

No. 09-4256

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.,

Plaintiff-Appellee,

v.

HON. JAMES DEWEESE, in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Ohio

**BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE, THE ANTI-DEFAMATION LEAGUE, THE HINDU AMERICAN
FOUNDATION, THE INTERFAITH ALLIANCE, AND THE UNION FOR REFORM
JUDAISM IN SUPPORT OF APPELLEE**

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INTERESTS OF THE *AMICI*

Amici are Americans United for Separation of Church and State; the Anti-Defamation League; the Hindu American Foundation; the Interfaith Alliance; and the Union for Reform Judaism. Descriptions of the *amici* appear in this brief's appendix.

Amici represent diverse religious and secular traditions. Despite our differences, we come together in the view that DeWeese's courtroom display violates constitutional principles that inure to the benefit of both government and religion.

All parties have consented to this filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

DeWeese's arguments, with respect to both the plaintiff's standing and the merits of the case, rest on gross distortions of fact and law. The ACLU's standing is firmly rooted in longstanding case law recognizing that observers may challenge religious displays with which they come into direct, unwelcome contact. DeWeese's argument to the contrary rests on an inapposite decision — *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) — that involved plaintiffs who had no direct, personal contact with the governmental action to which they objected.

Furthermore, DeWeese's claim that his display depicts a secular "theory" or "philosophy," rather than a religious viewpoint, is belied by both the display's plain

text and its history. DeWeese's effort is just the most recent in a long line of government officials' attempts to dress religious doctrine in secular clothing. His display, however, presents religious doctrine in exceedingly poor disguise.

ARGUMENT

I. The ACLU has standing because its member, Bernard Davis, was personally injured by DeWeese's religious display.

To establish standing, "a party must show (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff's injury." *Adland v. Russ*, 307 F.3d 471, 477-78 (6th Cir. 2002) (citation omitted).

A voluntary membership organization has standing to sue on behalf of its members "when (a) its members otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit."

ACLU of Ohio Found. v. Ashbrook, 375 F.3d 484, 489 (6th Cir. 2004) (citations omitted). Here, the ACLU's standing is based on the standing of its member, Bernard Davis. Davis has standing based on his direct, unwelcome contact with DeWeese's religious display.

A. This Court has consistently and repeatedly recognized the standing of plaintiffs who come into direct, unwelcome contact with religious displays on government property.

Davis's standing is based on his repeated and unwelcome exposure to DeWeese's poster display. (Davis Decl. ¶ 3.) As this Court recently reaffirmed, such exposure presents the kind of injury that gives rise to standing:

Under the Establishment Clause, a plaintiff may demonstrate an injury by showing direct and unwelcome contact with a government-sponsored religious object. Direct and unwelcome contact requires more than a general grievance; the harm cannot be remote, vicarious or generalized. The harm is sufficient when a plaintiff comes into direct, unwelcome contact with a government-sponsored religious object during business or recreational activities.

ACLU of Ky. v. Grayson County, ___ F.3d ___, No. 08-5548, 2010 WL 114361, at *3 (6th Cir. Jan. 14, 2010) (citations omitted). The Court concluded in *Grayson* that the plaintiff had standing to challenge a courthouse Ten Commandments display because he used the courthouse for business purposes and, during the course of that business, came into unwelcome contact with the display. *Id.* at *4.

Grayson County is merely the latest in a long line of Sixth Circuit cases holding that a plaintiff's direct, unwelcome contact with a religious display is sufficient to establish standing. In *Ashbrook*, in which the ACLU challenged a previous display of the Ten Commandments in DeWeese's courtroom, the ACLU, as

here, premised its standing on Davis's standing. 375 F.3d at 489-90. The Court held that the ACLU had standing because "Davis has and would continue to come into direct, unwelcome contact with the Ten Commandments display." *Id.* at 490. In *Washegesic v. Bloomington Public Schools*, 33 F.3d 679, 681-82 (6th Cir. 1994), noting that "unwelcome direct contact with the offensive object is enough," the Court held that a student had standing to challenge the display of a portrait of Jesus Christ that hung in the hallway of his public high school. Likewise, in *Adland*, 307 F.3d at 478-79, this Court held that the plaintiffs' frequent travel to the State Capitol and consequent likely "direct and unwelcome contact" with the Ten Commandments monument that was to be erected there was sufficient to establish standing to challenge the proposed monument. And in *Baker v. Adams County/Ohio Valley School Board*, 86 F. App'x 104, 108-09 (6th Cir. 2004), this Court held that the plaintiffs could challenge a public-school Ten Commandments display with which they had "direct and unwelcome personal contact."

