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## QUARTERLY REPORT

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [kmcdowel@doe.state.in.us](mailto:kmcdowel@doe.state.in.us).

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## EXPERT FEES NOT RECOVERABLE AS “COSTS” UNDER *IDEA*

The Individuals with Disabilities Education Act (*IDEA*) authorizes a court, in its discretion, to award reasonable attorneys’ fees “as a part of the costs” to “a prevailing party who is the parent of a child with a disability.” 20 U.S.C. § 1415(i)(3)(B).<sup>1</sup> Congress did not elaborate on its meaning or intent of the phrase “as a part of the costs.” Consequently, there arose disagreement among the courts whether the expense for retaining expert testimony would be one of the “costs” that could be recovered by a prevailing parent.<sup>2</sup> On June 26, 2006, the U.S. Supreme Court determined that expert fees were not recoverable “costs.”

### ***Background***

The federal district courts struggled with this dilemma. It wasn’t until 2003 that a Circuit Court of Appeals finally addressed the issue. The U.S. Circuit Court of Appeals for the Eighth Circuit, in Neosho R-V School District v. Clark, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003), declined to grant the parents’ request for expert witness fees as a part of the *IDEA* cost award, noting that “costs” under the *IDEA* does not have a different and broader meaning in fee-shifting statutes than it has in the costs’ statutes that apply to ordinary litigation. 315 F.3d at 1033. As a result, costs associated with expert testimony could not exceed the \$40-a-day attendance fee under federal statutes (see *infra*).

The parents argued that a House Conference Report indicates the undefined term “costs” was intended to include expert fees. The report states:

The conferees intend that the term “attorneys’ fees as part of the costs” include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian’s case in the action or proceeding, as well a traditional costs incurred in the course of litigating a case.

Id.<sup>3</sup> The 8<sup>th</sup> Circuit declined to adopt this bit of legislative history. Although Congress used the term “costs” in the attorney-fee section, implying that “costs” include something more than

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<sup>1</sup>The Individuals with Disabilities Education Improvement Act of 2004 expanded the court’s authority to award attorneys’ fees against the parent’s attorney to a State Educational Agency (SEA) or Local Educational Agency (LEA) where the SEA or LEA was the prevailing party; the parent’s attorney initiated a complaint or engaged in a cause of action that was frivolous, unreasonable, or without foundation; or the parent’s attorney continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. A court could also award attorneys’ fees against the parent’s attorney or the parent to a prevailing SEA or LEA where it is shown the parent’s complaint or subsequent cause of action was initiated for an improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. See 20 U.S.C. § 1415(i)(3)(B)(II), (III).

<sup>2</sup>See “Attorney Fees and Witness Fees,” Recent Decisions 1-12: 1992, which can be viewed at [http://ideanet.doe.state.in.us/legal/pdf/recent\\_decisions/1992\\_recdec.pdf](http://ideanet.doe.state.in.us/legal/pdf/recent_decisions/1992_recdec.pdf).

<sup>3</sup>H.R. Conf. Rep. No. 99-687, at 5 (1986).

attorneys' fees, the IDEA does not specifically authorize an award of costs or define what items are recoverable as costs. *Id.* at 1031. Under Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S. Ct. 2494 (1987), the U.S. Supreme Court held that “absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant’s witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920,” which limit payment to a \$40-a-day attendance fee. 315 F.3d at 1031.

Supreme Court Justice Antonin Scalia, in West Virginia University Hospitals v. Casey, 499 U.S. 83, 92, *n.* 3, 111 S. Ct. 1138 (1991), commented on the House Report, *supra*, characterizing it as “an apparent effort to depart from ordinary meaning and to define a term of art.” 315 F.3d at 1032. There was no need to resort to any legislative history, the 8<sup>th</sup> Circuit found, noting the statute—although it does not define the term “costs”—is not ambiguous. Absent any exceptional circumstances, where the terms of a statute are unambiguous, judicial inquiry is complete. The term “costs” typically does not include expert fees. If any ambiguity exists, it was created by the conferees’ language and not by the statute. *Id.* at 1032-33.

Later that same year, the 7<sup>th</sup> Circuit followed suit (so to speak). In T. D. v. LaGrange School District No. 102, 349 F.3d 469 (7<sup>th</sup> Cir. 2003), the school district’s procedural lapses—notably in its “child find” responsibilities—resulted in an adverse administrative hearing decision. The parents and the school had had previous disagreements regarding one of the parents’ other children. The parents’ child in this case, T.D., was dismissed from a private school because it could not meet his needs. The parents had him privately evaluated. The private evaluator recommended T.D. attend a school with low teacher-student ratio, preferably a private, therapeutic day school. During the second semester, T.D.’s mother had several discussions with special education personnel from the local public school district. The mother visited the public school where T.D. was likely to attend and spoke with building personnel regarding the school’s programs, including its special education services. “At no point... did the school district request written consent to conduct a case-study evaluation of T.D. to determine his potential eligibility for various special-education programs.” *Id.* at 472.

The following school year, T.D. was enrolled in a private therapeutic day school, contingent on the parents obtaining a one-to-one aide. The parents requested a due process hearing, alleging the school district, *inter alia*, failed to evaluate T.D. despite actual notice that he may require special education services, failed to advise the parents of their rights, failed to consider their independent evaluation, and failed to advise the parents of placement options. *Id.* In essence, the parents alleged the school district denied T.D. a “free appropriate public education” (FAPE), and sought, in part, an evaluation, a determination of eligibility, reimbursement for costs expended on the private placement (including the independent evaluation), and a one-to-one aide to assist T.D. at the private school. *Id.* at 472-73. The hearing officer’s interim orders required the school to evaluate the student. This occurred and he was found eligible for services under IDEA. *Id.* at 473.

The hearing officer determined the school district was aware in early Spring the student might require special education services. It should have obtained the parent’s consent to evaluate at that time and then should have considered those results to determine T.D.’s eligibility for services. The school district’s procedural lapses “contributed to the parents’ need to place T.D.

in the private school and to obtain a one-on-one aide.” *Id.* The hearing officer ordered reimbursement for the costs of the aide and transportation. He denied reimbursement for the private school tuition because the private school “could not adequately meet his needs.” *Id.* He ordered T.D. transferred to the placement offered by the public school district but rejected by the parents.

The parents sought judicial review along with attorney fees and costs. Before the federal district court could rule on the merits, the parties settled their differences except as to attorney fees and “costs,” leaving this issue for the federal court to decide. The 7<sup>th</sup> Circuit eventually found that the parents, as the prevailing party at the administrative hearing, were entitled to some attorney fees.<sup>4</sup> *Id.* at 480.

However, T.D. was not entitled to the costs of his expert witness. IDEA’s fee-shifting provisions do not address the costs of expert witnesses. *Id.* at 481. Following the 8<sup>th</sup> Circuit’s decision in Neosho R-V Sch. District, *supra*, the 7<sup>th</sup> Circuit determined that, in the absence of “a specific authorization for the allowance of expert witness fees,” the federal courts will be bound by the fee limitations set out in 28 U.S.C. § 1821 and § 1920 (\$40 a day for each day in attendance). *Id.* at 481-82.

### ***The Circuit Courts of Appeal Split***

The U.S. Court of Appeals for the Second Circuit disagreed with the 8<sup>th</sup> and 7<sup>th</sup> Circuits. In Murphy, et al. v. Arlington Central School District Board of Education, 402 F.3d 332 (2<sup>nd</sup> Cir. 2005), the “expert” was a well known lay advocate who has been involved in—and has been the subject of—much litigation involving the lay advocate’s attempts to recover fees for her representation of parents in IDEA administrative hearings.<sup>5</sup>

The parents, with the advocate’s assistance, successfully obtained through the IDEA procedures a private placement for their son at the school district’s expense. They then sought “fees and costs” for the advocate’s services in the amount of \$29,350. The federal district court determined the advocate could not be reimbursed under the “attorneys’ fee” provision but she could collect for “expert consulting services.” *Id.* at 334. The district court also discounted the amount of “costs” of the advocate that could be recovered to \$8,650. The school district appealed. *Id.* at 335.

The 2<sup>nd</sup> Circuit agreed that “costs” is “a term of art that generally does not include expert fees in civil rights fee-shifting statutes”; however, the court believed congressional intent was to authorize the reimbursement of expert fees in IDEA actions. *Id.* at 336. The court asserted that IDEA “is different from ordinary fee-shifting statutes,” and put a great deal more stock in the conferees’ report than either the 8<sup>th</sup> or 7<sup>th</sup> Circuit Courts. The 2<sup>nd</sup> Circuit believed the conferees’

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<sup>4</sup>For a fuller discussion of the attorneys’ fee question in T.D., see “Attorney Fees and the *IDEA*: Demise of the ‘Catalyst Theory,’” **Quarterly Report** July-September: 2003.

<sup>5</sup>See “The Advocate and Attorney Fees,” Recent Decisions 1-12: 1999, which can be downloaded at [http://ideanet.doe.state.in.us/legal/pdf/recent\\_decisions/1999\\_recdec.pdf](http://ideanet.doe.state.in.us/legal/pdf/recent_decisions/1999_recdec.pdf).

report “unambiguously demonstrates that Congress expressly intended to allow, rather than prevent, prevailing parties to recover the costs of experts.” *Id.* at 337. “Absent a fee-shifting provision that allows for the recovery of appropriate expert fees, most parents with children with disabilities would have difficulty pursuing their case. Prohibiting expert witness fees for prevailing parents would thus frustrate the purposes of the IDEA, resulting in fewer children receiving the education they deserve.” *Id.* at 338. The 2<sup>nd</sup> Circuit affirmed the district court’s award of expert fees for the advocate’s work. *Id.* at 339.

### ***The Supreme Court Resolves the Conflict***

In a 6-3 decision, the U.S. Supreme Court disagreed with the 2<sup>nd</sup> Circuit’s analysis, finding that IDEA does not provide for the recovery of expert fees as “costs” by a prevailing parent. *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455 (2006).

Justice Samuel A. Alito, Jr., writing for the majority, noted that the IDEA was enacted pursuant to the Spending Clause of the U.S. Constitution.<sup>6</sup> The IDEA provides federal funds to States and local school districts to assist in the education of children with disabilities. The funds are not provided without required assurances. “[W]hen Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out unambiguously.... States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain.” 126 S. Ct. at 2458-59 (internal punctuation and citations omitted). With regard to the IDEA, “[w]e must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.” *Id.* at 2459.

