

NO. 02-1765

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREETHOUGHT SOCIETY OF GREATER
PHILADELPHIA and SALLY FLYNN, Plaintiffs-
Appellees,

vs.

CHESTER COUNTY; COLIN A. HANNA, KAREN L.
MARTYNICK, and ANDREW E. DINNIMAN, each of
whom is sued in their official capacities as CHESTER
COUNTY COMMISSIONERS, Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

**BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE, AND ANTI-DEFAMATION
LEAGUE, ON BEHALF OF PLAINTIFFS-APPELLEES, IN SUPPORT
OF AFFIRMANCE**

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State (“Americans United”) is a national, nonsectarian public interest organization based in Washington, D.C. that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus* in many of the leading church-state cases decided by the U.S. Supreme Court (most recently in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002)) and by this Court (most recently in *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000)). Americans United has more than 60,000 members nationwide, including thousands within the jurisdiction of this Court.

Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and 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 hatred, bigotry, discrimination, and anti-Semitism. Among the ADL’s core beliefs is strict adherence to the separation of church and state embodied in the Establishment Clause of the First Amendment.

Separation, the ADL believes, preserves religious freedom and protects our democracy. In furtherance of this belief, the ADL has participated as an *amicus curiae* before the Supreme Court in many of the major church-state cases of the last half-century. The ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, the ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each.

SOURCE OF AUTHORITY TO FILE

All parties have consented to the filing of this brief.

ARGUMENT

I. Summary Of Argument

Defendant-appellant Chester County (“the County”) and *amicus* Chester County Historic Preservation Network (“the Preservation Network”) argue that the County’s display of a plaque containing the Ten Commandments (“the Plaque”) on

the Chester County Courthouse (“the Courthouse”) does not violate the Establishment Clause because the County is merely preserving a historical artifact. In addition to being unsound legally for the reasons stated in the briefs of plaintiffs-appellees and other *amici* supporting them, this argument is unsound factually. The Plaque is one of a plethora of similar plaques and placards erected in Pennsylvania and elsewhere in this country during the 1910s and 1920s as part of a religious campaign spearheaded by a reactionary religious group. The Plaque is thus not unique at all, and it has no historical significance that is independent of its religious roots.

The County and *amici* supporting it also argue that the display of the Plaque does not violate the Establishment Clause because the Ten Commandments allegedly have some connection to the American legal system. However, the courts have reached a consensus that the Ten Commandments can constitutionally be displayed on government property in connection with the law only as part of a greater, comprehensive display of influences on American law. Since there are numerous sources for American law, most of which are secular, displaying the Ten Commandments alone, as the County has done here, sends a religious message to a reasonable observer.

The County and some of the *amici* aligned with it place considerable

emphasis on the fact that one of the plaintiffs knew about the Plaque for a long time before filing suit. But this point (in addition to having no legal relevance for reasons stated by plaintiffs-appellees) provides no factual support for the County's position. Adherents of minority religions have historically faced hostility when they have objected to government action endorsing the dominant religion, and plaintiffs who have filed Establishment Clause cases have often been subjected to verbal, economic, and physical retaliation after filing suit. Accordingly, residents of communities are often reluctant to step forward and challenge in court conduct by their local government that violates the Establishment Clause.

II. The Plaque Is One Of Many Similar Plaques And Placards Erected As Part Of A Religious Campaign Led By A Reactionary Religious Group

The County and the Preservation Network contend that the display of the Plaque does not violate the Establishment Clause because the County is merely preserving a historical artifact. As explained in detail in the briefs of plaintiffs-appellees and other *amici* supporting them, this argument is legally meritless. *See* Brief of Plaintiffs-Appellees ("Pl. Br.") at 42-45; Brief of *Amicus Curiae* American Jewish Congress at 10-18. The County's attempt to manufacture out of whole cloth a new legal test for religious displays that have been in existence for a long

period of time is completely inconsistent with governing precedents of the Supreme Court and this Court, which hold that a religious text or symbol on government property is unconstitutional if the purpose of its erection was religious or if the effect of its continued display is to endorse religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989); *ACLU of New Jersey v. Schundler* (“*Schundler II*”), 168 F.3d 92, 101, 105 (3d Cir. 1999); *ACLU of New Jersey v. Schundler* (“*Schundler I*”), 104 F.3d 1435, 1443, 1444 n.6 (3d Cir. 1997). The arguments made by the County and the Preservation Network would eviscerate the long-standing principle that “no one acquires a vested or protected right in violation of the constitution by long use.” *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

Moreover, neither the County nor the Preservation Network provides any evidence that the Plaque actually is a “historical artifact.” In fact, the Plaque is one of numerous similar plaques and placards erected in Pennsylvania and other parts of the United States during the 1910s and 1920s as part of a religious campaign spearheaded by a reactionary religious group called the International Reform Bureau (“the IRB”).