These Sixth Circuit rulings are consistent with the Supreme Court's repeated adjudication of cases where the plaintiffs' standing was based on personal contact with a religious display. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005), *aff'g* 354 F.3d 438 (6th Cir. 2003), *aff'g* 145 F. Supp. 2d 845 (E.D. Ky. 2001), *modifying on other grounds ACLU of Ky. v. McCreary County*, 96 F. Supp. 2d

679, 682-83 (E.D. Ky. 2000) (holding that plaintiffs had standing to challenge Ten Commandments monument at state capitol building because they came into contact with it whenever they entered the building for business); *Van Orden v. Perry*, 545 U.S. 677 (2005), *aff'g* 351 F.3d 173 (5th Cir. 2003), *aff'g* No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002) (holding that plaintiff's regular, direct, unwelcome contact with Ten Commandments monument at Texas State Capitol gave rise to standing); *Stone v. Graham*, 449 U.S. 39 (1980) (holding that Kentucky statute requiring posting of Ten Commandments in public-school classrooms violated the Establishment Clause), *rev'g* 599 S.W.2d 157 (Ky. 1980) (upholding statute against Establishment Clause challenge brought by several plaintiffs, including students and a teacher-parent). Although such exercises of jurisdiction are not binding precedent when the High Court does not explicitly address the plaintiff's standing, *see Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006), in light of the Supreme Court's obligation to "examine standing *sua sponte* where standing has erroneously been assumed below," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), it is proper in determining whether standing exists for lower courts to consider the Supreme Court's exercise of jurisdiction, *see, e.g., Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir. 1997).

Davis "frequently and routinely" appears in DeWeese's courtroom in the

course of his professional work. (Davis Decl. ¶ 2.) As a result, he has repeatedly come into contact with DeWeese's poster, which he finds "personally offensive and demeaning because it makes [him] feel as though a particular religious point of view is being thrust upon [him]." (*Id.* ¶¶ 3-4.) This direct, unwelcome contact is a straightforward example of the kind of injury that, under both Sixth Circuit and Supreme Court case law, gives rise to a plaintiff's standing.

B. None of DeWeese's arguments defeats the ACLU's standing.

1. The *Valley Forge* plaintiffs had no personal, direct contact with the transaction they challenged.

DeWeese relies on language from *Valley Forge*, 454 U.S. 464, to argue that Davis did not suffer the kind of injury that gives rise to standing. (DeWeese Br. at 13-18.) But *Valley Forge* is both legally and factually inapposite: it did not involve a religious display, and the plaintiffs there had no personal, direct contact with the transaction to which they objected.

In *Valley Forge*, an organization based in Washington, D.C., along with several of its employees, challenged the transfer of a tract of Pennsylvania property from the government to a Christian college. 454 U.S. at 467-69. The plaintiffs, who had learned of the conveyance through a news release, argued that their status as federal taxpayers was sufficient to establish standing to challenge the land transfer. *Id.* at

469. The Third Circuit held that although the plaintiffs lacked taxpayer standing, they had “standing merely as citizens, claiming injury in fact to their shared individuated right to a government that shall make no law respecting the establishment of religion.” *Id.* at 470 (quoting *Ams. United for Separation of Church & State, Inc. v. U.S. Dep’t of Health, Educ. & Welfare*, 619 F.2d 252, 261 (3d Cir. 1980) (internal quotation marks omitted)).