The text of 20 U.S.C. § 1415(i)(3)(B) does provide for an award of “reasonable attorneys’ fees,” but “this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts.” *Id.*

The Supreme Court declined to adopt the parents’ argument that “costs” should be read to authorize reimbursement for all costs parents incur in IDEA proceedings, including expenses associated with expert assistance and testimony.

This argument has multiple flaws. For one thing, as the [2<sup>nd</sup> Circuit] Court of Appeals in this case acknowledged, “‘costs’ is a term of art that generally does not include expert fees.” 402 F.3d at 336. The use of this term of art, rather than a term such as “expenses,” strongly suggests that § 1415(i)(3)(B) was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing parents in connection with an IDEA case—for example, travel and lodging expenses or lost wages due to time taken off from work. Moreover, contrary to [the parents’] suggestion, § 1415(i)(3)(B) does not

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<sup>6</sup>Art. 1, § 8, cl. 1 (“The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”)

say that a court may award “costs” to prevailing parents; rather, it says the court may award reasonable attorney’s fees incurred by prevailing parents. This language simply adds reasonable attorney’s fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover. This list of otherwise recoverable costs is obviously the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees under § 1920 is strictly limited by § 1821, which authorizes travel reimbursement and a \$40 per diem. Thus, the text of 20 U.S.C. § 1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause.

126 S. Ct. at 2459-60. This stance is bolstered by the fact that Congress requires parents to receive a full explanation of their procedural safeguards, including the expressed right to recover attorneys’ fees, but there is not mention of expert fees. See 20 U.S.C. § 1415(d)(2). *Id.* at 2460.

In sum, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants. Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State’s receipt of IDEA funds.

*Id.* at 2461. The court then applied its previous constructions to this issue. In Crawford Fitting, the case the 8<sup>th</sup> Circuit referred to *supra*, the Supreme Court rejected the argument that the Federal Rule of Civil Procedure 54(d)<sup>7</sup> authorized an award of “costs” to a prevailing party that is not listed in 28 U.S.C. § 1821. Rather, “costs” for Rule 54(d) purposes is defined by the list set out in § 1920,<sup>8</sup> which, in turn, would be strictly limited by § 1821 with regard to witness expenses. *Id.* at 2461-62.

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<sup>7</sup>Fed. Rule of Civ. Proc. 54(d)(1): “*Costs Other Than Attorneys’ Fees*. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs....”

<sup>8</sup>28 U.S.C. § 1920. **Taxation of Costs**

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The reasoning of *Crawford Fitting* strongly supports the conclusion that the term “costs” in 20 U.S.C. § 1415(i)(3)(B), like the same term in Rule 54(d), is defined by the categories of expenses enumerated in 28 U.S.C. § 1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting*, that no statute will be construed as authorizing the taxation of witness fees as costs unless the statute “refer[s] explicitly to witness fees.” 482 U.S. at 445[.]

Id. at 2462. The court also relied upon its decision in *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S. Ct. 1138 (1991), where it found a virtually identical fee-shifting provision in another federal statute did not empower a district court to award expert fees to a prevailing party. “To decide in favor of [the parents] here, we would have to interpret the virtually identical language in 20 U.S.C. § 1415 as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in 42 U.S.C. § 1988 was held to mean in *Casey*.” Id. (emphasis original).

Lastly, the Supreme Court declined to rely upon the Conference Committee Report, *supra*, noting that this is insufficient for the purpose of statutory construction.

Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for [the parents’] position. Under these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey*, we cannot say that the legislative history on which [the parents] rely is sufficient to provide the requisite fair notice.

Id. at 2463. Justice Ruth Bader Ginsburg, concurring in part and concurring in the judgment, noted the majority opinion is consistent with previous decisions where the texts of fee-shifting, expense-allocation legislation did not alter the common import of the terms “attorneys’ fees” and “costs.” If Congress intended for prevailing parents to recover expert witness fees, Congress would have to so state.

Given the constant meaning of the formulation “attorneys’ fees as part of the costs” in federal legislation, we are not at liberty to rewrite the statutory text adopted by both Houses of Congress and submitted to the President...to add several words Congress wisely might have included. The ball, I conclude, is properly left in Congress’ court to provide, if it so elects, for the consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize, along with any specifications, conditions, or limitations geared to those fees and expenses Congress may deem appropriate.

Id. at 2465 (Ginsburg, J., concurring in part, concurring in judgment) (internal punctuation and citation omitted).<sup>9</sup>

### **THE TEN COMMANDMENTS: THE SUPREME COURT HANDS DOWN A SPLIT DECISION**

On June 27, 2005, the Supreme Court revisited the Ten Commandments and its previous decision in Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192 (1980).<sup>10</sup> In Stone, the Supreme Court found unconstitutional a Kentucky law requiring the display of the Ten Commandments in public school classrooms. The court found that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths...” 449 U.S. at 41.<sup>11</sup> It rejected the Kentucky legislature’s stated secular purpose in requiring public school classrooms to post the Ten Commandments (the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World). 449 U.S. at 45. But Stone dealt with a legislative mandate. It did not address the passive acceptance of a donated monument or legislation that permits—rather than requires—certain displays of historical significance that include the Ten Commandments.<sup>12</sup>

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<sup>9</sup>The Circuit Court of Appeals for the District of Columbia, in Goldring, et al. v. District of Columbia, 416 F.3d 70 (D.C. Cir. 2005) reached the same conclusion as the 7<sup>th</sup> and 8<sup>th</sup> Circuits, *supra*. Plaintiffs sought review by the Supreme Court. On June 30, 2006, the Supreme Court denied certiorari. See Goldring v. District of Columbia, 126 S. Ct. 2985 (2006).

<sup>10</sup>The Ten Commandments are also known as the “Decalogue” (from the Greek for “ten words”). There is no precise numbering of the commandments. As a result, the numbering of the commandments will vary somewhat among the faith traditions. Drawn from *Exodus* 20:2-14 and *Deuteronomy* 5:6-18, the Ten Commandments contain proscriptions against polytheism, idolatry, murder, adultery, theft, false testimony, and greed, while requiring reverence for God, respect for the Sabbath, and respect for one’s parents. These commandments were part of the revelations to Moses as detailed in Hebrew Scripture. According to rabbinical tradition, there are 613 *mitzvot* (literally, “commandments”; singular, *mitzvah*) in the Pentateuch, the first five books of the Bible in which legal requirements are established. The Ten Commandments are the best known of these *mitzvot* (248 positive, 365 negative). *The Penguin Dictionary of Religions* (John R. Hennells, Ed., 1984).

<sup>11</sup>Later Supreme Court decisions have held that, in some cases, “context” may override impermissible “content.” See Allegheny Co. v. Greater Pittsburgh American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086 (1989), which addressed whether the presence of a nativity scene (a crèche) on the Grand Staircase in the county courthouse violated the Establishment Clause of the First Amendment. The majority opinion determined that, when viewed in its overall context, the crèche’s preferential placement amounted to a promotion of a Christian holy day rather than acknowledging Christmas as a cultural phenomenon.

<sup>12</sup>For additional articles on this topic, please consult the Cumulative Index under “Ten Commandments” and “Decalogue.”

## ***Monuments and Establishment Clause Challenges***

By the time the Supreme Court decided Stone in 1980, a number of communities around the country had accepted donations from a fraternal organization of a monument that contained Judaic, Christian, and patriotic symbols, along with an amalgamation of Jewish, Protestant and Catholic versions of the Ten Commandments.<sup>13</sup> The monuments were donated in the mid-1950s. Producer Cecil B. DeMille, whose movie “The Ten Commandments” was about to be released, was also involved in the funding of the monuments as a means of promoting his movie. These monuments were well entrenched by the time Stone was handed down.

There have been a considerable number of legal challenges around the country to these monuments, although these disputes did not arise until well after 40 years had passed since the monuments were donated and erected. Indiana has had such a dispute, one that turned out to be a harbinger of the Supreme Court’s later decisions.

In Books v. City of Elkhart, 79 F.Supp.2d 979 (N.D. Ind. 1999), the federal district court had to decide a First Amendment Establishment Clause<sup>14</sup> challenge to a monument with the Ten Commandments donated to the city in 1956 by the Fraternal Order of Eagles (FOE), the fraternal organization that was spear-heading the monument distribution around the country.<sup>15</sup> The monument was erected on the grounds of the Elkhart municipal building. The district court judge was less certain than the Supreme Court in Stone as to the exact nature of the Ten Commandments or even what legal test should be applied.

The first difficulty before the court in deciding on a test [for determining whether a display of the Ten Commandments would violate the First Amendment] is determining how to characterize the Ten Commandments. It is not exactly a religious symbol, as in challenges to displays of nativity scenes and Latin crosses, because it has a message. It is not purely a religious message, though, because it has great historical and legal significance in this country. It is close to being a religious free speech issue, but not quite, because the donation of the monument [by the FOE] means that it is no longer the speech of a private actor in a forum which the City has opened to the public.... In Establishment Clause analysis dealing with religious symbols and messages, context is everything.

79 F.Supp.2d at 989. The district court later determined that the monument containing the Ten Commandments “is no more religious than the national motto, ‘In God We Trust,’ and no more pervasive than the presence of the motto on national coins and currency.” Id. at 993. In this

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<sup>13</sup>As the 11<sup>th</sup> Circuit Court of Appeals observed, “Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments.” These differences are not trivial or semantic, but reflect deep theological disputes. Glassroth v. Moore, 335 F.3d 1282, 1299, n. 3 (11<sup>th</sup> Cir. 2003).

<sup>14</sup>“Congress shall make no law respecting an establishment of religion....”