A. The IRB's Ten Commandments Campaign

The IRB described itself as “the first ‘Christian lobby.’” *History of the International Reform Bureau 2* (1910), reprinted in *Patriotic Studies of A Quarter Century of Moral Legislation* (Wilbur F. Crafts ed. 1911) (AmA47¹). It called itself “a union home missionary society to prevent the heathenizing of our Christian land.” *Id.* The IRB contended that “[t]his is a Christian Nation.” *Patriotic Studies, supra*, at 104 (AmA62). It was founded and headed by the Rev. Wilbur F. Crafts, who proclaimed himself to be “a Christian lobbyist.” *History of the International Reform Bureau, supra*, at 3-4, 35 (AmA48-49, 56). The IRB advocated for many religion-based goals, including “the recognition of ‘Christian morality’ in the national Constitution” (*id.* at 93 (AmA60)); strict divorce laws “allowing absolute divorce . . . only on scriptural grounds” (*id.* at 5, 17, 26-27, 61, 89 (AmA50, 52, 54-55, 58-59)); and daily prayer and Bible reading in all public schools (*Report of the International Reform Bureau for 21st Year, Ending June*

¹ In this section, *amici* cite various books and periodicals that were published between 1910 and 1922. Because these books and periodicals may not be readily available to the Court, *amici* are including within this brief a consecutively-paginated appendix which contains the pages from these books and periodicals that are cited herein. *Amici* provide parallel citations to this appendix in the format “AmA__.”

30, 1916, 20th Century Quarterly, September 1916, at 7 (AmA11); Wilbur F. Crafts, *Familiar Talks on That Boy and Girl of Yours* 213-15 (1922) (AmA6-8)).

In September 1916, the IRB initiated a campaign to post the Ten Commandments in or on the front of every courthouse, on the outside of all churches, and in all schools, mills, factories, and camps. *See The Commandments*, 20th Century Quarterly, September 1916, at 13 (AmA12); *Help Us Put the Commandments on School Walls*, 20th Century Quarterly, December 1916, at 2 (AmA14); *A Christmas Present*, 20th Century Quarterly, December 1916, back cover (AmA16); *Posting Commandments in Schools, Courts, Factories and on Churches*, 20th Century Quarterly, March 1917, at 18 (AmA19); *Restoring and Improving Bible Reading in Public Schools*, 20th Century Quarterly, March 1917, at 21 (AmA20); *Bible and Charts of Commandments in Schools*, 20th Century Quarterly, September 1917, at 10-11 (AmA23-24); *Resolutions Adopted Unanimously by Reform Bureau Directors*, 20th Century Quarterly, December 1917, at 12 (AmA27); *International Reform Bureau Plans, 1919-1922*, 20th Century Quarterly, June 1919, at 6 (AmA38). In a quarterly magazine that it published, the IRB urged, “[L]et the movement to put wall charts of the Commandments in the schools and mills and courts be taken up in every county by some preachers’ meeting or Bible Class or young people’s society.

Every court house should show its corner stone in a tablet containing God's law.”

September Slogan: “Back to the Bible” in School and Home, 20th Century

Quarterly, September 1919, at 5 (AmA40).

For its Ten Commandments campaign, the IRB developed a “wall chart” of the Commandments that was taken from Exodus 20 in the King James version of the Bible. *The Commandments*, 20th Century Quarterly, September 1916, at 13 (AmA12); *Wall Charts of the Commandments for Schools*, 20th Century Quarterly, December 1916, at 4 (AmA15). The IRB repeatedly advertised its Ten Commandments wall chart in its magazine. *See The Commandments*, 20th Century Quarterly, September 1917, at 16 (AmA25), December 1917, at 16 (AmA28), March 1918, at 2 (AmA30), December 1918, at 22 (AmA35), September 1919, at 15 (AmA41), December 1919, at 15 (AmA43), March 1920, back cover (AmA45). A paper placard version of this Ten Commandments wall chart could be purchased from the IRB for a dime. *Id.* Bronze plaque versions were available for \$350 each, and were manufactured by Matthews & Co. of Pittsburgh and by the Gorham Company of Providence. *The Commandments*, 20th Century Quarterly, March 1920, back cover (AmA45).

A comparison of a photograph of the Plaque at issue in this case with photographs in IRB publications of the Ten Commandments plaques designed by

the IRB reveals that the Plaque is identical to the IRB's plaques. *Compare* A. 577 (photograph of Plaque) *with The Commandments*, 20th Century Quarterly, June 1918, front cover (AmA31) *and Familiar Talks*, *supra*, at 164 (AmA4). For this reason, and because the Plaque was erected during the time period in which the IRB was pursuing its Ten Commandments campaign, there can be no legitimate doubt that the Plaque was originally created by the IRB (before making its way to the Council of Religious Education of the Federated Churches of West Chester, which gave the Plaque to the County).

