”

We reject this argument. The mere fact that Jersey City’s first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked “a secular legislative purpose,” or that it was “intend[ed] to convey a message of endorsement or disapproval of religion.”

Id. at 105 (citations omitted)(emphasis added). The Court added:

If the plaintiffs’ view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse [in *County of Allegheny*] should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials’ miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

Adopting the same logic explicitly rejected by Justice Alioto, the District Court here found that the Foundations Displays retain their impermissible religious purposes. The court did not elucidate why the displays remain “tainted,” nor what has to be done to remove the “taint.” Instead, the District Court merely adopted the

“litigating position” language that the Supreme Court used to describe Defendants’ actions in 2000 and applied that to all of the actions taken by Defendants since 2005. The District Court alluded to the “constitutionally significant conditions” mentioned by the Supreme Court, but failed to define them, let alone apply them to Defendants’ displays. Defendants are left with little more than a hollow promise that they might be able to erect their Foundations Display when the District Court decides that Defendants have done enough to “remove the taint” so that the permanent injunction can be rescinded.⁶

The District Court’s determination that the Foundations Display continues to have an impermissible predominant religious purpose despite the passage of nearly a decade, changes in the fiscal courts and the enactment of two separate resolutions is clear error. Defendants respectfully request that this Court reverse the District Court’s ruling granting summary judgment to Plaintiffs.

II. THE DISTRICT COURT ERRED WHEN IT REVERSED ITSELF AND ENTERED A PERMANENT INJUNCTION AGAINST THE FOUNDATIONS DISPLAYS.

Initially, the District Court properly denied Plaintiffs’ Motion for Summary

⁶ The District Court’s decision also illustrates the concerns raised by Justice Thomas in *Van Orden* that the adjudication of Establishment Clause challenges turns on judicial predilections. *Van Orden*, 545 U.S. at 697(Thomas, J., concurring). “The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.” *Id.*

Judgment “because they are not entitled to a permanent injunction as a matter of law.” (September 2007 Order, Record Entry 153, at p. 11, App. at 0162). The District Court correctly held that “Since it is possible to purge the taint of the impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not ‘continuing’ as required by the standard for a permanent injunction.” (September 2007 Order, Record Entry 153, at p. 10, App. at 0161). That standard for a permanent injunction has not changed and Plaintiffs offered no new evidence to counter the District Court’s findings. (Motion to Alter Judgment, Record Entry 155, App. at 0166). Nevertheless, the District Court inexplicably reversed course and granted Plaintiffs’ request for a permanent injunction against the Foundations Displays, pronouncing them unconstitutional. (August 2008 Order, Record Entry 173, at pp. 10-11, App. at 0203-0204).

The District Court’s abrupt reversal is all the more incomprehensible in light of the additional actions taken by Defendants to repudiate the prior displays and affirm the educational purposes of the Foundations Displays in response to the District Court’s statement that further actions were needed to “purge the taint.” (Exhibits A and B to Renewed Motion for Summary Judgment, Record Entry 159, App. at 0186, 0188). On October 9, 2007, Defendants’ fiscal courts, comprised of new voting majorities, adopted new resolutions approving the exhibition of the

Foundations Displays and restating the Displays' educational purpose.(Exhibits A and B to Renewed Motion for Summary Judgment, Record Entry 159, App. at 0186, 0188). Defendants submitted those resolutions to the District Court subsequent to its September 2007 order denying the permanent injunction. (Exhibits A and B to Renewed Motion for Summary Judgment, Record Entry 159, App. at 0186, 0188).

Consequently, the only new evidence presented to the District Court after it initially denied the permanent injunction was evidence that Defendants had taken official action to approve the Foundations Displays and confirm their educational purpose – precisely the kind of further (post 2005) actions that the District Court said had prevented it from granting Defendants' Motion for Summary Judgment. (September 2007 Order, Record Entry 153, at p. 10, App. at 0161). If Plaintiffs could not establish a continuing injury before Defendants took further actions to “purge the taint,” then certainly they could not establish a continuing injury after Defendants took those actions. Nevertheless, the permanent injunction was issued.

As this Court's precedents establish, issuing a permanent injunction under these circumstances was wholly without merit. “Under well-settled law, a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer ‘continuing irreparable injury’ for which there is no adequate remedy at law.” *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 616 (6th Cir.