<sup>15</sup>The FOE’s purpose was not religious *per se*. Its interest was associated with a movement by a Minnesota judge to improve the moral fiber of youth and reduce juvenile delinquency.

case, the FOE, in the 1950s, was engaged in a national effort to address moral standards among the youth and was not affiliated with any religious group. The City of Elkhart maintained the monument, along with other monuments at its municipal building, for cultural and historical reasons. The court found there was present a secular purpose, which satisfies the first part of the *Lemon* test.<sup>16</sup>

Whether a monument or similar display in a public area gives one the impression of government endorsement of religion depends upon the context of the display. *Id.* at 1000, considering the first and second parts of the *Lemon* analysis under an “endorsement” analysis. The court reviewed the matter based upon what a reasonable person might perceive when viewing the monument in its context with other monuments on the municipal lawn. *Id.* at 1001. That is, is the monument part of a larger display of monuments of historical and cultural importance? *Id.* at 1002. Although the text of the Ten Commandments dominates the monument’s surface, a “neutral observer looking at the monument, presumed to have an awareness of its history, would know that the Ten Commandments has both religious and historical significance in this nation.” *Id.* The presence of various religious symbols would likewise lead the “reasonable observer” to view this as an attempt to “acknowledge equally the significance of the major religions represented in this country at the time of [the monument’s] donation to the City.” The reasonable observer would note that the monument is “part of [the City’s] overall collection of displays of historical and cultural significance,” although the lawn is relatively small. *Id.*

“Local municipalities,” the court added, “should be granted some latitude by the federal courts in how they arrange artistic displays in the space they have available.” The presence of the monument on the lawn of the City’s municipal building did not present an “endorsement” problem, but there was a question as to its placement near one of the main entrances to the building. However, it is not the only such monument or display. Had the lawn been a bigger area, the court opined, this would not be a significant question. Notwithstanding, the court held “that it is not an unconstitutional endorsement of religion for the City of Elkhart to acknowledge the importance of the Ten Commandments in the legal and moral development of this nation by displaying this monument in its present location on the lawn of the Municipal Building.” *Id.* at 1002-03.

The court also concluded there was no coercion present. Elkhart did not expend any public funds in the maintenance of the monument, although it did ensure the grounds were kept, an event that would occur whether there was a monument there or not. In addition, no one was forced to stand in front of the monument and read its religious message. *Id.* at 1005.

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<sup>16</sup>The *Lemon* three-part test is derived from the Supreme Court’s decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971). In order to pass constitutional muster, a challenged governmental action: (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive entanglement with religion. Failure to satisfy any one of these three parts will render the challenged activity unconstitutional. As will be seen, *infra*, the *Lemon* test is not always a satisfactory framework. The Supreme Court has employed hybrid tests based on *Lemon* for certain challenged governmental activities.

Elkhart had not engaged in any content-based or viewpoint discrimination. The monument was donated in 1956. Elkhart accepted the gift—albeit, a religious one—but displayed it not as a religious monument but within a larger display of items considered to be of cultural and historical significance. The federal district court granted summary judgment to Elkhart.

A three-member panel of the 7<sup>th</sup> Circuit Court of Appeals reversed (2-1). In Books v. City of Elkhart, 235 F.3d 292 (7<sup>th</sup> Cir. 2000), the Circuit Court acknowledged the monument sat on the municipal grounds for 40 years without any controversy. It was only in 1998 that suit was threatened should the monument not be removed. Although the text of the Ten Commandments is religious, there is “no doubt [the Ten Commandments] played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.” Id. at 302. The monument and its message should “not be considered in the abstract; instead, courts must ask whether the particular display at issue, considered in its overall context, could be said to advance religion.” Id. at 303 (internal punctuation and citation omitted).

The 7<sup>th</sup> Circuit determined the display of the monument was not secular because its presentation on the municipal lawn did nothing to diminish the obvious religious character. Although the reason for accepting the monument was secular (to address wayward youth), the code of conduct chosen was religious in nature. Although this code contains some legitimate concerns for civil authorities, there are other areas that are unquestionably religious in nature and beyond the legitimate role of government. Id.

The monument also failed the “context” test. In this case, there was a “symbolic union” between religion and government because the monument was displayed at the seat of government (the municipal building grounds), which marks it “implicitly with governmental approval[.]” Id. at 306-07.

The U.S. Supreme Court denied certiorari. See Books v. City of Elkhart, 532 U.S. 1058, 121 S. Ct. 2209 (2001), but not without rare comment from three dissenting justices, including the then-Chief Justice, the late William Rehnquist. “[W]e have never determined, in Stone or elsewhere, that the Commandments lack a secular application.... Undeniably..., the Commandments have a secular significance as well [as serving as a sacred text], because they have made a substantial contribution to our secular codes.” 532 U.S. at 1061. The context and history, especially as the monument sat there for over four decades without controversy, are relevant. In addition, the dissent added, even assuming there is some religious meaning associated with the monument, “the city is not bound to display only symbols that are wholly secular, or to convey solely secular messages. In determining whether a secular purpose exists, we have simply required that the displays not be ‘motivated wholly by religious considerations.’ Lynch v. Donnelly, 465 U.S. 668, 680, 104 S. Ct. 1355 (1984). The fact that the monument conveys some religious meaning does not cast doubt on the city’s valid secular purposes for its display.” 532 U.S. at 1062. The dissent does not believe that, within the contextual analysis and in consideration of the monument’s long history, the monument sends any message of government endorsement of religion.” Id.

Chief Justice Rehnquist’s dissent proved to be prophetic.

## ***State and Local Legislative Maneuvering***

It was a legislative initiative mandating the display of the Ten Commandments in public school classrooms that resulted in Stone v. Graham. State and local legislative actions continued well after Stone was decided, often in an attempt to circumvent the holding in Stone. A considerable amount of litigation followed. The courts engaged in more scrutiny for these types of endeavors than for the cases involving donated monuments. While courts were widely divided on the constitutionality of donated monuments, there was more consistency when legislative actions were at the core of the dispute. Indiana was no different.

In the 2000 session of the Indiana General Assembly, legislation was passed containing the following language:

### **Displays on Public Property**

An object containing the words of the Ten Commandments may be displayed on real property owned by a political subdivision along with other documents of historical significance that have formed and influenced the United States legal or governmental system. Such display of an object containing the words of the Ten Commandments shall be in the same manner and appearance generally as other documents and objects displayed, and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects.<sup>17</sup>

This display could occur on real property owned by the State or any political subdivision, including a public school district.

The grounds of the State Capitol Building in Indianapolis contain a number of monuments to various Indiana, national, and historical groups, personages, and events. On the south lawn there had once been a monument with the Ten Commandments on it. The monument was donated to the State in 1958 by the FOE. The monument was removed in 1991 after being vandalized several times.

After the passage of legislation, one of the Senate sponsors of the bill donated to the State a monument prepared by the Indiana Limestone Institute. The monument was to be placed on the south lawn of the State Capitol Building. The monument contained a version of the Ten Commandments similar to that addressed in Books, *supra*, along with the Preamble of the 1851 Indiana Constitution<sup>18</sup> and the Bill of Rights. The monument was four-sided, stood seven feet tall and weighed about 11,500 pounds. The governor, in accepting the donation on behalf of the State, said through a press release that the monument would be placed on the State Capitol

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<sup>17</sup>P.L. 22-2000, adding I.C. § 4-20.5-21 *et seq.* and I.C. § 36-1-16 *et seq.* to the Indiana Code.

<sup>18</sup>“To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.”

Building lawn to remind people of “some of our nation’s core values,” which all people “need to be reminded of from time to time.”

The lawsuit followed.

In Indiana Civil Liberties Union, Inc., et al. v. O’Bannon, 110 F.Supp.2d 842 (S. D. Ind. 2000), the plaintiffs claimed the monument violated the First Amendment’s Establishment Clause. The plaintiffs did not allege the legislation was unconstitutional nor did they assert the monument would foster excessive entanglement. Accordingly, the district court analyzed the dispute under the “endorsement” test, combining the first two parts of the *Lemon* test: (1) Does the monument serve a secular purpose? and (2) Is the effect of the monument one that advances or inhibits religion?

As a preliminary matter, the court noted that the general rule for determining the purpose behind a governmental action is to consult and to defer to the stated purpose. The avowed purpose, however, must be sincere and not a sham. 110 F.Supp.2d at 849. The monument would also have to be reviewed in its “context” as a part of the overall display to determine whether, in fact, there was a secular purpose. *Id.* The only stated purpose was contained in the governor’s press release—to serve as a reminder of core values and ideals. Although the State represented at oral argument that the Ten Commandments were “ideals” that animated American government, it was unable to establish any historical linkage between seven of the commandments and “weak historical links to three of them.”<sup>19</sup> *Id.* at 851.

The monument itself would have the Ten Commandments appearing on one of the four sides. There would be no explanatory text as to the historical context within which it should be viewed, nor would there be any explanation of the relationship of the Ten Commandments to the other inscriptions on the monument. “Rather, the Ten Commandments will be displayed in such a way that a person looking at them will see only the Ten Commandments, as they are set out on a seven-foot tall limestone block.” The purpose, the court concluded, was religious and not secular. *Id.* at 852.

The court also noted the text of the Ten Commandments was prominently located, to the exclusion of everything else, on one side of the monument. A reasonable observer would not be able to discern the “historical context” without walking around the monument to read everything inscribed. Even after circumnavigating the monument, there would be nothing to assist the reasonable observer to put the documents into a secular context. “[A] reasonable person looking at this monument would undoubtedly view it as an endorsement of religion.” *Id.* at 856-57.

The State appealed to the 7<sup>th</sup> Circuit. The 7<sup>th</sup> Circuit, again by a 2-1 count, upheld the district court’s decision. Indiana Civil Liberties Union, Inc., et al. v. O’Bannon, 259 F.3d 766 (7<sup>th</sup> Cir. 2001). The 7<sup>th</sup> Circuit did not state that such a display would always violate the Establishment Clause, but in this case, the State did not articulate a valid secular justification for the erection of

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<sup>19</sup>The three were “thou shalt not kill” (although not all killing is, in and of itself, illegal); “thou shalt not commit adultery” (although such laws are no longer on the books); and “thou shalt not bear false witness against thy neighbors” (possible relationship to perjury laws). 110 F.Supp.2d at 851, n. 10.

this monument on public property. In addition, “[t]he permanence, content, design, and context of the monument amounts to the endorsement of religion by the state.” *Id.* at 773. By occupying a prominent position on the grounds of the seat of government for the State of Indiana—and with the Ten Commandments prominently displayed on the monument itself—“a reasonable observer would think that this monument...occupies this location with the support of state government. And, since we find that a reasonable observer would think the monument conveys a religious message, we hold that it impermissibly endorses religion.” *Id.* at 772. The Supreme Court denied certiorari, without comment. *O’Bannon v. ICLU, Inc., et al.*, 534 U.S.1162, 122 S. Ct. 1173 (2002).<sup>20</sup>

### ***The Supreme Court Weighs In***

With the federal courts wrestling with a virtual explosion of disputes surrounding the Ten Commandments—and with the federal courts split on how to address such disputes—the Supreme Court found it necessary to review two cases, applying the “reasonable observer” test to a display of a monument within the context of a larger display and one involving a local legislative act.