In its magazine, the IRB depicted its Ten Commandments campaign as an extension of its campaign for daily Bible reading in schools. *Bible and Charts of Commandments in Schools*, 20th Century Quarterly, September 1917, at 10 (AmA23). The IRB contended that children would “be improved” by seeing the Ten Commandments daily. *See Posting Commandments in Schools, Courts, Mills and on Churches*, 20th Century Quarterly, March 1917, at 17 (AmA18). The IRB described its Ten Commandments wall chart as “a preacher of God’s law.” *The Very Time to Post the Commandments*, 20th Century Quarterly, December 1918, at 22 (AmA35). The IRB stated in its magazine its hope that “the whole world might soon be compelled to face the law of God” if its Ten Commandments campaign was successful. *Id.*

The campaign did have considerable success. Numerous IRB Ten Commandments plaques and placards were put up all over the United States. The places where the plaques and placards were erected include courthouses in Pittsburgh, Pennsylvania and Uniontown, Pennsylvania; the city hall and other government buildings in Uniontown; courtrooms in Washington, Pennsylvania and Greensburgh, Pennsylvania; schools in Washington (D.C.), Wichita (Kansas), Greeley (Colorado), Louisville (Kentucky), Wilmington (Delaware), Puerto Rico, and the Pennsylvania cities of Pittsburgh, McKeesport, Oil City, Greensburgh, Johnstown, Altoona, Tyrone, York, Wilkes-Barre, and Uniontown; industrial plants in Pittsburgh; and churches in Greensburgh. *See Posting Commandments in Schools, Courts, Factories, and on Churches*, 20th Century Quarterly, March 1917, at 18 (AmA18); *September Slogan: "Back to the Bible" in School and Home*, 20th Century Quarterly, September 1919, at 5 (AmA40); *The Commandments*, 20th Century Quarterly, March 1920, back cover (AmA45). The IRB crowed in its magazine that "[n]ew cities are reached every week with this fundamental reform" of "Posting Wall Charts of the Commandments in Schools, Mills, Courts and on the Churches." *Capturing "Trenches" on Twelve "Fronts,"* 20th Century Quarterly, March 1917, at 23 (AmA21). Indeed, in one city, Charleston, West Virginia, over four hundred of the IRB's Ten Commandments

placards were placed in schools, shops, and other public places. *The Very Time to Post the Commandments*, 20th Century Quarterly, December 1918, at 22 (AmA35). Many of the IRB's plaques still remain on display in Pennsylvania municipalities. See Brief for *Amicus Curiae* County Commissioners Association of Pennsylvania at 2 (“[a]n informal survey of Pennsylvania’s counties reveals that there are many plaques, similar to the one in Chester County, affixed to public buildings or in public places throughout Pennsylvania’s sixty-seven counties”).

The IRB devoted particular attention to the placement of its Ten Commandments plaques on courthouses. In its magazine, the IRB described the first erection of one its plaques on a courthouse (the Allegheny County Courthouse in Pittsburgh) as “[t]he most important event of the year in connection with our Bible work,” and the IRB featured that event as a cover story. See *Bible Readings and the Commandments*, 20th Century Quarterly, December 1918, at 18 (AmA34); *The Commandments*, 20th Century Quarterly, June 1918, front cover (AmA31). Writing about the Pittsburgh plaque in a 1922 book, IRB leader Rev. Crafts proclaimed that the plaque was placed “on the County Court House at the street level, where rich and poor, in the heart of the town, would daily face the law of God.” *Familiar Talks*, *supra*, at 165 (AmA5). According to the IRB, the Pittsburgh plaque “challeng[ed] nationwide attention as a precedent.” *Quarter*

Century of Manifold Reforming, 20th Century Quarterly, June 1919, at 5

(AmA37).² As a result, wrote Rev. Crafts, “[i]n many other cities movements were started to place the same appropriate tablet on the court house.” *Familiar Talks*, *supra*, at 165 (AmA5). One such movement obviously succeeded in the Borough of West Chester in 1920.