2006). Absent evidence of a continuing and irreparable injury, Plaintiffs were not entitled to a permanent injunction. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). As the District Court itself said, any constitutional injury that might have been suffered by Plaintiffs could be remedied by Defendants taking actions to “purge the taint” of the prior displays, so there is no “continuing injury.” (September 2007 Order, Record Entry 153, at p. 10, App. at 0161). After Defendants took those additional actions following the initial ruling, it was then even more true that there was no continuing injury. Therefore, at the time that the District Court revisited its September 2007 Order, it was even more evident that there was no basis for a permanent injunction. The District Court’s contradictory finding is without explanation or legal support and must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT GRANTED PLAINTIFFS’ MOTION TO ALTER JUDGMENT, EFFECTIVELY DENIED DEFENDANTS’ RENEWED MOTION FOR SUMMARY JUDGMENT AND THEN CONSTRUED IT AS A MOTION FOR RELIEF FROM JUDGMENT.

As well as being substantively without merit, the District Court’s disposition of the case was procedurally flawed. The District Court initially denied both parties’ motions for summary judgment, but foreclosed a trial to resolve the issues, claiming that a trial would be “unavailing” because there are no triable issues of fact for resolution by a jury. The District Court provided no other proposed resolution for the

case, but merely referred it to the magistrate judge for a settlement conference. The parties were placed on a bridge to nowhere – no pending summary judgment motions, no trial date and no other direction from the District Court on how to resolve the case, particularly once the settlement conference was unsuccessful.

Defendants responded by taking some of the further actions that the District Court found missing and necessary for judgment in Defendants' favor. The fiscal courts, which were comprised of predominantly new members wholly unaffiliated with the prior actions (only three of the original thirteen signatories remained on the court), adopted resolutions that rescinded the 1999 Resolutions and repudiated the prior actions taken by their predecessors. (Renewed Motion for Summary Judgment, Record Entry 164, Exhibits A and B, App. at 0186-0190). The new resolutions also reiterated that the Foundations Displays were educational in nature. (Renewed Motion for Summary Judgment, Record Entry 164, Exhibits A and B, App. at 0186-0190). Having addressed the concerns raised by the District Court when it initially denied Defendants' motion for summary judgment, Defendants renewed the motion based upon the new evidence. (Renewed Motion for Summary Judgment, Record Entry 164, App. at 0174-0190). Meanwhile, Plaintiffs presented no new evidence or legal precedent, but asked the District Court to alter/amend the September 2007 Order by filing a Motion to Alter/Amend Judgment under F.R.Civ.P. 59. (Motion to Alter or

Amend Judgment, Record Entry 153, App. at 0166-0173). Despite the absence of new evidence or legal authority, the District Court granted Plaintiffs' motion. (August 2008 Order, Record Entry 173, App. at 0194). At the same time, the District Court claimed that Defendants' Renewed Motion for Summary Judgment was improper because it was filed beyond the dispositive motion deadline, and would be construed as a Motion for Relief from Final Judgment under F.R. Civ. P. 60. (August 2008 Order, Record Entry 173, App. at 0194). Each of these decisions represent an abuse of discretion.

A. The District Court Abused Its Discretion When It Granted Plaintiffs' Motion To Alter/Amend The Judgment.

The District Court erred when it determined granted Plaintiffs' request for relief under F.R.Civ.P. 59. Motions to alter or amend judgment may be granted if there is a clear error of law newly discovered evidence, an intervening change in controlling law or to prevent manifest injustice. *GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Plaintiffs did not establish either.

Plaintiffs presented no evidence in support of its Motion to Amend/Alter

Judgment, nor any intervening change in controlling law. (Motion to Alter or Amend Judgment, Record Entry 153, App. at 0166-0173). The District Court alluded to these prerequisites, but did not establish that Plaintiffs had satisfied either one. In fact, the District Court's August 2008 order shows that its granting of a permanent injunction against the Foundations Displays was based upon the Supreme Court's *McCreary County* ruling from 2005. (August 2008 Order, Record Entry 173, at p. 11, App. at 0204). The other alterations to the September 2007 order were based upon cases from 1994-2006. (August 2008 Order, Record Entry 173, at pp. 6-11, App. at 0199-0204). The only case cited by Plaintiffs or the District Court that was contemporaneous to the September 2007 order was a case from another division of the same district, *ACLU v. Garrard County*, 517 F.Supp. 2d 925 (E.D. Ky. 2007). However that case from a parallel court was not controlling precedent, and therefore not an intervening change in controlling law sufficient to justify an alteration of judgment.

The Plaintiffs failed to establish the necessary prerequisites for relief under Rule 59. The District Court abused its discretion when it granted the relief and reversed its September 2007 order denying summary judgment.

B. The District Court Abused Its Discretion When It Effectively Dismissed Defendants' Renewed Motion For Summary Judgment.

The District Court claimed that it could not consider Defendants' Renewed Motion for Summary Judgment because it was filed after the dispositive motion deadline. Since by definition a renewed motion would have to be filed after an initial motion, and therefore after a deadline for a motion, the District Court's determination makes no logical sense. More importantly, it is not supported by precedent.