### ***The Texas State Capitol Grounds***

*Van Orden v. Perry, et al.*, 545 U.S. 677, 125 S. Ct. 2854 (2005) is similar to *Books*. The Texas State Capitol has 22 acres of land surrounding it. On this property are 17 monuments and 21 historical markers. One of the monuments is a six-foot tall monolith donated by the FOE in 1961. The federal district court found Texas had a valid secular purpose in recognizing and commending the FOE for their efforts to reduce juvenile delinquency, and that a reasonable observer, mindful of history, purpose, and context, would not conclude that the passive acceptance of the monument would convey a message of State endorsement of religion. The 5<sup>th</sup> Circuit affirmed. 125 S. Ct. at 2858-59.

The Supreme Court, by a plurality, affirmed the 5<sup>th</sup> Circuit, finding the monument did not violate the Establishment Clause. Chief Justice Rehnquist noted the monument was on the grounds of the Texas State Capitol without incident for over 40 years. The Chief Justice referred to Supreme Court jurisprudence as “Januslike,” with one face looking “towards the strong role played by religion and religious traditions throughout our Nation’s history,” while “[t]he other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.” *Id.* at 2859.

...Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in

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<sup>20</sup>The monument did not go quietly into the night. The state legislator prevailed upon the commissioners from his county to erect the monument on the courthouse lawn. The results were predictable. In *Kimbley v. Lawrence County*, 119 F.Supp.2d 856 (S.D. Ind. 2000), the court found “dubious” the commissioners’ explanation the monument represents core values and promotes local business (limestone). The purpose of the monument remained religious and not secular, and thus violated the First Amendment’s Establishment Clause.

acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage[.]

Id. Although the *Lemon* test has been the governing test for Establishment Clause challenges, the factors identified in *Lemon* serve as “no more than helpful signposts.” Id. at 2860, citing Hunt v. McNair, 413 U.S. 734, 741, 93 S. Ct. 2868 (1973). “Many of our recent cases simply have not applied the *Lemon* test...Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.” Id. at 2861 (citations omitted).

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.

Id. The Chief Justice noted that there has been an “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” Id., quoting Lynch v. Donnelly, 465 U.S. 668, 674, 104 S. Ct. 1355 (1984). It was in 1789 that both Houses of Congress passed resolutions asking President George Washington to issue a Thanksgiving Day Proclamation to “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God.” Id., citing 1 *Annals of Congress* 90, 914. President Washington’s subsequent proclamation was replete with references to the Supreme Being, attributing to God the foundations and successes of the young Nation. Id.

The Supreme Court itself has acknowledged that religion is closely identified with American history and government, and that the history of man is inseparable from the history of religion. Id. at 2861-62 (internal punctuation and citations omitted). It would be incongruous to impose on States more stringent First Amendment limits than are imposed on the Federal government. Id. at 2862.

This dispute involves the display of the Ten Commandments on government property outside the Texas State Capitol. Such displays are common throughout America.

We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze.<sup>21</sup> Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandment tablets.

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<sup>21</sup>See “Holy Moses, Roy’s Rock, and the Frieze: The Decalogue Wars Continue,” **Quarterly Report** April-June: 2003. The referenced frieze is reproduced at page two.

Id. Similar displays can be observed throughout Washington, D.C., including the Library of Congress, the National Archives, the Department of Justice, the federal courthouse, the House of Representatives, and the Washington, Jefferson, and Lincoln Memorials. Id. at 2862-63.

The Ten Commandments are religious and are viewed as such. Any monument with the Ten Commandments on it would have religious significance, but Moses—who received the commandments on Mt. Sinai—was a lawgiver as well as a religious figure. “There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public classroom. *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980)(*per curiam*). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose.” Id. at 2863.

Stone does not stand for the proposition that the Ten Commandments played an exclusively religious role in the history of Western Civilization.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit.... Texas has treated her Capitol grounds monuments as representing the several strands in the State’s political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas’ display of this monument violates the Establishment Clause of the First Amendment.

Id. at 2864.

### **“Real Threat and Mere Shadow”**

Justice Stephen G. Breyer, concurring in the judgment, noted (as did the others) that the so-called “tests” developed to analyze such conflicts are not adequate substitutes for “legal judgment,” especially in “difficult borderline cases” such as this one. Id. at 2869. Relying on the text of the monument is inadequate. “Rather, to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.” Id. (emphasis original). A display of the tablets containing the Ten Commandments (or a representation of the Ten Commandments) can convey not only a religious message but a secular moral one as well. Such displays are evident in courthouses around the country and in the Supreme Court itself. Id. at 2869-70.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets’ message to predominate. And the monument’s 40-year history on the Texas state grounds indicates that that has been its effect.

Id. at 2870. This is bolstered by the nature of the group that donated the monument—the FOE, a private civic organization that “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” Id. The physical setting itself does not suggest a purely religious purpose. “The setting does not readily lend itself to meditation or any other religious activity.” The message that predominates is a reflection of the relationship between ethics and law, concepts that citizens have historically endorsed. Id.

It is also noteworthy—although not conclusive in and of itself—that “40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by the petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation.... Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.” Id. at 2870–71.

This case is also distinguishable from Stone. “The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state.” Id. at 2871.

The Texas display serves “a mixed but primarily nonreligious purpose” that does not advance or inhibit religion, nor does it create an excessive entanglement of government with religion. “But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment’s Religious Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.” Id. (emphasis original).

A contrary decision would actually “exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” Id.

He concluded that “where the Establishment Clause is at issue, we must distinguish between real threat and mere shadow. Here, we have only the shadow.” Id.

### ***Local Legislative Actions and Divisiveness: The Objective Observer***

In the second case decided on June 27, 2005, the “reasonable observer” found a real threat. McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky, et al., 545 U.S. 844, 125 S. Ct. 2722 (2005) began in 1999 when McCreary County and Pulaski County erected in their Kentucky courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments. Both were erected with some ceremony and in prominent places. Anyone conducting business in the courthouses would readily see the postings. 125 S. Ct. at 2728-29. The American Civil Liberties Union of Kentucky (ACLU) sued

the counties, asserting the displays violated the Establishment Clause and seeking injunctive relief. Id. at 2729.

Shortly after the suit was filed, the legislative bodies for both counties, through virtually identical resolutions, authorized a second, expanded display, stating that the Ten Commandments are “the precedent legal code upon which the civil and criminal codes of...Kentucky are founded,” bolstering this position with the following: “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”;<sup>22</sup>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.” Now posted along with the edited King James version of the Ten Commandments were eight other documents in smaller frames, each having a religious theme or excerpted to highlight religious content. Id. at 2729-30.

The federal district court entered a preliminary injunction, ordering the “display...be removed from [each] County Courthouse IMMEDIATELY” and that no county official “erect or cause to be erected similar displays.” Id. at 2730 (emphasis original). Applying the *Lemon* test, the district court found the original display lacked any secular purpose, rejecting the Counties’ argument the display was intended to be educational. The second version, the court found, “clearly lack[ed] a secular purpose” because the Counties “narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity.” Id.

The Counties hired new lawyers and then installed yet another display—the third within the year. The Counties did not create the third display through a resolution, nor did they repeal the resolution that created the second display. This display consisted of nine framed documents, all of equal size, with one setting out the Ten Commandments identified explicitly as the “King James Version.”<sup>23</sup> Id.

The plaintiffs sought to enjoin the third display. The district court granted the request, relying upon Stone v. Graham. The Counties’ stated educational goal is belied by the history of the litigation, the court noted. The first display explicitly violated Stone; the second one emphasized a religious objective by surrounding the Ten Commandments with other references to Christianity. From this history, the court reasoned the Counties’ clear purpose was to post the

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<sup>22</sup>Roy Moore is the former Chief Justice of the Alabama Supreme Court. See Glassroth v. Moore, 335 F.3d 1282 (11<sup>th</sup> Cir. 2003), where his antics ran afoul of the federal courts, resulting in his removal from office.

<sup>23</sup>The other documents included the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the *Star Spangled Banner*, the Mayflower Compact, the National Motto (“In God We Trust”), the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection was entitled “The Foundations of American Law and Government Display.” Id. at 2731.

Commandments and not to educate. *Id.* at 2731. A divided panel of the 6<sup>th</sup> Circuit Court of Appeals affirmed.<sup>24</sup> The U.S. Supreme Court (5-4) affirmed the 6<sup>th</sup> Circuit.

Justice David H. Souter, writing for the majority, reiterated the court’s holding in *Stone* that the Ten Commandments “are undeniably a sacred text in the Jewish and Christian faiths.” *Id.* at 2732, quoting *Stone*, 449 U.S. at 41. In analyzing governmental action and whether there is a secular legislative purpose, “[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. [Citations omitted. Internal punctuation omitted.] When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *Id.* at 2733 (citations omitted).

The Supreme Court rejected the suggestion from the Counties that the purpose prong of *Lemon* should be abandoned because of its susceptibility to subjective selection of evidence to divine intent. The purpose of a legislative body is not “unknowable,” as the Counties asserted. An “understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts. [Citation omitted.] The eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show upon in the text, legislative history, and implementation of the statute, or comparable official act. [Citations and internal punctuation omitted.] There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.” *Id.* at 2734.

The Supreme Court has found only four governmental actions motivated by illegitimate religious purpose since *Lemon* was decided. *Id.* at 2733, *n.* 9. In one case, the purpose was inferred from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. In another, the court relied upon a statute’s text and the detailed public comments of its sponsor when determining the purpose of a state law requiring the teaching of creationism along with evolution. In some cases, it is the governmental action itself that indicated the patently religious purpose, such as the required study of the Bible in the public schools. “In each case, 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 2734-35.

