UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA CIVIL LIBERTIES UNION, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:00-cv-00811-SEB-MKK
MIKE BRAUN, in his official capacity as the Governor of the State of Indiana,	)	
Defendant.	)	

Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment

Introduction

There is no doubt that current Establishment Clause jurisprudence requires an examination of "historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (internal quotations and citations omitted). The inquiry demands an examination of whether "history shows that the specific practice is permitted," *Town of Greece, N.Y. v. Galloway,* 572 U.S. 565, 577 (2014), or that the challenged practice at least fits within a "historically sensitive understanding of the Establishment Clause" that "faithfully reflect[s] the understanding of the Founding Fathers." *Kennedy*, 597 U.S. at 536-37(cleaned up). This sensitivity to history requires that the governmental practice "fit[] within a long national tradition." *Woodring v. Jackson County, Ind.*, 986 F.3d 979, 996 (7th Cir. 2021).

The Governor seeks to loosen the required focus on the history and tradition of erecting a Ten Commandments monument, of which there is little, and instead attempts to plumb the psychology of the Founders to try to discern what they would have thought about a massive, seven-foot-tall Ten Commandments monument on government property that does not fit within any national tradition. The Governor's answer to this question is contradicted by facts introduced by the plaintiffs. But this contradiction does not introduce contested issues of material fact as the Governor

uses these facts to apply an incorrect legal test. Instead, the uncontested material facts demonstrate that the placement of the Ten Commandments monument violates the First Amendment. And, contrary to the Governor's arguments, the numerous cases that recognize that the plaintiffs have standing have not been overturned by the Supreme Court's *per curiam* decision in *National Park Service v. National Trust for Historic Preservation in the United States* ("*NPS*"), 609 U.S. 1068 (2026).

This action against the Governor to stop him from violating the First Amendment is a quintessential example of an action authorized by the enduring legal fiction established by *Ex parte Young*, 209 U.S. 123 (1908). The Governor's motion for summary judgment should be denied, and the plaintiffs' motion should be granted.

Statement of Material Facts in Dispute and Additional Uncontested Material Facts

A. Introduction

For purposes of summary judgment, "[a] disputed fact is material if it might affect the outcome of the suit under the governing law. In other words, while there may be facts that are in dispute, summary judgment is appropriate if those facts are not outcome determinative. Fact disputes that are irrelevant to the legal question will not be considered." *Braxton v. Indianapolis Public Sch.*, No. 1:23-cv-01052-JMS-MJD, 2024 WL 3819442, at *2 (S.D. Ind. Aug. 14, 2024) (citations omitted). As noted above, the Governor cites facts that are not material given the appropriate legal test. However, Local Rule 56-1(f) requires that the plaintiffs controvert the facts that are disputed, lest they be taken as true. Therefore, similar to what the Governor did in his briefing (Dkt. 126 at 15)[1], the plaintiffs note that the below facts presented by the Governor are disputed, but also emphasize that they are not material.

[1] All page numbers are as assigned by this Court's electronic filing system.

B. Statement of facts in dispute

1. In paragraph 4 of his Statement of Material Facts Not in Dispute (Dkt. 126 at 11), the Governor, citing the report of Dr. Mark Hall, states that "[n]o one at the time of the founding would have understood a religious monument or display on public property to constitute an establishment of religion." Dr. Hall does not support this conclusory opinion with citation to authority. Moreover, this attempt to glean the Founders' "understanding" of something that admittedly had not occurred—the posting of a Ten Commandments monument, or any religious monument, on public property—is contradicted by Dr. Green's conclusions that during the Founding generation there was a quick and profound evolution of the meaning of establishment, leading to a clear separation of church and state. (Green Rep., Dkt. 114-5 at 11-12 ¶ 24). Given that the necessary focus is on history and tradition as it relates to Ten Commandments monuments or monuments in general, these contested facts are not material.

2. In paragraph 8 of the Governor's Statement of Material Facts Not in Dispute, the Governor, again citing Dr. Hall, states that "[n]umerous scholars, civic leaders, and jurists have recognized that the Commandments are a source of Western and American law." (Dkt. 126 at 11). While it is true that there are persons, including Supreme Court justices, who have made general statements concerning the influence of the Ten Commandments on Western and American law, Dr. Green notes that these statements are not supported by any evidence and there is absolutely no evidence that the Ten Commandments directly influenced English common law or the development of American law. (Green Rep., Dkt. 114-5 at 16 ¶ 29 – 24 ¶ 39). However, inasmuch as the focus on history and tradition must be on monument displays, to the extent there is a dispute between what persons proclaim and the fact that the evidence points in a contrary direction here, it is not material.