The Supreme Court agreed that the plaintiffs did not have taxpayer standing because the land transfer was not undertaken pursuant to the congressional taxing and spending power. *Id.* at 479-80. The Court also held that the plaintiffs lacked “citizen standing,” noting that the plaintiffs “fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation [through a news release] of [out-of-state] conduct with which one disagrees.” *Id.* at 485.

Not only has the Sixth Circuit explicitly rejected the argument that *Valley Forge* precludes offended-observer standing in religious-display cases, but it has done so in a case involving DeWeese himself. In *Washegesic*, this Court allowed a student to challenge a religious display in his public high school, contrasting the situation in *Valley Forge*, where plaintiffs “had no direct contact with the dispute,” with cases in which a plaintiff has “continuing direct contact with the object at issue.”

33 F.3d at 682-83. That did not, however, deter DeWeese from arguing in *Ashbrook* that *Valley Forge* deprived Davis of standing to challenge a preceding Ten Commandment display with which Davis came into regular and unwelcome contact.

The Court, again, showed little hesitation in dismissing the argument:

[T]he Supreme Court’s decision that the *Valley Forge* plaintiffs lacked standing because its members had suffered no direct injury was based, in large part, on the fact that although the property transfer occurred in Chester County, Pennsylvania . . . the named plaintiffs resided in Maryland and Virginia and “learned of the transfer through a news release.” Accordingly, this circuit and other circuits have read *Valley Forge*’s language as depending in no small part on the directness of the harm alleged.

375 F.3d at 489 n.3 (quoting *Valley Forge*, 454 U.S. at 487). This conclusion serves as binding precedent now. See *United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004).

2. The standing issue raised in *Salazar* is not present here.

DeWeese claims that Davis objects to DeWeese’s courtroom display solely for constitutional or philosophical, rather than religious, reasons. DeWeese further claims that *Salazar v. Buono*, No. 08-472 (U.S. filed Oct. 7, 2009) — a case currently pending before the U.S. Supreme Court that involves a Catholic individual’s challenge to the display of a large cross on public land — supports the conclusion that such an objection is insufficient to establish standing. (DeWeese Br. at 17.)

But the Supreme Court has yet to issue a decision in that case. And both lower courts concluded that the plaintiff *does* have standing. *See Buono v. Norton*, 371 F.3d 543, 546-48 (9th Cir. 2004), *aff'g* 212 F. Supp. 2d 1202, 1210-14 (C.D. Cal. 2002). To be sure, the United States is urging the Supreme Court to reverse that conclusion, but the basis for that request is the claim that the plaintiff “expressly disclaimed any injury, including offense or feelings of exclusion,” from the display. Brief for the Petitioners at 13, *Salazar*, No. 08-472 (U.S. June 1, 2009). Even the government has not argued that the *Salazar* plaintiff would have lacked standing if he had proclaimed personal offense at the cross display. Here, of course, Davis has unambiguously declared that he finds the display “personally offensive and demeaning” (Davis Decl. ¶ 4), so *Salazar* should have no bearing on the outcome here.

3. DeWeese’s argument conflates the plaintiff’s standing with the merits of his claim.

DeWeese urges the Court to limit offended-observer standing to those cases in which a “challenged object or behavior [is] plainly, inarguably religious.” (DeWeese Br. at 15-16.) The Court should reject this invitation to blur the plaintiff’s standing with the merits of his claim. But even if the Court were to accept the invitation, DeWeese would find no refuge in the new legal regime because his display *is* “plainly” and “inarguably” religious.

Whether DeWeese's poster is religious or secular is the question posed by the *merits* of the ACLU's challenge, not to the ACLU's ability to mount that challenge in the first instance. Thus, in *Van Orden*, the district court held that the plaintiff had standing to challenge a display that the court found to be primarily secular. 2002 WL 32737462, at *2, 4-5. The Supreme Court affirmed the district court's conclusion that the challenged display sent a primarily secular message, without ever questioning the plaintiff's standing to challenge the display. 545 U.S. 677. And rightfully so, because whether a plaintiff's rights have actually been violated is a question different from whether a plaintiff has standing to complain. *See, e.g., Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 292 (6th Cir. 2006).