B. The Plaque’s Religious Origins Further Evince Its Unconstitutionality

The religious nature of the campaign that led to the erection of the Chester County Plaque provides further support for the plaintiffs’ claims that the Plaque has the purpose and effect of endorsing religion. In analyzing whether a reasonable observer would view a government action as having the purpose or effect of endorsing religion, “the reasonable observer . . . must be deemed aware” of the “history and context” underlying the action. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2468-69 (2002); *accord Schundler II*, 168 F.3d at 107. Moreover, the Supreme Court has stated, “[T]he Establishment Clause does not limit only the

² Rev. Crafts stated that the erection of the Pittsburgh plaque in 1918 constituted the first ever posting of the Ten Commandments on the exterior of an American courthouse. *See The Commandments*, 20th Century Quarterly, March 1920, back cover (AmA45). This further supports plaintiffs’-appellees’ point that *Marsh v. Chambers*, 463 U.S. 783 (1983), is inapplicable here, for *Marsh* only applies to non-sectarian practices that date back to the enactment of the U.S. Constitution. *See Pl. Br.* at 44-45.

religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message." *Allegheny*, 492 U.S. at 600-01.

Accordingly, in cases involving religious displays on public property, courts have treated the religious intent of the displays' donors as evidence of religious purpose or effect. In *Adland v. Russ*, 307 F.3d 471, 487 (6th Cir. 2002), *aff'g* 107 F. Supp. 2d 782 (E.D. Ky. 2000), in concluding that a monument containing the Ten Commandments endorsed religion, the court noted, "it seems to us that a reasonable observer would know that the [donating organization] donated the monument with a religious purpose in mind." In *Doe v. County of Montgomery*, 915 F. Supp. 32, 33, 36 (C.D. Ill. 1996), the court treated the fact that a religious sign was placed on a county courthouse at the request of religious organizations who were motivated by religious considerations as evidence of a religious purpose for the county's display of the sign. Here, likewise, the fact that the erection of the Plaque was the product of a religious campaign spearheaded by a religious organization for religious motives is additional evidence that the Plaque's purpose and effect are religious. *See also State v. Freedom From Religion Foundation*, 898 P.2d 1013, 1024 (Colo. 1995) ("absent evidence to the contrary, we presume

that the donative intent is also the basis of acceptance [and] ascribe to the donee the intent of the donor”).

C. The Plaque Cannot Constitutionally Be Displayed On The Courthouse As A “Historical Artifact”

The Plaque’s religious origin also makes clear that the Plaque cannot constitutionally be displayed on the Courthouse as a “historical artifact.” The Ninth Circuit has explained that, in order for any historical value that a religious display might have to be constitutionally relevant, the “display’s historical significance must be independent of the display’s religious content.” *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 631 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993). This Plaque has no historical significance that is independent of its religious roots. The Plaque is neither unique nor uncommon. Hundreds, if not thousands, of such plaques and placards were put up all over Pennsylvania and other parts of the country. The Plaque is not a historical monument, such as the Lincoln Memorial, which happens to contain some religious references. In addition, any historical value that the Courthouse itself might have does not provide any independent historical significance to the Plaque. *See Carpenter*, 93 F.3d at 631 (city could not “borrow the history” of a mountain and “attribute it” to a Christian cross erected on top of the mountain, as “the Cross

does not become imbued with the mountain's history merely because it was erected upon it," and the mountain "will retain its historical significance with or without a cross atop it").

If the Plaque is an "artifact" of anything, it is an artifact of religious proselytization and prejudice. And where a religious object's "history is intertwined with its religious symbolism . . . '[t]his kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion.'" *Id.* (quoting *Ellis*, 990 F.2d at 1526). While it might be appropriate to display the Plaque in a museum, as part of an exhibit designed to teach and remind people about an era during which government bodies paid little regard to the principle of separation of church and state or to the rights of religious minorities, continued display of the Plaque on the Courthouse does not serve this function. So long as the Plaque remains in its present setting – in isolation on the outside of a key government building – it conveys a message that Chester County is a Christian Protestant county.

Perhaps the most apposite analogy would be to a sign stating, "WHITES ONLY," on the entrance of a government building. It could fairly be said that such a sign has some historical significance. And it could also be said that such a sign could properly be placed in a museum, as a reminder of an era of racism. Yet no

one would argue that such a sign could continue to be displayed on the government building as a “historical artifact.” As long as the “WHITES ONLY” sign remained on the government building, it would keep conveying its racist message and its display would continue to be unconstitutional. Letting the Plaque stay on the Courthouse, instead of moving it to a museum or private property, would be no different.

III. Because The Plaque Is Not Part Of A Comprehensive, Unitary Display Relating To The Law But Hangs Alone, This Is An Easy Case, And The Display Of The Plaque Is Clearly Unconstitutional

A. The Plaque Is Not Part Of A Comprehensive Display Relating To The Law

The County and *amici* supporting it contend that a purported connection between the Ten Commandments and American law supports their position that the Plaque can constitutionally be displayed on the Courthouse. However, “[h]istorically, displays on government property of the Ten Commandments alone have been found to be unconstitutional.” *Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 929 (6th Cir. 2002). The courts have reached a consensus that the Ten Commandments can be displayed by the government in connection with the law only as part of a greater, comprehensive, unitary display of

influences on American law.³ The fountainhead of this body of law is the Supreme Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980). In *Stone*, the Court ruled that a state could not post the Ten Commandments in order to honor them "as the fundamental legal code of Western Civilization and the Common Law of the United States," stating that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Id.* at 41.