The denial of a summary judgment motion does not have res judicata effect, and a district court may permit a party to renew a previously denied summary judgment motion or file successive motions, particularly if good reasons exist. *Kovacevich v. Kent State University*, 224 F.3d 806, 835 (6th Cir. 2000)(citing *Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir.1995)). A renewed or successive summary judgment is especially appropriate if there has been an intervening change in controlling law, the availability of new evidence, an expanded factual record or the need to correct a clear error or prevent manifest injustice. *Whitford*, 63 F.3d at 530. *Accord*, *Kovacevich*, 224 F.3d at 835 (“District courts may in their discretion permit renewed or successive motions for summary judgment, particularly when the moving party has expanded the factual record on which summary judgment is sought.”)

In this case, Defendants presented the District Court with an expanded factual

record that included evidence of the very actions the court alluded to as necessary but missing in the prior motion. There was no other proposed resolution of the case on the horizon, nor any pending motions that would have been prejudiced by the granting of Defendants' motion. Plaintiffs had a full opportunity to, and did, respond to the motion, and so would suffer no prejudice if the motion were considered. Resolution of the motion in Defendants' favor would have obviated the need for an appeal. Resolution of the motion in Plaintiffs' favor would have clarified the question of what actions the District Court believed were necessary to remove the "taint" from the Foundations Display, which would have either obviated the need for an appeal or made the issues clearer. By not even considering the motion, the District Court placed the parties and this Court at a great, and unnecessary disadvantage. Defendants respectfully request that this Court reverse the District Court's decision.

C. The District Court Abused Its Discretion When It Construed Defendants' Renewed Motion For Summary Judgment As A Motion For Relief From Judgment.

The District Court's decisions to construe Defendants' Renewed Motion for Summary Judgment as a Rule 60(b) motion, and to at least in part grant Plaintiffs relief under Rule 60 were in error since there was no final judgment, rule or order from which the parties could seek relief. At the time that the District Court decided to re-define Defendant's motion, the only order that had been entered was the

September 2007 order denying both parties' motions for summary judgment. (September 2007 Order, Record Entry 153, App. at 0152-0165). The order that the District Court deemed final and appealable was issued nearly a year after Defendants filed their motion, contemporaneously with the ruling re-construing the motion. (August 2008 Order, Record Entry 173, at pp. 6-11, App. at 0199-0204).

The September 2007 order denying both parties' summary judgment motions was not a final judgment, but an interlocutory order. *Whitford*, 63 F.3d at 530. Rule 60 "applies only to a 'final judgment, order or proceeding....' It is a method of reopening a closed case." *Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.* 773 F.2d 151, 154 (7th Cir. 1985)(citing 7 J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 60.20 (1983)).

The Advisory Committee's notes say that the Rule was devised to give the district court a power of revisitation it had lacked. A court always had the power to modify earlier orders in a pending case. Therefore "final" in Rule 60(b) must modify "order, or proceeding" as well as "judgment." Otherwise the Rule creates a power of modification redundant with the ordinary power to conduct pending proceedings and rethink earlier orders.

Id. "A party should not get immediate review of an order for discovery, or **one denying summary judgment** and setting the case for trial, just by filing a Rule 60(b) motion to set aside the order and then appealing the denial of this motion." *Id.* (emphasis added). Defendants did not have the right to bring a motion under Rule

60(b) following the denial of their summary judgment motion. Neither should the District Court have the ability to circumvent the rules by redefining motions.

Since the September 2007 order denying both parties motions for summary judgment was not a final order, Rule 60 could not be used by either party, or the court, to re-visit the issues. The District Court abused its discretion both when it construed Defendants Renewed Motion for Summary Judgment as a Rule 60 motion, and to the extent it based its grant of relief to Plaintiffs on the basis of Rule 60. Consequently, its decision must be reversed.

IV. THE DISTRICT COURT ERRED WHEN IT DENIED WHAT IT DETERMINED TO BE A MOTION FOR RELIEF FROM JUDGMENT BECAUSE OF THE INSTANT APPEAL.

Assuming, *arguendo*, that Defendants' motion could be regarded as a motion for relief from judgment under Rule 60, the District Court erred when it determined that it lacked jurisdiction to decide the motion because of the instant appeal and then dismissed the motion without prejudice. (September 30, 2008 Order, Record Entry 187, at pp1-2, App. at 0207-0208). While in general the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals, the rule "is not an inflexible rule." *Cochran v. Birkel* 651 F.2d 1219, 1221 (6th Cir. 1981). In particular, the district court retains jurisdiction to proceed with matters that are in aid of the appeal and remedial matters unrelated to the merits of the

appeal. *Id.*

More importantly, this Court has specifically held that a district court retains jurisdiction to determine Rule 60(b) motions under circumstances such as those present in this case. *Avery v. Nicol*, 208 F.3d 212 (6th Cir. 2000). In *Avery*, this Court held that the district court erred when it concluded that it lacked jurisdiction to the plaintiff's Rule 60(b) motion.