II. DeWeese's attempt to characterize his religious display as legal or philosophical "theory" is one in a long line of efforts to dress religious doctrine in secular clothing.

DeWeese hung the "Philosophies of Law in Conflict" poster after this Court held unconstitutional his earlier display pairing the Ten Commandments with the Bill of Rights. *Ashbrook*, 375 F.3d at 491-94. The new poster lists the Ten Commandments as "examples" of "Moral Absolutes" and expresses DeWeese's "personal[] acknowledg[ment] [of] the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation." (DeWeese Ex. A-3.) Despite the poster's reference to "Almighty God," DeWeese argues that his display has

nothing to do with religion, but merely presents a legal or philosophical “theory.” (DeWeese Br. at 21-27.) This attempt to dress a religious display in secular clothing has many forerunners, and it should fare no better than its predecessors.

A. Many have sought to sidestep constitutional requirements by reframing religious doctrine as secular “theory.”

History reveals many efforts, by those who have been disappointed with Establishment Clause decisions precluding the introduction of religious doctrines into governmental operations, to retool the doctrines to render them palatable for governmental presentation.

1. Creationism in the public schools.

Efforts to teach creationism in public-school science classes have gone through many different iterations, with proponents repeatedly attempting to recast the religious doctrine as secular.

Beginning in the 1920s, in response to Christian Fundamentalists’ growing opposition to the teaching of evolution in the public schools, many states passed statutes prohibiting schools from introducing evolution into their curricula. *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1258-59 (E.D. Ark. 1982). The movement was short-lived, however: In 1968, the Supreme Court ruled that such statutes run afoul of the Establishment Clause. *See Epperson v. Arkansas*, 393 U.S. 97, 109

(1968).

In response to that development, religious opponents seized on a new strategy: advocating the “balanced treatment” of creationism alongside evolution. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 716-17 (M.D. Pa. 2005). “[R]eligious opponents of evolution began cloaking religious beliefs in scientific sounding language and then mandating that schools teach the resulting ‘creation science’ or ‘scientific creationism’ as an alternative to evolution.” *Id.* at 717. The Supreme Court again entered the fray, declaring in *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987), that such “balanced treatment” violates the Establishment Clause by “restructur[ing] the science curriculum to conform with a particular religious viewpoint.”

Creationism proponents then went back to the drawing board, this time settling on the advocacy of a theory they named “intelligent design” (“ID”), which posits that nature must have had an “intelligent designer” because “[w]herever complex design exists, there must have been a designer.” *Kitzmiller*, 400 F. Supp. 2d at 718. But while ID proponents were careful not to explicitly mention religion or God, their work was otherwise quite sloppy: They crafted their principal textbook by taking an explicitly creationist text and “deliberately and systematically replac[ing] with the phrase ID” all “cognates of the word creation (creationism and creationist), which

appeared approximately 150 times.” *Id.* at 721. Accordingly, the court in *Kitzmiller* had little trouble concluding that ID was simply creationism by another name. *Id.* at 722.

2. Bible classes in public schools.

Efforts to teach religious doctrine in the public schools have not been limited to creationism; many have sought to introduce the Bible wholesale. And while the courts have long held that the Bible may be studied in public schools for its literary and historical significance,¹ the courts have been equally clear that the Bible may not be taught as religious truth.² In many corners of the country, however, that prohibition has not been respected, and the rebellion has principally taken the form of presenting a biblical worldview in secular disguise.

After the federal courts held unconstitutional public-school classes that teach

¹*See, e.g., Epperson*, 393 U.S. at 106 (“[S]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment’s prohibition.”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (“It certainly may be said that the Bible is worthy of study for its literary and historic qualities.”).