*Lemon* requires a government action to have a secular purpose. “[A]lthough a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 2735.

The court also declined to accept the Counties’ argument that its review should be concerned only with the latest legislative action (the third display). “[T]he world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government’s actions and competent to learn what history has to show. [Citations

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<sup>24</sup>*ACLU v. McCreary County*, 354 F.3d 438 (6<sup>th</sup> Cir. 2003).

omitted.] The Counties’ position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose.” Id. at 2736-37 (citation and internal punctuation omitted).

In this case, the first display was similar to the one in Stone, setting out the text of the Ten Commandments, standing alone, and not part of a secular display. Although Stone “stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message,” there was no attempt to do so here.<sup>25</sup> In the installation ceremony in Pulaski County, the county executive and his pastor made overtly religious statements. “The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.” Id. at 2738.

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. at 2738-39. The actions of the Counties in response to the lawsuit were telling. They modified their exhibits through nearly identical resolutions, listing a series of American historical documents with theistic references. Their purpose was to continue to provide a setting for the Ten Commandments. The resolutions expressed support for a former Alabama judge who posted the Commandments in his courtroom and included a reference to the Kentucky legislature adjourning a session in honor of “Jesus Christ, Prince of Ethics.” The second display continued to highlight references to God with a Christian perspective. “The display’s unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content.” The displays and the resolutions “presented an indisputable, and undisputed, showing of an impermissible purpose.” A reasonable observer would not forget the second display. Id. at 2739.

The Counties then changed lawyers and the displays themselves, but without repealing for the former resolutions. The third exhibit—The Foundations of American Law and Government—did not prominently display the Ten Commandments among other exhibits, as the second display had. The new display and revamped purpose—to educate citizens regarding documents that have played a significant role in the formation of American law and government—does not negate the memory of the reasonable observer.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action 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

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<sup>25</sup>The court made a distinction between the text and the symbolic representation. “Displaying the text is...different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith.” Id. at 2738.

resolutions for the second display passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done.... No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

Id. at 2740. The selection of “foundation” documents was also suspect. All had theistic references, but more important “foundation” documents—which did not contain theistic references—were systematically excluded. Other statements, such as the Ten Commandments directly influenced the Declaration of Independence, would lack any observable support. “If the observer had not thrown up his hands, he 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 2740-41.

The majority opinion did not wish to leave the impression that the past actions of the Counties forever tainted any future efforts to construct a constitutionally appropriate display of documents that may include the Ten Commandments.

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....

Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.

Id. at 2741. Government must, of course, be neutral toward religion.

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.

Id. at 2742. The “divisiveness of religion in current public life is inescapable.” Id. at 2745. So too is the “predominantly religious purpose behind the Counties’ third display[.]” For this reason, the 6<sup>th</sup> Circuit’s decision upholding the injunctive relief was affirmed. Id.

Justice Sandra Day O’Connor, in a concurring opinion, noted that the two religion clauses of the First Amendment—protecting the free exercise of religion while also barring establishment of

religion—were intended “to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible.” The court should enforce the religion clauses in order to keep “religion as a matter for the individual conscience, not for the prosecutor or bureaucrat.” The world is presently replete with examples of the violent consequences visited upon people by “the assumption of religious authority by government[.]” It is important to maintain the constitutional boundaries” to protect us from similar experiences. “Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?” *Id.* at 2746.

When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual’s decision about whether and how to worship.... Government religious expression...risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks that sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risk to both.

*Id.* at 2747.

### ***The Critics Have Their Say***

It didn’t take long for some federal courts to express dismay that Van Orden and McCreary County do not provide sufficient guidance in addressing Establishment Clause disputes. In Newdow v. the Congress of the United States, et al., 383 F.Supp.2d 1229 (E.D. Cal. 2005), the federal district court found the inclusion of “under God” in the Pledge of Allegiance violated the Establishment Clause. However, in reaching this decision, the judge did not rely upon either Van Orden or McCreary County. Rather, the district court was obliged to follow 9<sup>th</sup> Circuit precedent in this matter.<sup>26</sup> The judge expressed relief that he did not have to resort to the Supreme Court’s latest decisions on the Ten Commandments.

This court would be less than candid if it did not acknowledge that it is relieved that, by virtue of the disposition above, it need not attempt to apply the Supreme Court’s recently articulated distinction between those governmental activities which endorse religion, and are thus prohibited, and those which acknowledge the Nation’s asserted religious heritage, and thus are permitted. As last term’s cases, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) and Van Orden v. Perry, 125 S. Ct. 2854 (2005) demonstrate, the distinction is utterly standardless, and ultimate resolution depends on the shifting, subjective sensibilities of any five members of the High Court, leaving those of us who work in the vineyard without guidance. Moreover, because the doctrine is inherently a boundary-less slippery slope, any conclusion might pass muster. It might be remembered that it was only a little more than one hundred years ago that the Supreme Court of this nation declared without hesitation, after reviewing the history of religion in this country,

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<sup>26</sup>Newdow v. U.S. Congress, 328 F.3d 466 (9<sup>th</sup> Cir. 2003).

that “this is a Christian nation.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471, 12 S. Ct. 511 (1892). As preposterous as it might seem, given the lack of boundaries, a case could be made for substituting “under Christ” for “under God” in the pledge, thus marginalizing not only atheists and agnostics, as the present form of the Pledge does, but also Jews, Muslims, Buddhists, Confucians, Sikhs, Hindus, and other religious adherents who, not only are citizens of this nation, but in fact reside in this judicial district.

383 F.Supp.2d at 1244, *n.* 22. It should not take long to find out if Van Orden and McCreary Co. are as “standardless” as the federal district court predicted.

### **COURT JESTERS: *DRAMATIS PERSONAE NON GRATA***

Max Reger (1873-1916), the German composer and organist, read a negative review from Munich critic Rudolph Louis. Reger wrote the following to Louis:

I am sitting in the smallest room of my house. I have your review before me. In a moment, it will be behind me.<sup>27</sup>

No doubt Reger’s critical review of his critic’s review assuaged his sense of injured reputation. The Cherry Sisters should have followed Reger’s example. Unfortunately, they went to court and sued for libel only to be told the negative review was wholly justified.

In the waning days of the 19<sup>th</sup> Century, the Cherry Sisters—Effie, Jessie, and Addie—put together a vaudeville show of sorts and booked venues in various small towns throughout Iowa.<sup>28</sup> Their “entertainments” consisted of recitations, readings, and singing—some comedic, some intentionally comedic, but much of it maudlin sentimentality.

After one particularly raucous performance of their show *Something Good, Something Sad*, described more particularly below, the *Des Moines Leader* published the following “review”:

Billy Hamilton, of the *Odebolt Chronicle*, gives the Cherry Sisters the following graphic write-up of their late appearance in his town: “Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the *danse du ventre*<sup>29</sup> and fox trot—strange creatures with painted faces

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<sup>27</sup>This exchange is attributed to a number of artists who chafed at less-than-favorable reviews of their artistic efforts or endeavors.

<sup>28</sup>There were two other sisters—Ella and Elizabeth—who also occasionally performed.

<sup>29</sup>This is a polite way to refer to a “Belly Dance.”

and hideous mien. Effie is spavined,<sup>30</sup> Addie is stringhalt,<sup>31</sup> and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle.”

Cherry v. Des Moines Leader, et al., 86 N.W. 323 (Iowa 1901).<sup>32</sup>

Oddly, the Cherry Sisters were offended by the review. Addie sued the newspaper and Mr. Hamilton (who *was* present at the performance, accompanied by his wife) for libel.

Hamilton, the editor of the *Odebolt Chronicle*, testified the entertainment was “the most ridiculous performance I ever saw. There was no orchestra there. The pianist left after the thing was half over. She could not stand the racket and left.” Id. at 324.

The Cherry Sisters apparently didn’t “connect” with their audience. “One young man,” the editor stated, “brought a pair of beer bottles which he used as a pair of glasses. [The Cherry Sisters] threatened to stop the performance unless he was put out, but he was not put out, and they didn’t stop.” Id.

This was the least of the Cherry Sisters’ problems. “When the curtain went up,” the editor continued, “the audience shrieked and indulged in catcalls, and from that time one could hardly hear very much, to know what was going on, to give a recital of it.” Id.

During one act, Jessie appeared on stage in her bare feet. “She was asked to trim her toe nails, and such irreverent remarks as that. She appeared more pleased than anything else.” Id.

It would appear the Cherry Sisters were not strangers to devastating reviews. During the performance at issue, they sang a song, “I want to be an editor,” which was intended to realize some measure of revenge on “an editor down at Cedar Rapids [who] insulted them[.]” When they started singing the song, “the audience rose as one man and called on me to stand up,” Hamilton related. “I did not stand up. My wife was there.” Id.

Although the editor expressed reluctance “to pass an opinion upon the merits of the singing,” he did testify that the “discord was something that grated on one’s nerves.” Id.

The editor described sharp exchanges between the Cherry Sisters and the hooting members of the audience. “The audience was talking to the women, and they (the Cherry Sisters) would talk back. They would say: ‘You don’t know anything. You have not been raised well, or you would not interrupt a nice, respectable show.’” Id. Notwithstanding the apparent dearth of talent, “Nobody left during the performance except the pianist.” Id.

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<sup>30</sup>Lame.

<sup>31</sup>A condition in horses that causes one or both hind legs to jerk spasmodically when walking.

<sup>32</sup>Hamilton also wrote: “When the curtain went up... [t]he audience saw three creatures surpassing the witches in Macbeth in general hideousness.”

Of course this was just Hamilton's opinion. Unfortunately for the Cherry Sisters, Addie performed some of her artistic pieces for the benefit of the judge and the jury. The court thereafter directed a verdict for the defendants. Id. at 325.

The Iowa Supreme Court, on appeal, was not sympathetic to the Sisters' cause. "[I]t is well settled," the court wrote, "that the editor of a newspaper has the right to freely criticize any and every kind of public performance, provided that in so doing he is not actuated by malice." Id. at 323.

One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticized. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write.... The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true[.]

Id. at 325. In this case, there was sufficient justification for Hamilton to write the review, for the *Des Moines Leader* to publish it, and for the trial court to direct a verdict for the defendants, thus defeating the libel claim.