Following *Stone*, the court in *Adland*, 307 F.3d at 480, held unconstitutional a state's plan to place a Ten Commandments monument on the grounds of its state capitol in order "to remind [citizens] of the Biblical foundations of the laws of the Commonwealth." The court explained that "we cannot ignore [the state's] decision to focus only on the 'Biblical foundations' of the law" and the state's "adoption of a view that emphasizes a single religious influence to the exclusion of all other

³ Courts disagree, however, on what the content and background of such a display have to be in order for it to be constitutional. Compare *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845 (E.D. Ky. 2001) (display of Ten Commandments alongside eight American historical documents violated endorsement/effect test and had unconstitutional purpose) and *ACLU of Kentucky v. Grayson County*, No. Civ.A.4:01CV-202-M, 2002 WL 1558688 (W.D. Ky. May 13, 2002) (similar display violated endorsement/effect test but did not appear to have unconstitutional purpose) with *ACLU of Tennessee v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002) (similar display did not violate endorsement/effect test but had unconstitutional purpose) and *ACLU of Kentucky v. Mercer County*, 219 F. Supp. 2d 777 (E.D. Ky. 2002) (similar display did not violate endorsement/effect test and did not appear to have unconstitutional purpose).

religious and secular influences.” *Id.* at 481-82. Likewise, in *Books v. City of Elkhart*, 235 F.3d 292, 302, 306 (7th Cir. 2000), *rev’g* 79 F. Supp. 2d 979 (N.D. Ind. 1999), *and cert. denied*, 532 U.S. 1058 (2001), the court ruled that a city could not display a Ten Commandments monument in order to recognize the alleged impact of the Ten Commandments “on the fundamental legal principles of Western civilization,” since the monument was not “a component of a comprehensive display” and “the only ‘law’ displayed is the Commandments.” *See also Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part) (carving of Moses holding Ten Commandments on courtroom wall would be unconstitutional if it was only adornment on wall, but would be constitutional if it was part of larger display containing many secular lawgivers); *ACLU of Ohio Foundation v. Ashbrook*, 211 F. Supp. 2d 873, 891-92 (N.D. Ohio 2002) (Ten Commandments poster in courtroom did not serve “legal-historical function” because it was not “‘integrated’ in any meaningful way into a secular display” such as “a historical display of the development of law or . . . a collection of numerous moral codes”); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (display of Ten Commandments placard on courthouse wall did not “merely represent[] a recognition of a ‘historical, jurisprudential cornerstone of American legal significance;” placard would be constitutional only if “it were part of a

display to try to include all the various moral, historical, and political influences on our legal system”), *aff’d mem.*, 15 F.3d 1097 (11th Cir. 1994).

Here, too, by displaying the Ten Commandments by themselves, the County is ignoring the numerous secular influences that are principally responsible for shaping our law, and is sending a religious message to a reasonable observer. The main sources for American law include the common and statutory law of England, Roman law, the civil law of the post-Roman period, and the responses of courts, legislators, and legal theorists to the events, experiences, and controversies unique to American history. *See Adland*, 107 F. Supp. 2d at 785-86; *Harvey*, 811 F. Supp. at 672; Kermit L. Hall, et al., *American Legal History: Cases and Materials* 4, 23-24, 56-58, 114-16, 353-56, 455-57 (2d ed. 1996); Charles Phineas Sherman, *Roman Law in the Modern World* 1, 359-62, 386-88 (1917). Legal texts and codes that have had a significant impact on American law include the Magna Carta, Blackstone’s *Commentaries*, John Locke’s *Second Treatise of Government*, Montesquieu’s *Spirit of the Laws*, the Mayflower Compact, the Declaration of Independence, and the Bill of Rights. *See ACLU of Tennessee v. Hamilton County*, 202 F. Supp. 2d 757, 764 (E.D. Tenn. 2002); *Adland*, 107 F. Supp. 2d at 786; Hall, *supra*, at 5, 8, 11, 94. Most of these texts and codes do not even mention the Ten Commandments, and none place any emphasis on them.