²*See, e.g., Doe v. Porter*, 370 F.3d 558, 563 (6th Cir. 2004) (striking down Bible course for presenting Bible as truth); *Hall v. Bd. of Sch. Comm’rs*, 656 F.2d 999, 1002-03 (5th Cir. 1981) (striking down Bible course that was taught by ordained minister, used textbook written from a Christian perspective, and had final exam that involved rote memorization of Bible passages); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 593-95 (N.D. Miss. 1996) (striking down Bible course that treated Bible as actual literal history).

the Bible as religious truth, many states passed statutes calling for school districts to teach classes that present the Bible as “history” or “literature.” *See, e.g.*, GA. CODE ANN. § 20-2-148 (2006); TENN. CODE ANN. § 49-6-1026 (2008); TEX. EDUC. CODE ANN. § 28.011 (Vernon 2007). These statutes, however, were often not motivated by an interest in educating America’s youth; rather, they were enacted and have often been implemented as a ruse to legitimize the inclusion of religious doctrine in public-school curricula.

For example, a 2006 report on the teaching of the Bible in Texas public schools revealed numerous problems with classes focused on the Bible. Most teachers assigned to teach Bible classes had little to no academic background in biblical or religious studies, and several school districts concluded that teachers’ experience teaching the Bible in church settings qualified them to teach Bible classes at school. MARK A. CHANCEY, TEX. FREEDOM NETWORK EDUC. FUND, READING, WRITING & RELIGION: TEACHING THE BIBLE IN TEXAS PUBLIC SCHOOLS 13 (2006), *available at* http://www.tfn.org/site/DocServer/TX_Bible_Report_UPDATE_DEC-06.pdf. In some districts, the classes were taught by ministers. *Id.* Many courses had few, or no, substantial writing assignments and failed to focus on the development of critical thinking skills; and “[m]ost courses stress[ed] basic memorization work, whether of individual Bible verses, entire Psalms, Proverbs, the Sermon on the Mount, the Ten

Commandments (in the Protestant order), or the names of the books of the Bible (also in Protestant order).” *Id.* at 15. The resources often appeared to be designed for use in church rather than in public schools. *Id.* at 19.

Many Texas school districts used the curriculum of the National Council on Bible Curriculum in Public Schools (“NCBCPS”), *id.* at 19, whose agenda is “to expose the kids to the biblical Christian worldview.” *See* interview by D. James Kennedy with Elizabeth Ridenour, President, NCBCPS, in Ft. Lauderdale, FL (Sept. 14, 1995). NCBCPS proclaims on its website that that “[t]here has been a great social regression since the Bible was removed from our schools. We need to refer to the original documents that inspired Americanism and our religious heritage.” National Council on Bible Curriculum in Public Schools, <http://www.bibleinschools.net/Is-this-Legal> (last visited Jan. 26, 2010). The NCBCPS curriculum, much of which “is reproduced from online and popular-level sources,” is “the product of two individuals who have no academic training in biblical or religious studies.” CHANCEY, *supra*, at 19.

Indeed, the curriculum in many of the Bible-study courses in the Texas public schools included materials that advocated that the Bible is divinely inspired. For example, one course required students to read essays entitled “The Truth of the Bible” and “10 Reasons to Believe in the Bible.” *Id.* at 25. Another course showed a video

that presented the Bible as “completely historically accurate” and divinely inspired. *Id.* at 26.

Nor does Texas stand alone in this regard. The courts have confronted numerous instances in which “Bible as History and Literature” statutes have been used as a ruse to legitimize the presentation in the public schools of the Bible as religious truth. *See, e.g., Porter*, 370 F.3d at 563; *Hall*, 656 F.2d at 1002-03; *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1434 (M.D. Fla. 1998); *Herdahl*, 933 F. Supp. at 593-95; *Doe v. Human*, 725 F. Supp. 1503, 1506-07 (W.D. Ark. 1989), *aff’d mem.*, 923 F.2d 857 (8th Cir. 1990).

3. Government displays of the Ten Commandments.

Those seeking to advance a religious agenda have, on many occasions, used the “legal theory” ruse to advocate for governmental displays of the Ten Commandments. For example, when Roy Moore, the Chief Justice of the Alabama Supreme Court, erected a Ten Commandments monument in the Alabama State Judicial Building, he sought to shore up the display’s legitimacy by surrounding the Commandments with quotations from various secular sources, such as the Declaration of Independence, the Constitution of Alabama, George Washington, and James Madison. *See Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1295 (M.D. Ala. 2002), *enforced* 242 F. Supp. 2d 1067 (M.D. Ala. 2002), *aff’d* 335 F.3d 1282 (11th Cir. 2003). Moore then relied on

those quotations to argue that the “Ten Commandments, as he ha[d] presented them in the monument, . . . are not religious; instead, he sa[id], they represent the moral foundation of secular duties that individuals owe to society.” *Glassroth*, 335 F.3d at 1294.