If there ever was a case justifying ridicule and sarcasm—aye, even gross exaggeration—it is the one now before us. According to the record, the performance given by the plaintiff and the company of which she was a member was not only childish, but ridiculous in the extreme. A dramatic critic should be allowed considerable license in such a case.

Id. The trial court was affirmed.

**Epilogue:** The Cherry Sisters did not just fade from the stage. Although they were subjected to considerable abuse from audiences, who threw everything imaginable at the performers, they caught the eye of Oscar Hammerstein (1847-1919), the famous opera impresario and theater builder, who booked the Cherry Sisters into the Olympia Music Hall at Broadway and 44<sup>th</sup> Streets. They performed their awful *Something Good, Something Bad* routines to merciless reviews and a barrage of tomatoes, cabbages, onions, screeches, yowls, and catcalls, so much so that a fishnet had to be erected between the Cherry Sisters and their audiences. Hammerstein convinced the Cherry Sisters that the "truck-garden bouquets" were from rival performers jealous of the Sisters' talent. Their performances were so awful, they played to packed houses for two months, saving Hammerstein's theater from financial doom. They retired from the stage in 1903. None of the sisters ever married. The last one died in 1944.<sup>33</sup>

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<sup>33</sup>*Cherry Bomb: The Story of the Awful Cherry Sisters* (Irwin Chusid). See [www.wfmj.org/LCD/Early/cherry.html](http://www.wfmj.org/LCD/Early/cherry.html).

## QUOTABLE . . .

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Supreme Court Justice Hugo L. Black, Talley v. California, 362 U.S. 60, 64-65, 80 S. Ct. 536 (1960).

## UPDATES

### *THEORY OF EVOLUTION*

Critics of the teaching of the Theory of Evolution continue to litigate the issue. Cases involving “Intelligent Design” and “Creationism” or “Creation Science” have been reported previously.<sup>34</sup> In **Quarterly Report** July-September: 2005, another alternative—“Quality Science Education Policy” or QSEP—was referred to in the case of Caldwell v. Roseville Joint Union High School District, et al., 2005 U.S. Dist. LEXIS 24923 (E.D. Cal. 2005), a dispute that involved a proponent of QSEP (Larry Caldwell) who wanted to have this concept introduced into the school district’s biology classes in part to expose the “scientific weaknesses of evolution.” In order to achieve this end, Caldwell sought to place QSEP on the school board’s agenda, participate on the curriculum instruction team, and initiate the “instructional materials challenge” procedure created by the school district.

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<sup>34</sup>Please consult the Cumulative Index for previous articles on “Creationism,” “Creation Science,” and Evolution.

Caldwell attempted to place QSEP on the school board's agenda on twelve (12) occasions. His intention was to create debate on the concept and, eventually, have the school board adopt QSEP. The school board, however, would not place it on the agenda until Caldwell obtained approval from each high school curriculum council. Notwithstanding, Caldwell continued to attempt to bring up QSEP at school board meetings. He eventually sued the school board, asserting the school board's refusal to place QSEP on its agenda discriminated against him on the basis of his viewpoint or religious beliefs and affiliations. The school board moved to dismiss the suit. The court granted the Motion to Dismiss in part but also denied the Motion in part, finding that Caldwell may have sufficiently pleaded First Amendment "free speech" issues.<sup>35</sup> Caldwell was permitted to amend his complaint.<sup>36</sup>

The latest reported case also involves a QSEP proponent, also named Caldwell, and also represented by the same counsel who represented Larry Caldwell. In Caldwell v. Caldwell, 420 F.Supp.2d 1102 (N.D. Cal. 2006), Jeanne E. Caldwell brought suit as a taxpayer against Roy L. Caldwell and others, challenging the content of a website ("Understanding Evolution") published by the University of California through a grant from the National Science Foundation (NSF).<sup>37</sup> Caldwell claimed the website violated the Establishment Clause of the First Amendment.<sup>38</sup>

Caldwell particularly objected to a link from this website to information supplied by the National Center for Science Education, especially a link to a site entitled "What statements do different religious groups make on evolution?"<sup>39</sup> Caldwell believed that the website link containing seventeen (now eighteen) statements from various religious groups operated to endorse impermissibly certain religious beliefs, as well as to advance and proselytize these beliefs. Caldwell primarily claimed the website endorsed the following: (1) the religious doctrine that religion and religious beliefs are limited to the spiritual and supernatural world; and (2) the religious doctrine that the theory of evolution is not in conflict with properly understood Christian or Jewish religious beliefs. 420 F.Supp.2d at 1104. Caldwell stated that this endorsement of religious beliefs she does not espouse has caused her to suffer injury because she was "offended" by the views contained at the website and made to feel like an "outsider." *Id.*

The federal district court dismissed the complaint against both the state and federal defendants, finding that Caldwell did not have standing to initiate the suit.<sup>40</sup> Caldwell, as a federal taxpayer, would have to establish a logical link between her taxpayer status and a congressional enactment, and she must establish a nexus between her taxpayer status and the precise nature of

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<sup>35</sup>"Congress shall make no law...abridging the freedom of speech[.]"

<sup>36</sup>At this writing, there are no further reports on this dispute.

<sup>37</sup>See <http://evolution.berkeley.edu>.

<sup>38</sup>"Congress shall make no law respecting an establishment of religion[.]"

<sup>39</sup>See [http://evolution.berkeley.edu/evolibrary/controversy\\_faq.php](http://evolution.berkeley.edu/evolibrary/controversy_faq.php).

<sup>40</sup>The federal district court dismissed the state defendants in an earlier, unreported decision. This decision involves only the federal defendants.

the purported constitutional infringement. *Id.* at 1106, citing Flast v. Cohen, 392 U.S. 83, 102-03, 88 S. Ct. 1942 (1968).

In this case, Caldwell has alleged only an “incidental expenditure of tax funds in the administration of an essentially regulatory statute.” *Id.* She doesn’t allege that the NSF grant “resulted from any type of direct congressional action.” *Id.* The grant was administered by the NSF in response to a solicitation process that was independent of any congressional action. There is no direct link to the general appropriation by Congress to the NSF. *Id.* Caldwell also failed to supply the necessary “nexus” between her taxpayer status and the purported constitutional infringement. *Id.*

Caldwell also stated only a “generalized grievance against the defendants,” which is insufficient to constitute an “injury in fact.” *Id.* at 1107, citing Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 102 S. Ct. 752 (1982). Caldwell’s complaint was dismissed with prejudice. *Id.* at 1108.

### ***STRIP SEARCHES***

New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985) is the seminal U.S. Supreme Court decision regarding the constitutional limits on searches of students, especially within the public school context. T.L.O. established a two-fold inquiry for searches of students by school personnel where there is a reasonable suspicion to believe that a law or school rule has been broken.

1. The search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and
2. The search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”

In addition, “such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” T.L.O., 469 U.S. at 342, 105 S. Ct. at 743.

T.L.O., however, did not involve so-called “strip searches” of students.<sup>41</sup> Prior to T.L.O., the U.S. 7<sup>th</sup> Circuit Court of Appeals did have the opportunity to address the constitutionality of such invasive searches. In Doe v. Renfrow, 631 F.2d 91 (7<sup>th</sup> Cir. 1980), *reh. den.* 635 F.2d 582

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<sup>41</sup>A “strip search” of students typically involves the students being separated by gender and marshaled into an area of privacy where they are required individually to partially disrobe and pull their clothes away from their person, all in the presence of school personnel of the same gender. See “*Strip Searches*” of Students: *Expectations of Privacy*, “*Reliable Informants*,” and “*Special Relationships*,” **Quarterly Report** April-June: 2005. Also consult the Cumulative Index for earlier articles on this topic.

(1980), *cert. den.* 451 U.S. 1022, 101 S. Ct. 3015 (1982), the 7<sup>th</sup> Circuit addressed a suspicionless “strip search” of students in search of contraband at an Indiana public school:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.”

Doe v. Renfrow, 631 F.2d at 92-93, quoting Wood v. Strickland, 420 U.S. 308, 321, 95 S. Ct. 992, 1000 (1975).

Indiana courts have followed the Renfrow and T.L.O. holdings, generally finding disfavor with such procedures except where there are exigent circumstances that would warrant such invasive procedures.<sup>42</sup> In Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995), the federal district court found the public school violated the constitutional rights of middle school students when a “strip search” was performed on seventh-grade female students in search of missing money. The court noted there was no imminent threat of harm from weapons or drugs that would have justified such a search.

In Higginbottom v. Keithly, 103 F.Supp.2d 1075 (S.D. Ind. 2000), the court granted in part and denied in part the school district’s and teacher’s Motion for Summary Judgment for claims arising out of a “strip search” of four sixth-grade boys when money turned up missing from an snack cart. The money was later found on the person of another student.<sup>43</sup>

Courts continue to wrestle with the constitutional dimensions of such searches.

1. Carlson ex rel. Stuczynski, et al. v. Bremen High School District 228, et al., 423 F.Supp.2d 823 (N.D. Ill. 2006) involved two female high-school students who were required to undress and shake out their gym clothes in the presence of a female administrator and female teacher following a report during a physical education class of \$60 missing by another student. The two students were the last students seen in the locker room. The money was not found. The students filed suit, alleging a host of constitutional violations, as well as claims for invasion of privacy, negligent infliction of emotional distress, and intentional infliction of emotional distress. The defendants filed a

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<sup>42</sup>Circumstances that have warranted such invasive searches have included safety concerns, including reasonable suspicion of drug possession. These circumstances are often affected by the known disciplinary history of the student or the reliability of the source of information. See, e.g., Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7<sup>th</sup> Cir. 1993), where a 16-year-old student with a significant disciplinary and behavioral history was suspected of “crotching” drugs. Justice John Paul Stevens, in T.L.O. (concurring in part and dissenting in part), also wrote that “to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm.” T.L.O., 469 U.S. at 383, 105 S. Ct. 764, n. 25.

<sup>43</sup>See **Quarterly Report** April-June: 2000.

Motion to Dismiss. The court granted the Motion in part and denied it in part. 423 F.Supp.2d at 825-26.