Moreover, while the Ten Commandments undoubtedly do represent a significant code of human conduct and behavior, they are hardly unique. The Code of Hammurabi – the earliest compilation of Babylonian law – predated the Ten Commandments. *See The Hammurabi Code* 120 (Chilperic Edwards trans. 1904). Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and bearing false witness. *Id.* at 3, 6, 8, 21-22, 129, 153, 206-07, 209-10, 259-60. Other ancient codes similarly prohibited such things as murder, theft, adultery, and perjury. Examples include Hittite laws written around 1370 B.C.E., the Hindu Laws of Man (which were authored around 1100 B.C.E.), Ch’in Dynasty laws written in the Seventh Century B.C.E., Athenian laws of the 6th Century B.C.E., and Roman laws. *See The Hittite Laws* (E. Neufeld trans. 1951); Albert Kocourek & John H. Wigmore, *Sources of Ancient and Primitive Law* 469-99 (1915); A.F.P. Hails, *Remnants of Ch’in Law* 120-31, 138-49, 168-69 (1985); Ilias Arnaoutoglou, *Ancient Greek Laws: A Sourcebook* 22-23, 70-73 (1998); 1 *The Civil Law* 57-77, 11 *The Civil Law* 29-46 (S.P. Scot trans. 1932). For these reasons, it is inappropriate to treat the Ten Commandments as a major (let alone the central) source of American law. *See* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 *J.L. & Religion* 525, 558 (1999-2000).

B. Other Objects On The Courthouse Grounds Do Not Mitigate The Religious Message Of The Plaque

The County suggests that some other plaques on the Courthouse grounds mitigate the religious message of the Ten Commandments Plaque. *See* Brief for Appellants Chester County, *et al.*, at 80-81. These other plaques, however, have nothing to do thematically, visually, or otherwise with the Ten Commandments Plaque. *See* A. 595-96 (stipulation describing other plaques on Courthouse). The courts have repeatedly rejected arguments that the message of endorsement of religion communicated by the governmental display of a religious text or symbol can be neutralized by the display of unrelated secular objects in the general vicinity of the religious object. Instead, a religious text or symbol must be subsumed in a *unitary*, secular, greater display for its religious nature to potentially be neutralized for purposes of the endorsement test.

The Supreme Court's decision in *Allegheny*, 492 U.S. at 578-79, in which the Court struck down the display of a creche on the grand staircase of a courthouse, is particularly instructive. *Id.* at 598-602. The Court dismissed an argument that the religious message of the creche could be negated by other holiday decorations that were not visible from the grand staircase but were present in an adjacent "gallery forum" and in other parts of the courthouse. *Id.* at 581, 598 n.48.

The Court stated:

The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Id. at 598 n.48.

Indiana Civil Liberties Union v. O’Bannon, 259 F.3d 766 (7th Cir. 2001), *aff’g* 110 F. Supp. 2d 842 (S.D. Ind. 2000), *and cert. denied*, 534 U.S. 1162 (2002), is also quite instructive. In *O’Bannon*, the court enjoined the placement on the Indiana Statehouse grounds of a four-sided monument that contained, all on different sides, the Ten Commandments, the Bill of Rights, the preamble of the Indiana Constitution, and an inscription identifying the monument’s donor. *Id.* at 768-69. The Seventh Circuit concluded that the Bill of Rights and constitutional preamble did not mitigate the religious message conveyed by the Ten Commandments because “[t]he placement of the texts on different sides . . . inhibits observers from visually connecting the texts.” *Id.* at 773. The Seventh Circuit also found that numerous other monuments and displays that were on the Statehouse grounds and had historical significance did not neutralize the religious message of the Ten Commandments monument, since “[t]here are no other monuments or statues directly near this one and there is no unifying historical or

legal significance between this monument and the others.” *Id.* Moreover, the district court in *O’Bannon* explicitly rejected the state’s contention that monuments in the interior of the Statehouse should have been considered, explaining that such monuments could not be “reasonably regarded as part of the context.” 110 F. Supp. 2d at 857 n.14.

Similarly, in *Adland*, 307 F.3d at 488, the Sixth Circuit held that the presence of eight other monuments, markers, and signs near the Ten Commandments monument at issue could not mitigate the monument’s religious message, because the “display does not convey an easily discernible, unified theme to a reasonable observer.” In *Books*, neither the presence of two historical monuments on the municipal building lawn that hosted the Ten Commandments monument in controversy, nor the existence of numerous historical and cultural plaques inside the municipal building itself, kept the Seventh Circuit from concluding that the monument endorsed religion. *See* 235 F.3d at 295-96, 307, *rev’g* 79 F. Supp. 2d at 984-85, 1002. In *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 122, 125-26 (7th Cir. 1987), the court struck down the display of a nativity scene in the lobby of Chicago’s city hall, concluding that assorted seasonal decorations in the lobby and other parts of the city hall did not combine with the nativity scene to form one display, as they were not thematically related to the nativity scene. In

Chabad-Lubavitch of Vermont v. City of Burlington, 936 F.2d 109, 112 (2d Cir. 1991), the Second Circuit prohibited the display of a menorah in a city park, and dismissed an argument that nearby signs containing secular holiday messages mitigated the menorah’s religious message, for the menorah and signs were not “originally conceived as a unitary symbol.”