Moore’s out-of-court statements, however, belied his legal tactics. The evidence showed that he had elsewhere proclaimed that his purpose was “to acknowledge the law and sovereignty of the God of the Holy Scriptures” and “to remind all who enter the building that ‘we must invoke the favor and guidance of Almighty God.’” *Id.* at 1296 (quoting 229 F. Supp. 2d at 1297, 1322). The court concluded that “[a]gainst the weight of all of this evidence, Chief Justice Moore’s insistence . . . that the Ten Commandments as presented in his monument have a purely secular application is unconvincing.” *Id.* at 1296.

* * *

None of this is to suggest that governmental displays of religious messages are always unconstitutional. A display that does not convey a governmental endorsement of religion may well comply with constitutional requirements even if it includes religious elements. *See, e.g., Van Orden*, 545 U.S. at 681-82 (upholding display of Ten Commandments monument on Texas State Capitol grounds where the monument was donated by a civic organization and was one of seventeen monuments on the

grounds). But a court must ensure that any proffered secular purpose is “genuine, not a sham, and not merely secondary to a religious objective.” *McCreary County*, 545 U.S. at 864.

B. DeWeese’s display is an especially poorly disguised effort to rebrand religious doctrine as secular.

DeWeese’s poster displays the Ten Commandments, which “are undeniably a sacred text in the Jewish and Christian faiths,” *Stone*, 449 U.S. at 41, as “examples” of “Moral Absolutes.” The poster itself states that DeWeese “personally acknowledg[es] the importance of Almighty God’s fixed moral standards for restoring the moral fabric of this nation.” (DeWeese Decl. Ex. A-3.) DeWeese’s pamphlet, to which the poster refers, fleshes out his view of moral absolutism, asserting that this view “bases its distinctions between right and wrong on the God of the Bible” and “holds that God has defined for humanity’s own good and happiness what is right and wrong and that those standards cannot be altered or abolished.” (DeWeese Decl. Ex. A-4.) The pamphlet chastises courts in the United States for “cut[ting] themselves loose from the Fixed principles of God.” (*Id.*) The pamphlet goes on to emphatically endorse moral absolutism, stating that “[t]he Founders were right about the necessity of moral absolutes to the survival and prosperity of our country.” (*Id.*) In light of these statements, it simply cannot reasonably be argued that the poster does not

endorse a religious message; that is its very purpose.

And this Court need not examine DeWeese's display and pamphlet in a vacuum, for the history behind a display is highly relevant to its constitutionality. *See McCreary County*, 545 U.S. at 868-74. In *McCreary*, two Kentucky counties had displayed lone framed copies of the Ten Commandments in their courthouses. *Id.* at 851. After the counties were sued, but before the district court had ruled on the plaintiffs' request for a preliminary injunction, the counties sought to legitimize the displays by cloaking the Commandments in secular trappings:

[T]he legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously . . . to adjourn . . . 'in remembrance and honor of Jesus Christ, the Prince of Ethics'"; that the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

Id. at 853. The new display included, in addition to the first display's large, framed copy of the Ten Commandments, eight other documents in smaller frames, each of

which featured a religious theme or was excerpted to highlight a religious element.

Id. at 853-54. The eight documents were:

the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

Id. at 854.

After the district court issued a preliminary injunction ordering the removal of this display, the counties retooled the display, this time erecting nine framed documents of equal size, including the Ten Commandments, “the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.” *Id.* at 855-56. The new display was entitled “The Foundations of American Law and Government Display,” and each document was accompanied by a statement of its historical and legal significance.