For Fourth Amendment analysis, the court noted the requirements of T.L.O., but added that the search must be preceded by individualized, reasonable suspicion and cannot be “excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Id. at 826, citing T.L.O., 469 U.S. at 341-42, 105 S. Ct. at 733. The administrator’s only reason for suspecting the two students was based on her belief they were the last two students in the girls’ locker room. “[B]ut this does not establish that Plaintiffs had any greater opportunity than any other person to take the missing money. This is not sufficient to provide a reasonable suspicion that Plaintiffs were responsible for the purported theft or that searching them would reveal evidence of a crime.” Id. at 827. This also fails the “balancing test” under T.L.O. in that the search was invasive given “the relatively unserious nature of the infraction.” The students have sufficiently pleaded a Fourth Amendment issue. Id. at 827. In addition, the court found that the public school administrator and teacher were not entitled to qualified immunity from liability for the strip search because she lacked individualized, reasonable suspicion and the searches were excessively invasive. Id. at 828. All other claims were dismissed against the school district and the teacher but not against the administrator. Id. at 828-31.

2. Phaneuf v. Fraikin, et al., 448 F.3d 591 (2<sup>nd</sup> Cir. 2006) also involved a high school girl who was subject to a strip search. She sued the Connecticut public school district under the Fourth Amendment. The federal district court dismissed her suit, but the U.S. Second Circuit Court of Appeals reversed, finding that the strip search was not justified at its inception and was, therefore, unreasonable. Phaneuf began with a search by school officials of seniors preparing to depart for an off-campus senior class picnic. The search had been announced previously. During this search, cigarettes were found in Phaneuf’s purse. Although she was old enough to legally possess cigarettes, school regulations prohibited their presence on school grounds. Another student told a physical education teacher that Phaneuf had stashed marijuana “down her pants.” The teacher reported the information to the principal, also a female. The principal considered the student-informant to be “reliable.” The principal had Phaneuf leave the bus and report to the nurse’s office. The principal ordered the nurse to inspect Phaneuf’s underwear, but the nurse declined. Phaneuf’s mother was called and asked to report to the school in order to conduct the search. The mother objected to the search, but the principal informed her if she did not conduct the search herself, the police would be called. The mother, accompanied by the nurse, went into a small examination room and conducted the search. No marijuana was found. Id. at 592-94.

The 2<sup>nd</sup> Circuit applied the reasonableness standard of T.L.O., noting that what constitutes reasonable suspicion can vary with the circumstances. “What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.” Id. at 595-96, quoting Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1321 (7<sup>th</sup> Cir. 1993). Under these circumstances, then, the question “is whether the school officials had a reasonably high level of suspicion that Phaneuf had marijuana on her person to justify an intrusive, potentially degrading strip search.” Id. at 597. The Second Circuit rejected the

arguments of the school district that its search was reasonable, finding that the student-informant did not have a history of informing on other students such that her trustworthiness could be gauged. The principal did not investigate, corroborate, or otherwise attempt to substantiate the informant's tip prior to ordering the strip search. The principal's "acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration—concerns us." *Id.* at 597-98.

The court was likewise unpersuaded that the strip search was justified by Phaneuf's past disciplinary problems, especially as these problems did not involve drug use generally or marijuana in particular. *Id.* at 599. In addition, the fact that Phaneuf had cigarettes and a lighter in her purse did not justify the strip search. School officials found the cigarettes and lighter before the student-informant told the teacher Phaneuf had hidden marijuana in her underwear. The fact that Phaneuf possessed cigarettes did not justify a strip search for other contraband. "Surely, a discovery of cigarettes cannot alone support a suspicion that a student is carrying a firearm or is bootlegging gin. Without further explanation, the school cannot vault from the finding of one type of (commonly used) contraband to a suspicion involving the smuggling of another." *Id.* at 599-600.<sup>44</sup>

The search was not "justified at its inception." The court did not address whether the search was reasonable in scope because its initial determination required reversal. The case was remanded to the district court. *Id.* at 600-01.

### ***T-SHIRTS: FREE-SPEECH RIGHTS VS. SUBSTANTIAL DISRUPTION***

Although by statute, Indiana public schools may establish dress codes,<sup>45</sup> "dress code" actually implicates two different types of policy: "Uniform Policies," which prescribe dress and typically do not implicate student free-speech issues under the First Amendment<sup>46</sup>; and "Dress Codes" that proscribe the wearing of certain clothing, which often does implicate student free-speech issues.<sup>47</sup> Whether student speech can be justifiably regulated within the public school context often requires resort to the trilogy of student free-speech cases issued by the U.S. Supreme

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<sup>44</sup>The school also alleged that Phaneuf's denial of possession of marijuana when confronted was "suspicious." The court found there was insufficient information to be able to analyze just how school officials found Phaneuf's denial to be "suspicious." *Id.* at 593.

<sup>45</sup>See I.C. § 20-33-8-12(a)(1)(A) ("The governing body of a school corporation must do the following: (1) Establish written discipline rules, which may include: (A) appropriate dress codes[.]).

<sup>46</sup>The First Amendment is comprised of four clauses: "Congress shall make no law respecting an establishment of religion [the Establishment Clause], or prohibiting the free exercise thereof [the Free Exercise Clause]; or abridging the freedom of speech, or of the press [the Free Speech Clause]; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances [the Assembly Clause]." In the following article, the first three (3) clauses are implicated in some fashion.

<sup>47</sup>See "Dress Codes: Free Speech and Standing," **Quarterly Report** April-June: 2002.

Court: (1) school-sponsored speech, as addressed by Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988); (2) vulgar, lewd, obscene and plainly offensive speech under Bethel School District v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986); and speech that falls into neither category but causes a material disruption, is reasonably likely to cause a material disruption, or interferes with other students' rights, as addressed in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969). Lately, most of these disputes have involved the ubiquitous t-shirt.<sup>48</sup>

1. Harper, et al. v. Poway Unified School District, et al., 445 F.3d 1166 (9<sup>th</sup> Cir. 2006). The high school has had a history of conflict over sexual orientation. In 2003, the high school let the Gay-Straight Alliance (GSA) hold a "Day of Silence" at the school, which was intended to heighten awareness of intolerance shown towards those of a different sexual orientation. A series of incidences and altercations occurred on the school campus arising from the "Day of Silence." Other students conducted a "Straight-Pride Day" and wore T-shirts with derogatory remarks about homosexuals. Some students were suspended for wearing such T-shirts when they refused to remove them. In 2004, the GSA wanted to stage another "Day of Silence." On the day of the event, Harper, a sophomore, wore a T-shirt expressing his religious objections to homosexuality and his general objection that the school had seemingly endorsed a practice that God had condemned. Id. at 1170-71. Harper was advised that the T-shirt created "a negative and hostile working environment for others" and violated the school's dress code. He refused to remove the T-shirt. The assistant principal told Harper the T-shirt's message was "inflammatory" and "could cause disruption in the educational setting." Id. at 1172. The principal advised Harper of the tensions on campus from the previous year and attempted to dissuade Harper from continuing to wear the T-shirt that condemned homosexuality. Harper acknowledged he had had a confrontation with other students already over the content of his T-shirt. Id. Harper rebuffed all attempts to require him to remove the shirt. He remained in the office for the remainder of the day. He was not suspended and no disciplinary record was made of the incident. Id. at 1173. Harper sued, alleging violations of his First Amendment right to free speech, right to free exercise of religion, and the Establishment Clause, as well as his Fourteenth Amendment rights under the Equal Protection Clause and the Due Process Clause. He also sought injunctive relief. The school filed a Motion to Dismiss. The federal district court granted the school's Motion to Dismiss as to Harper's Fourteenth Amendment claims and injunctive relief, but did not dismiss his three First Amendment claims. Harper appealed. A three-judge panel (2-1) affirmed. Id. at 1173.

The Circuit Court acknowledged that Harper's shirt contained political speech that would have First Amendment protection outside of a public school setting. Under Tinker, however, there are "special characteristics" that sometimes permit infringement of student speech. Id. at 1176, quoting Tinker, 393 U.S. at 506. These circumstances include where the speech would "impinge upon the rights of other students" or would result in "substantial disruption of or material interference with school activities."

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<sup>48</sup>See *T-Shirts: Free Speech Rights vs. Substantial Disruption*, **Quarterly Report** July-September: 2005.

Tinker, 393 U.S. at 509, 514. The school was justified in prohibiting Harper’s wearing of the T-shirt based on the first circumstance. Thus, the district court was justified in declining to grant the injunctive relief Harper sought. 445 F.3d at 1177. “Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.” Id. at 1178. Name-calling within the school context does not merit First Amendment protection, especially where the language is intended to abuse and intimidate other students. Id. “The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.” Id. at 1178-79 (with collected studies). The school district “had a valid and lawful basis for restricting Harper’s wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.” Id. at 1180.

The majority opinion denied that its position permits schools to “define civic responsibility and then ban opposing points of view.” Id. at 1182 (citation omitted).

We consider here only whether schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases, or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury. We do not believe that the schools are forbidden to regulate such conduct.

Id. at 1182. Because the court decided the injunction was not warranted on the basis of the derogatory and demeaning language on the T-shirt, it declined to analyze the matter under the “substantial disruption” circumstance. Id. at 1183-84.

The majority of the three-judge panel also rejected Harper’s argument that the school’s actions constituted impermissible “viewpoint discrimination.” Id. at 1184. “[P]ublic schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.” Id. at 1185. The majority added “that we do not suggest that all debate as to issues relating to tolerance or equality may be prohibited. As we have stated repeatedly, we consider here only the question of T-shirts, banners, and other similar items bearing slogans that injure students with respect to their core characteristics.” Id. at 1186.

The court also rejected Harper’s arguments that the school’s actions punished him for expressing his sincerely held religious beliefs that homosexuality is condemned by God. The court noted that generally governmental action that substantially burdens a religious belief or practice must be justified by a compelling state interest and must be narrowly tailored to serve that interest. Id. at 1186, citing to Sherbert v. Verner, 374 U.S. 398, 402-03, 83 S. Ct. 1790 (1963). However, the right to free exercise of one’s religious beliefs and practices “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious belief prescribes (or proscribes).’” Id., quoting Employment Division, Dep’t of Human Resources of Oregon v. Smith, 494 U.S. 872,

879, 110 S. Ct. 1595 (1990). A neutral law of general application need not be supported by a compelling governmental interest even though it has the incidental effect of burdening religion. Id.