3. In paragraph 14 of his Statement of Material Facts Not in Dispute, the Governor states that the original Eagles monument that was on the Statehouse lawn was eventually moved to a church in

Bedford. (Dkt. 126 at 13). That is incorrect as it is the Ten Commandments monument that Governor O'Bannon had proposed to place on the lawn of the Statehouse and that Governor Braun is now proposing be placed there that has resided on church property in Bedford for many years. (Answer to Amended Complaint, Dkt. 102 at 10-11 ¶¶ 36-39). Given that the Governor admitted in his answer that the Ten Commandments monument in Bedford is the one that he wishes to place on the Statehouse lawn, this appears to be an inadvertent error by the Governor and the plaintiffs do not believe that that there is any contested issue as to this point.

C. Response to the Governor's Statement of Material Facts in Dispute

1. The Governor disputes the position taken by Reverend Lesesne and Rabbi Kerber that "for believers, the Ten Commandments are held together by a faith community's covenant with God, and they make sense as a coherent document only as a statement given by God." (Dkt. 115 at 8 [citing Lesesne Dec., Dkt. 114-3 at 2-3 ¶¶ 10-13; Kerber Dec., Dkt. 114-2 at 2 ¶ 9]; *see* Dkt. 126 at 16). However, the Governor does not deny that this is a position taken by persons of faith who are believers, but only points out that other persons may not view them in that way.

2. The Governor states that no admissible evidence supports the conclusion that the text of the Ten Commandments on the monument is taken from the version in the King James Bible. (Dkt. 126 at 16 [citing Dkt. 115 at 7]). However, the statement in plaintiffs' Statement of Material Facts Not in Dispute that the Governor is responding to indicates that "[t]he Ten Commandments monument at issue here is an abbreviated version of the Ten Commandments taken from the King James Bible's Version's translation of the Decalogue in the book of Exodus" (Dkt. 115 at 7), and cites to the statements of both Dr. Chancey and Dr. Green that state precisely that. (*See* Chancey Rep., Dkt. 114-4 at 20; Green Rep., Dkt. 114-5 at 27 ¶ 45). The Governor cites no evidence to refute the claims made by Dr. Chancey and Dr. Green and therefore the fact that the language on the Ten Commandments

monument is taken from the King James version of the Bible should be deemed admitted. *See* Fed. R. Civ. P. 56(e); Local Rule 56-1(f).

3. The Governor disputes the plaintiffs' assertion that "[t]here is no evidence that the Ten Commandments directly influenced English common law' or 'American law,'" as plaintiffs' state in their memorandum at Dkt. 115 at 8-9 (Dkt. 126 at 16). The Governor bases his dispute on a partial quote from Dr. Green's deposition. (*Id.*). But the Governor ignores the fact that the principles in the Ten Commandments that made their way into American law are consistent with principles in many legal codes, including those that predate the Ten Commandments. Therefore, the existence of these principles in American law does not demonstrate a direct influence by the Decalogue. This is clear from Dr. Green's deposition:

> Q. Have you previously written—and this is a quote—"It is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western Legal Tradition."?
>
> A. Many—and love how—I mean, this is now about the seventh or eighth time somebody has taken this quote out of context. But, yes, principles about killing, about stealing, those are found in the Ten Commandments. Those are found in almost all legal codes. And so just because they appear in the Ten Commandments and they appear in our current legal codes doesn't necessarily mean that's where they came from.
>
> Q. But you continue to agree with that sentence that you wrote, right, it is axiomatic that many of the principles contained in the Ten Commandments are fundamental to Western Legal Tradition.
>
> A. That are found in the Ten Commandments? Yeah. Are they original to the Ten Commandments? No. The Code of Hammurabi which predates the Ten Commandments by a couple of hundred years has many of those same principles. So, yes, they are found in the Ten Commandments. They're found in multiple other codes in other contexts. And so just because they have parallels to the Ten Commandments doesn't mean that the Ten Commandments [are] foundational for the American legal system.

(Green Dep., Dkt. 123-6 at 70:16 – 71:18).