See also Glassroth v. Moore, ___ F. Supp. 2d ___, Nos. 01-T-1268-N, 01-T-1269-N, 2002 WL 31546094 at *4, 12 (M.D. Ala. Nov. 18, 2002) (plaques containing Bill of Rights and quotations of Rev. Dr. Martin Luther King, Jr. and Frederick Douglass could not negate religious message of Ten Commandments monument, as plaques were “over seventy feet away with no sign to indicate that they are connected to or related to the monument in any way”); *Ashbrook*, 211 F. Supp. 2d at 891 (religious message of Ten Commandments poster was not neutralized by nearby displays because “these displays were erected at vastly different times and the self-contained nature of each, as well as their physical separation, belies any connection”); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 872-73 (S.D. Ind. 2000) (court enjoined attempt to place monument at issue in *O’Bannon* on county courthouse lawn, rejecting argument that message communicated by monument should have been evaluated in context of other displays on other sides of courthouse); *ACLU of Central Ohio v. County of*

Delaware, 726 F. Supp. 184, 190 (S.D. Ohio 1989) (religious message sent by nativity scene in front of courthouse was not allayed by nearby peace tree, war memorials, and flagpole, since “[t]hey are not one unified display, but separate and unrelated”); *ACLU of Mississippi v. Mississippi State General Services Administration*, 652 F. Supp. 380, 384 (S.D. Miss. 1987) (display of cross on one side of public building was not made constitutional by display of three secular symbols on three other sides of building, “because placed one on each side of the building the symbols appear less as one single than as four separate displays”).

The other plaques and signs on the Courthouse – plaques memorializing those who served in World War II, commemorating the year the County built its first courthouse, marking the placement of a time capsule, and setting forth the hours of the Courthouse, and signs informing the public not to smoke or skateboard on Courthouse property – are not thematically or visually related to the Plaque and are far smaller than the Plaque. *See* A. 574, 578, 580-81, 595-96 (photographs of and stipulation describing other plaques and signs on Courthouse). They therefore cannot mitigate the Plaque’s religious message. Indeed, in comparison to the plaques the County relies on here, the displays found insufficient to negate a religious display’s message in the above-cited cases generally had greater historical and cultural significance, were closer to having a

thematic connection to the religious display, and were more comparable in size to the religious display.

IV. The Fact That The Display Of The Plaque Was Not Legally Challenged Earlier Is Very Likely The Result Of Hostility Toward Religious Minorities And Ensuing Fear On Their Part

The County and some of the *amici* supporting it place considerable emphasis on the fact that the Plaque was erected in 1920 but did not face legal challenge until 2001. As explained by plaintiffs-appellees, no viable laches or statute of limitations arguments can be made based on this point, because any such arguments have been waived procedurally and would be meritless substantively. *See* Pl. Br. at 21 n.7. In any event, the fact that the Plaque's display was not challenged many decades earlier may be explained as a product of one thing: fear. Adherents of minority religions have historically faced hostility that has made persons who object to government conduct endorsing the dominant religion reluctant to come forward and file suit.

In the era that followed World War I – the time period during which the Plaque was erected – intolerance toward religious minorities was particularly prevalent. With victory in World War I, the “enormous heightening of patriotic Americanism . . . reduced the general tolerance for nonconformist behavior.”

Sydney E. Ahlstrom, *A Religious History of the American People* 899 (1972).

Jews and Catholics, often associated with liberal and radical causes, were targets of a “pervasive hysteria” that manifested itself in a variety of forms: the violence of the Ku Klux Klan, the fundamentalist crusade to halt the teaching of evolution, restrictive admissions policies at colleges and universities, and the anti-immigrant fervor of the prohibition crusade. *Id.* at 899-901, 909-15. Other religious groups, including Eastern Orthodox and marginal Protestant denominations, also “bore the brunt of nativistic intolerance.” *Id.* at 916. Such religious hostility was exacerbated by the Great Depression, which gave birth to a number of “religio-political movements” influenced by “nativist bigotry,” fostering an atmosphere of “hate and fear” that “ever since those years . . . has remained a potent factor in American public affairs.” *Id.* at 926-29.