Id. at 856. Although the counties asserted that the purpose behind this display was

“to demonstrate that the Ten Commandments were part of the foundation of American Law and Government’ and ‘to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government,’” the district court found that “the assertion that the Counties’ broader educational goals are secular ‘crumble[s] . . . upon an examination of the history of this litigation.” *Id.* at 857 (quoting 145 F. Supp. 2d at 849). In affirming, the Sixth Circuit also refused to view the third display in a vacuum, noting that “the very history of the litigation [was] evidence of the Counties’ religious objective.” *Id.* at 858 (citing 354 F.3d at 457).

The Supreme Court agreed that the first two displays exposed the true purpose of the third display. Holding that the Counties did not act with a secular purpose in erecting the third display, the Court noted that an objective observer “would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.” *Id.* at 873. The Court recognized that “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.” *Id.* at 874.

Common sense compels a similar result here. DeWeese previously displayed the Ten Commandments with a poster of the Bill of Rights, presenting each as “the

rule of law.” *Ashbrook*, 375 F.3d at 487. DeWeese testified that he erected those items “to express his belief that the law of God is the ‘ultimate authority,’” *id.* at 491, evidence that this Court cited in concluding that

“[a] state actor officially sanctioning a view of moral absolutism in his courtroom *by particularly referring to the Ten Commandments* espouses an innately religious view and, thus, crosses the line created by the Establishment Clause.”

Id. at 492 (quoting *ACLU of Ohio Found., Inc. v. Ashbrook*, 211 F. Supp. 2d 873, 889 (N.D. Ohio 2002)). The new display, like the old one, proclaims God as the ultimate authority and refers to the Ten Commandments as “absolutes” that are essential to society’s survival. DeWeese’s “implausible claim that [his] purpose has changed should not carry the day in a court of law any more than in a head with common sense.” *McCreary County*, 545 U.S. at 874.

CONCLUSION

The issues in this appeal are squarely controlled by existing precedent. Davis’s direct, unwelcome contact with the religious display in DeWeese’s courtroom amply establishes the plaintiff’s standing to bring this lawsuit. And DeWeese’s display manifestly and unequivocally reflects a religious purpose and effect. Accordingly, this court should affirm the district court’s decision.

Respectfully submitted,

By: /s/ Alex J. Luchenitser

Date: January 27, 2010

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APPENDIX: DESCRIPTIONS OF INDIVIDUAL *AMICI*

Americans United for Separation of Church and State is a national, nonsectarian, nonpartisan public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in this Circuit. Americans United's membership includes people who belong to a wide array of both majority and minority faiths, as well as people with no religious affiliation and nonbelievers. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the United States Supreme Court, this Court, and other federal and state courts nationwide.

Organized in 1913 to combat racial, ethnic, and religious prejudice in the United States, the **Anti-Defamation League (ADL)** is today one of the world's leading organizations fighting anti-Semitism, hatred, and bigotry of all kinds. Decades of work on issues related to the religion clauses of the First Amendment, the Equal Protection Clause, and federal and state anti-discrimination laws have reinforced ADL's core belief in the importance of these values as a means of preserving religious freedom and protecting our democracy. Because standing is critically important to enforcing our fundamental rights under the constitution, ADL

believes that taxpayer access to the courts is essential to preserving religious liberty and democracy and that those seeking to fight discrimination deserve their day in court.

The **Hindu American Foundation** (HAF) is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes and human rights. HAF has both litigated and participated as *amicus curiae* in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country who come from 75 different religious traditions as well as from no religion. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

The **Union for Reform Judaism** (Union) is the congregational arm of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history. Government sponsorship of religious symbols threatens the principle of separation of church and state, which is indispensable for the preservation of that unique blessing of American democracy – religious liberty.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29 AND 32

I certify that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), and the associated type-volume limitations for *amicus* briefs of Rule 29(d), because it contains 5,083 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as determined by the word-count utility in WordPerfect version 12.

2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface.

Date: January 27, 2010

/s/ Taryn Wilgus Null
Taryn Wilgus Null

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010, I filed this **Brief of *Amici Curiae*** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system, which caused this brief to be served upon counsel for all parties:

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