4. The Governor also disputes Dr. Green's statement that "'there are no references to God' or the 'Ten Commandments' in the 'Constitution,' since the Constitution is dated 'the Year of our Lord'

1787 and excepts Sundays from the time for the President to veto bills." (Dkt. 126 at 16). Of course, the Supreme Court has recognized that by the time of the Founding there were nonreligious arguments for Sunday closing laws. *McGowan v. State of Md.*, 366 U.S. 420, 434 (1961). And referring to a year as being in "the Year of our Lord," translated from the Latin *Anno Domino*, which is the meaning of the abbreviation "A.D.," *benMiriam v. Off. of Personnel Mgt.*, 647 F. Supp. 84, 85 (M.D.N.C. 1986), while certainly mentioning God, is hardly a religious reference. *Id.* (noting "that the designation 'A.D.' has a purely secular impact"). In any event, the mention of "Lord" does not refute the fact that there is no evidence of a direct influence of the Ten Commandments on common law or American law.

5. The Governor states that he disputes that "'[t]he practice of placing Ten Commandments monuments with the complete text of the Decalogue on the exterior of courthouses and government building in the United State originated . . . in the mid-1950s' as incomplete since Plaintiffs' own expert identified interior-of-courthouse examples going back to 1918 and 1920, Chancey Dep. Tr. 45:13-17, Dkt. 125-1." (Dkt. 126 at 16-17). To point out the obvious, interior-of-courthouse examples do not dispute the above statement as it refers to exterior monuments. Moreover, Dr. Chancey refers to only three plaques across the entirety of the United States, one of which was immediately taken down and he notes further, without contravention, that there are only a "few" other examples of courthouse displays and they were an "exception." (Chancey Rep., Dkt. 114-4 at 7-8). What is also clear, and conceded by the State, is that the practice of placing Ten Commandments monuments with the complete text of the Decalogue on the exterior of courthouses and government buildings did not occur until the mid-1950s with the monuments placed by the Fraternal Order of Eagles (*Id.* at 9-13; Shubow Dep., Dkt. 114-8 at 18:21 – 19:3).

6. Citing a statement by Justice Breyer in a Supreme Court decision, the Governor disputes the fact that the Eagles had a religious purpose for the Ten Commandments monument. (Dkt. 126 at 17). However, the Governor does not present evidence to contradict the fact that:

> [t]he Fraternal Order of Eagles was unabashed about its religious intentions. It placed an essay on the back of its copies of the Ten Commandments that explained them in explicitly theological terms. "Presented to Moses on Mount Sinai by the hand of God as two stone tablets, the Ten Commandments stand today after more than 3500 years as God's law to the human race," it began. The commandments, it continued, outlined "our obligations to God" and "our obligations to fellow men," noting that there was no better guide for moral instruction "than the original program presented by God, The Ten Commandments." The group offered its hope for each print: "May it inspire in all who see it renewed respect for the Law of God, which is our greatest strength against the forces that threaten our way of life.

(Chancey Rep., Dkt. 114-4 at 11) (footnote omitted). This clearly evinces a religious purpose.

7. "The Governor disputes that one is 'not . . . able to avoid seeing the monument' when using the Statehouse's west entrance, Dkt. 115 at 19, since it will be a seven-foot-tall monument on a 1.93-acre lawn, Dkt. 102 ¶¶ 16, 24." (Dkt. 126 at 17). However, the Ten Commandments monument will be close to the west entrance on the southwest corner of the Statehouse lawn. (Dkt. 59-3 at 6 ¶ 28, Dkt. 80-1 at 2; Dkt. 102 at 5 ¶ 19). Obviously, one will not be able to avoid seeing an almost six-ton, seven-foot-tall monument that looms near an entrance.

8. Finally, the Governor says that he "dispute[s] characterizations of the monument in Plaintiffs' summaries of their deposition testimony, Dkt. 115 at 13-20, but understands them merely to be recounting what Plaintiffs testified, rather than asserting 'facts.'" (Dkt. 126 at 17). It is unclear what "characterizations" the Governor refers to as the eight pages contain facts that plaintiffs have asserted are not in dispute. As the Governor does not dispute specific facts, they should be taken as admitted (*Supra* at 5).

D. Additional uncontested issues of material fact

Plaintiffs state the facts below as a supplement to their previous Statement of Material Facts Not in Dispute, which are incorporated by reference.

1. "History can never provide specific answers to modern controversies; neither can history tell us what the Founders may have thought about the future church-state conflicts or, in many instances, even about the church-state conflicts they faced. The historical record is too amorphous and too easily

misread or manipulated to resolve modern controversies. At best, history can only inform; it cannot resolve legal controversies." (Green Rep., Dkt. 114-5 at 7 ¶ 16 (footnote omitted)). "[H]istory can tell us about . . . a value that is implicated by a contemporary conflict. It can't necessarily tell us, you know, the ultimate conclusion." (Green Dep., Dkt. 123-6 at 51:12-15).