Distrust of religious pluralism continued to flourish even as America became socially more progressive in the decades following World War II. The 1950s witnessed “a new form of patriotic piety that was closely linked to the ‘cold war.’” *Id.* at 954. “[T]here seemed to be a consensus that personal religious faith was an essential element in proper patriotic commitment.” *Id.* The cultural turbulence and social experimentation of the 1960s and 1970s produced its own backlash, and religious fundamentalists came to play an increasing role in American politics in the

1980s and 1990s. *See, e.g.,* Sara Diamond, *Spiritual Warfare: The Politics of the Christian Right* 85 (1989).

It is thus not surprising that persons who have had the courage to bring legal challenges to government conduct violative of the Establishment Clause have been met with verbal, economic, and/or physical retaliation. One such plaintiff was Vashti McCollum, who brought in 1945 a suit that objected to the practice of releasing public school students from regular instruction and allowing them to attend religious classes held in public school classrooms. *See People of Illinois ex rel. McCollum v. Board of Education of School District No. 71*, 333 U.S. 203 (1948). After the case was filed, the McCollum house was vandalized. Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 84-89 (1996). Hate mail “arrived by the hundreds.” *Id.* “Excerpts include the following: ‘You slimy bastard, may your filthy rotten soul roast in hell’; ‘Rats like you should be put on the firing line to be shot’; ‘We will make some lovely incisions in your filthy bellies and pull out those nervy Guts one by one, slow and easy.’” *Id.* Vashti’s son Jim was physically attacked on the city streets. *Id.* at 87. “Harassment and cruelty were daily occurrences.” *Id.*

In 1981, Joann Bell and Lucille McCord filed suit to block religious meetings and the distribution of Gideon Bibles in the schools attended by their children. *See*

Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985). The plaintiffs' children were consequently called "devil worshipers." Alley, *supra*, at 106. "An upside-down cross was hung on thirteen-year-old Robert McCord's locker." *Id.* Threatening phone calls were made to the Bell home. "More than once a caller said he . . . was going to break in the house, tie up the children, rape their mother in front of them, and then 'bring her to Jesus.'" *Id.* at 107-08. Some of the threats were far from empty – the Bell home was burned down. *Id.*

In 1994, Lisa Herdahl brought an action challenging prayer practices in the public schools attended by her children. *See Herdahl v. Pontotoc County School District*, 887 F. Supp. 902 (N.D. Miss. 1995). As a result, her children were "called atheists and devil worshipers" by their classmates. Stephanie Saul, *A Lonely Battle in Bible Belt: A Mother Fights To Halt Prayers At Miss. School*, *Newsday*, Mar. 13, 1995, at A08. Other children were threatened with beatings by their parents if they were caught talking to or playing with the Herdahls. Alley, *supra*, at 177. There were reports that a boycott would be organized against the convenience store where Lisa Herdahl worked. Saul, *supra*, at A08. She gave up her job "because of threats against her children." Alley, *supra*, at 182. Threats were made to firebomb the Herdahls' house and to kill Lisa. *Id.* at 186.

The children of one of the plaintiffs in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (in which Bible reading in the public schools was held unconstitutional), were beaten on their way home from school, and their house was firebombed. Alley, *supra*, at 98. The son of the plaintiff in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2001) (a challenge to prayer at school-related events), was “harassed at school almost daily.” Jonathan Ringel, *Alabama Claims U.S. Court Order Denies Students’ Right to Pray*, *Fulton County Daily Report*, Dec. 4, 1998. Even though she was not a plaintiff but merely a vocal opponent of the policy at issue in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (in which student-led prayer at the beginning of school football games was held unconstitutional), Debbie Mason received threatening phone calls, was followed home by persons trying to scare her, and saw her husband and children become unable to find work in the town where they lived. Kenny Byrd, *Baptist Family Opposed to Football Prayer Feels Pressure*, *Baptist Standard*, June 12, 2000. The “emotional scars” inflicted by community harassment upon the plaintiff in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (a challenge to the display of a creche on government property), were so deep that “[w]hen queried by a newspaper feature writer whether he would ever again take a stand for a controversial belief that clashed with mainstream public opinion, he replied, ‘Never!’” Wayne R.

Swanson, *The Christ Child Goes to Court* 20-21 (1990). And, sadly, here, earlier this year, shortly after the district court's ruling, the founder of plaintiff Freethought Society received death threats. A. 603 (Verification of Margaret Downey, dated March 20, 2002).

It should therefore not be difficult to understand why the display of the Plaque went unchallenged until 2001.

V. Conclusion

For the foregoing reasons, the district court's decision should be affirmed.⁴

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⁴ *Amici* will not dignify with a detailed response the Preservation Network's wholly inappropriate comparison of the plaintiffs to the Taliban, save to say that, unlike the Taliban, the plaintiffs seek equal treatment by their government of all religious viewpoints, not destruction and death.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3, the undersigned certifies that he is one of the attorneys whose names appear on this brief and that he is a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using WordPerfect 9.0.

By: _____

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