If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A)–the notice becomes effective to a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. Fed. R.App. P. 4(a)(4)(B)(i). Thus, Avery's notice of appeal from the underlying judgment became effective when the district court ruled on Avery's time-tolling Rule 60(b) motion, which was filed no later than ten days after the judgment. See Fed. R.App. P. 4(a)(vi).

Id. In *Avery*, the district court concluded, as did the District Court here, that the intervening notice of appeal divested it of jurisdiction to decide the Rule 60(b) motion. *Id.* The *Avery* district court based its conclusion upon *Keohane v. Swarco, Inc.*, 320 F.2d 429, 432 (6th Cir.1963), which held that district courts lose jurisdiction to hear Rule 60(b) motions once an appeal is filed. *Id.* However, “neither *Keohane* nor the more recent *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir.1993), apply when a time-tolling motion is filed.” *Id.*

Under Fed. R.App. P. 4(a)(4), a Rule 60(b) motion – if served within 10 days of the entry of judgment – tolls the time for taking an appeal, and

the notice of appeal is ineffective until the Rule 60(b) motion is resolved; until that comes to pass, the district court retains jurisdiction to rule on the Rule 60(b) motion. Because the district court erred in concluding that it lacked jurisdiction to rule on Avery's time-tolling Rule 60(b) motion, and because the Rule 60(b) motion casts doubt upon the propriety of the Heck-based underlying judgment, we reverse and remand the case for further proceedings.

Id.

As was true with the motion in *Avery*, the motion here was filed and served within 10 days of the entry of judgment. In fact, depending upon how the filing date is calculated, the motion was filed either ten months before or simultaneously with the entry of judgment. Defendants filed their Renewed Motion for Summary Judgment on October 30, 2007.(Defendants' Renewed Motion for Summary Judgment, Record Entry 159, App. at 0174-0190). The District Court entered its order granting Plaintiffs' Motion to Alter/Amend Judgment on August 4, 2008. (August 2008 Order, Record Entry 173, App. at 0194-0206). As part of the August 4, 2008 order, the District Court determined that the Renewed Motion for Summary Judgment filed on October 30, 2007 would be construed as a Motion for Relief from Judgment under Rule 60(b) and ordered the parties to file responsive and reply briefs in accordance with the local rules. (August 2008 Order, Record Entry 173, at p. 13, App. at 0206). If the date of the filing of the "Rule 60(b)" motion is regarded as the date that Defendants filed the Renewed Motion for Summary Judgment that became the Rule 60 motion, then the filing date was October 30, 2007. If the date of the filing

of the “Rule 60(b)” motion is regarded as the date that the District Court transformed the motion into a Rule 60 motion, then the filing date is August 4, 2008. Either way, the motion was filed before the 10-day period described in F. R. App. P. 4(a)(4). Therefore, as was true in *Avery*, in this case the District Court retained jurisdiction over what it determined to be a Rule 60(b) motion despite the intervening notice of appeal.

Furthermore, as was true in *Avery*, in this case, the motion casts doubt upon the District Court’s underlying determination that the Foundations Displays have an impermissible religious purpose. The District Court determined that the Foundations Displays continued to have a religious purpose “taint” because Defendants had not taken any further actions to rescind the 1999 Resolutions or repudiate past acts. (August 2008 Order, Record Entry 173, at p. 13, App. at 0206). The Renewed Motion for Summary Judgment, which became the Rule 60 motion, presents new evidence of further actions taken by Defendants and thereby addressing the concerns raised by the District Court. Therefore, the motion casts doubt upon the District Court’s granting of summary judgment in Plaintiffs’ favor. In addition, resolution of the motion in Defendants’ favor could have obviated the need for the present appeal.

Consequently, the District Court erred when it determined that it did not have jurisdiction to rule on the motion it had construed as a Rule 60(b) motion. Since the

error potentially affects the present appeal, it is more than merely perfunctory and should result in reversal.

CONCLUSION

For the foregoing reasons, the District Court's order granting summary judgment to Plaintiffs and declaring Defendants' historical displays unconstitutional should be reversed.

Dated: January 12, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 13,991 words according to the word count feature of the software used to prepare the Brief.
2. The Brief has been prepared in proportionately spaced typeface using Word Perfect version 12 in Times New Roman 14 point.

/s/ Mary E. McAlister
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CERTIFICATE OF SERVICE

On January 12, 2009, I electronically filed this document through the ECF system, which will send a notice of electronic filing to the following:

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