The court did not find the school's action of banning Harper's T-shirt was different from its banning of other T-shirts with equally derogatory or demeaning messages. The school actions did not impose a substantial limitation on Harper's free-exercise rights. The school did not compel Harper to affirm a belief repugnant to his own beliefs, nor did the school penalize or discriminate against him based on his religious beliefs. The school did not punish him at all. "It simply prohibited him from wearing the offensive and disruptive shirt and required him to refrain from attending class for a portion of the day, if he insisted on continuing to wear it." Id. at 1188. Harper is not prevented from expressing his views in other contexts, but he doesn't have the right to express "his views at all times in all manners in all places regardless of the circumstances [.]" Id.

The school's attempt "to teach the virtues of tolerance" was not an attempt to force Harper to abandon his religious beliefs and adhere to another view. "A public school's teaching of secular democratic values does not constitute an unconstitutional attempt to influence students' religious beliefs." Id. at 1189-90. Public schools are not required to ensure that its curriculum is "consistent with all aspects of the views of all religions." Id. at 1190. If the subject and materials are educationally appropriate and the instruction is secular, "the school's teaching is not subject to a constitutional objection that it conflicts with a view held by members of a particular religion." Id.

There is no evidence, the majority found, that the school's actions were based on anything but the "secular and legitimate aim of protecting the rights of students and promoting a tolerant and safe learning environment." Id. at 1191. Harper was not required to participate in some other religion or to adopt a state-supported religion. The school's conduct in this case had a secular purpose; its principal or primary effect was not to advance or inhibit religion; and its actions did not foster excessive entanglement with government. Id., citing Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971). There is a lengthy, contentious dissent from Circuit Judge Alex Kozinski.

The marked differences among the 9<sup>th</sup> Circuit Court judges continues. In a subsequent decision on July 31, 2006, Harper, et al. v. Poway Unified School District, et al., 455 F.3d 1052 (9<sup>th</sup> Cir. 2006), the judges revealed that one of their members requested a vote to rehear this matter *en banc*, but the motion failed to receive a majority of the votes. Judge Stephen Reinhardt, who concurred in the denial to rehear the matter *en banc*, admonished the dissenting judges, asserting they fail to appreciate the application of Tinker to address offensive conduct that could pose a substantial disruption. Under the dissent's view, Judge Reinhardt opined, a student could wear a T-shirt to school with any message on it "at least until the time minority members chose to fight back physically and disrupt the school's normal educational process." Id. at 1053.

Perhaps some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school, or perhaps some are simply insensitive to the injury that public scorn and ridicule can cause young

minority students. Or maybe some simply find it difficult to comprehend the extent of the injury attacks such as Harper's cause gay students. Whatever the reason for the dissenters' blindness, it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution, and the exercise of that authority by school boards is surely consistent with *Tinker's* protection of the right of individual students "to be secure and to be let alone." Tinker, 393 U.S. at 508.

Id. Judge Ronald M. Gould concurred with the denial to rehear the dispute. He also added his opinion. "Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the school environment, where administrators have a duty to protect students from physical or psychological harms." Id. at 1053-54.

Judge Diarmuid F. O'Scannlain dissented, arguing the majority decision would allow school administrators to censor student speech merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. at 1054, quoting Tinker, 393 U.S. at 509. He accuses the majority of stretching "mightily to characterize Harper's message as a psychological attack" or verbal attack. "But if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant." Id. He added that the majority's stance "amounts to approval of blatant viewpoint discrimination." School officials can authorize the Gay-Straight Alliance to organize a "Day of Silence," but Harper is not permitted to offer a different view. Viewpoint discrimination by government that skews public debate is prohibited. Id., citing Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 894, 115 S. Ct. 2510 (1995). Under the majority's decision in this case, "school administrators are now free to give one side of debatable public questions a free pass while muzzling voices raised in opposition." Id. at 1055. There is no right to be free from offensive viewpoints. "No Supreme Court decision empowers our public schools to engage in such censorship nor has gone so far in favoring one viewpoint over another." Id.

2. Brandt v. Board of Education of the City of Chicago, 420 F.Supp.2d 921 (N.D. Ill. 2006)<sup>49</sup> involved eighth-grade students in a gifted program and a T-shirt design contest. A class T-shirt design contest—an annual eighth grade event at the school—prompted one student from the gifted program to submit his T-shirt idea. After his design did not win, the student decided to create a T-shirt for the students in the gifted program. The T-shirt depicted:

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<sup>49</sup>The court's 2004 decision dismissing the students' complaint in this case was reported in *T-Shirts: Free Speech Rights vs. Substantial Disruption*, **Quarterly Report** July-September: 2005. This decision addresses the parents' amended class-action complaint.

a boy giving a thumbs-up signal with one hand. The other arm ends in a handleless nub, from which a leash extends to a dog labeled the “Beaubien<sup>50</sup> Bulldog.” The head of the boy occupies roughly half of the space of the entire image. The pupil in one of the boy’s eyes is extremely dilated, and the boy’s teeth are spaced with at least one tooth-space between each existing tooth. The boy is wearing a shirt that says, “Beaubien Class of 2003,” and pants bearing a grid design. Given that Plaintiffs thought only the students in the gifted program would want to wear the shirt, Plaintiffs added the word “Gifties” and the year 2003 on the back of the shirt.<sup>51</sup>

Before the T-shirt was printed, the school warned the students in the gifted program that if they wore the T-shirt they would face “serious consequences.” The creator of the T-shirt drafted a petition—which fifty students signed despite a threat of suspension from school—to share with his eighth grade classmates to determine if there were any peer objections to the wearing of the “alternative shirt.” In spite of the warnings, two-thirds of the students in the gifted program attended class wearing the T-shirt. The students were found to have violated the Uniform Discipline Code (“failing to abide by school rules and regulations”) and were confined to their home room without being able to attend class. Parents of the students complained of the manner in which the school disciplined the students and requested the Chicago Board of Education to intervene. The Board’s Department of Law purportedly told complaining parents that “if there was no actual threat to the safety of the students, [the school’s] behavior was impermissible and a violation of [the students’] *First Amendment* rights. One or more students in the gifted program continued to wear the unofficial T-shirt on a daily basis several weeks after their initial discipline and continued to be punished in the same manner. The parents contended that the wearing of the T-shirt was to protest against the alleged “unreasonable rule promulgated by school administration,” as well as the punishment meted out to the students for “something as trivial as wearing a silly T-shirt.”<sup>52</sup> Also see 420 F.Supp.2d at 926-28.

School officials reported increased tensions between students in the gifted classes and students in general education classes. They also believed the T-shirt was insulting to students with physical deformities. *Id.* at 928. School officials and parents met to discuss possible solutions. However, it was not until a crisis intervention team intervened that the matter was resolved. The tensions among the eighth-grade classes was not over the T-shirt but whether the controversy would deprive all students of their

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<sup>50</sup>“Beaubien” refers to the school name: Jean Baptiste Beaubien Elementary School.

<sup>51</sup> The students maintained that “the attraction of the shirt to the eighth grade students in the gifted program was its irony, that is, the use of the nickname “Gifties” and the silly appearance of the boy in the Design.” 326 F.Supp.2d at 918.

<sup>52</sup>The preceding background is from the court’s earlier decision reported at 326 F. Supp.2d 916 (N.D. Ill. 2004).

yearbooks and class trip. The T-shirt was not compromising school safety. The students were allowed to wear their T-shirt with “gifties” printed on it. Id. at 929.

The school moved for summary judgment, which the court granted. The court noted that First Amendment rights are not absolute in a school context. Although Tinker does prevent public schools from punishing students for expressing their personal views at school, public schools are not prohibited from restricting speech the schools have reason to believe will substantially interfere with the work of the school or impinge upon the rights of other students. Id. at 930, citing Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 108 S. Ct. 562, 567 (1988).

The court declined to accept the school’s argument that the “speech” at issue—the wearing of the T-shirts—was not protected speech under the First Amendment. The court found that the students wore the T-shirts initially to protest an election they perceived as unfair and later to protest administrative action taken against them. Other students were aware of the protest. The wearing of the T-shirts expressed a particularized message that was understood by its viewers. There is a genuine issue of fact that the speech at issue is contemplated by the First Amendment. Id. at 931-32. The analysis does not stop there, however. The actual question is whether such speech was inconsistent with the school’s educational mission. Id. at 932. The reported tensions between the gifted students and the students in general education classes, the attendant safety concerns, the fear the controversy would jeopardize opportunities for all eighth-grade students, and the possibility the T-shirt’s depiction would insult students with physical deformities raise a genuine issue of fact that the wearing of the T-shirt to school substantially interfered with the school’s work or impinged upon the rights of other students. Id. at 932-33.

The Supreme Court’s decision in Tinker is not dispositive of the matter because its later decisions in Hazelwood and Fraser “cast some doubt on the extent to which students retain free speech rights in the school setting.” Id. at 934, citing Baxter v. Vigo County School Corporation, 26 F.3d 728, 736 (7<sup>th</sup> Cir. 1994). Accordingly, the students’ right to wear the T-shirts as a form of expressive speech was not “clearly established.” The court would have to look to whether a reasonable public official in the same or similar circumstances would have understood that his or her actions were unlawful in the factual situation at hand. Id.

Under these circumstances, the contours of the gifted students’ First Amendment rights would not be sufficiently clear to a reasonable official that what he or she was doing violated those rights, especially because Defendants’ restrictions concerning the T-shirts took place in the nonpublic setting of a school. [Citation omitted.] Moreover, case law regarding student speech under the First Amendment is nuanced, and thus the law is not as clear cut as Plaintiffs argue....

Id. at 935. Because of the “legal uncertainties concerning First Amendment rights to free speech in the school setting,” the prohibition of the wearing of the T-shirt was “not an obvious violation of the students’ First Amendment rights.” Id. A school official “could not have known *definitively* whether the prohibition of the T-shirts violated the gifted

students' First Amendment rights.” *Id.* (emphasis original). The school officials are entitled to qualified immunity. *Id.*

The court also declined to find the school discipline code and dress code overbroad or void for vagueness, nor did these codes confer impermissible final policy-making authority on the principal. *Id.* at 937-39.

Date: October 5, 2006

/s/Kevin C. McDowell  
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Indiana Department of Education

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