2. "Many religions do not accept the Ten Commandments as authoritative doctrine and/or do not consider it to be a part of their religious tradition, including but not limited to Eastern religions, such as Hinduism, Buddhism, Taoism, Jainism, and Sikhism, and earth-based and humanistic religions." (Green Rep., Dkt. 114-5 at 25 ¶ 43).

3. Professor Tanford's stepfather worked on the stained glass in the Statehouse, and Professor Tanford visits the Statehouse at times to see it and enjoy a quiet spiritual moment. (Tanford Dep., Dkt. 114-11 at 21:14 – 22:22, 35:14-18). Having to see the monument, which is contrary to everything that his stepfather believed in, is like putting something offensive next to his grave, is bothersome to Professor Tanford, and interferes with his ability to reach out to his stepfather. (*Id.* at 35:2-18, 36:19-22). His objections to the monument are emotional, psychological, moral, and religious. (*Id.* at 36:23 – 37:1). It hurts and offends him on many levels. (*Id.* at 38:1-2).

4. Patrice Muumba Abduallah objects to the monument inasmuch as it would have potential influence on him and reflects a religious text that does not include him. (Abduallah Dep., Dkt. 114-13 at 25:7-10). It is telling people that they must believe in a certain way. (*Id.* at 32:19-21).

5. The Very Reverend William Grainger Lesesne, Jr., the Dean of Christ Church Cathedral, located on Monument Circle in Indianapolis, notes that the Ten Commandments monument represents a gross misrepresentation of scripture that he would be compelled to address as it would threaten the individual practice of religion by his congregants. (Lesesne Dec., Dkt. 114-3 at 1 ¶ 5; Lesesne Dep., Dkt. 114-6 at 48:11-14, 50:1-8). It would impose stress on him as he would have to consider his own vocational commitments as to what he would need to do to repair the errors caused

by the State's endorsement of a particular religious sect. (Lesesne Dep., Dkt. 114-6 at 36:13-21). It would bring stress to his body, raise his anxiety, and could cause physical harm. (*Id.* at 37:6-11). And, it would force him to work against the State's framing of a sacred text in order to faithfully teach the text within his religious tradition. (*Id.* at 45:17-22).

6. McKenzie Conrad is not a religious person and finds the Ten Commandments monument, located where the heart of democracy lives in Indiana, to be uninclusive. (Conrad Dep., Dkt. 114-15 at 16:10-25).

7. Danielle Drake believes that placement of the Ten Commandments on state property is a promotion of religion by the State. (Drake Dep., Dkt. 114-16 at 22:18 – 23:5, 24:11-14).

Argument

I. This Court has jurisdiction to reach the plaintiffs' claims

A. The plaintiffs have standing, and *NPS* has not overruled the ample precedent establishing this

A cognizable "injury in fact" for standing purposes refers to a "concrete and particularized" and "actual or imminent . . . invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40 (2016) (stating that an interest is "concrete" when it is "real" and "not abstract" and is "particularized" when it "affect[s] the plaintiff in a personal and individual way") (quotations and citations omitted). And in the Establishment Clause context, the Seventh Circuit has held that "a plaintiff who must come into direct and unwelcome contact with a religious display when participating in government or fulfilling legal obligations suffers an injury in fact." *Woodring*, 986 F.3d at 985 (citing *Doe v. County of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994); *Books v. Elkhart Cty.*, 401 F.3d 857, 861 (7th Cir. 2005) (*Books II*), *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000)(*Books I*)); *see also Spokeo*, 578 U.S. at 339 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance . . . [when] each individual suffers a particularized harm.").

The Governor argues that *NPS*, a recent Supreme Court decision, implicitly overrules this precedent and that the plaintiffs otherwise lack cognizable injuries. (Dkt. 126 at 18-23 (citing 609 U.S. 1068)). Both arguments fall short.

1. *NPS* did not concern the Establishment Clause and did not displace Seventh Circuit precedent

In *NPS*, the Supreme Court held that the plaintiff lacked standing to challenge the White House East Wing construction project because, during her once-a-month visits to the neighborhood around the White House, she merely "f[ound] the scale, height, and massing of the government's design distasteful." 609 U.S. at 1070 (internal quotation marks omitted). Mere offense, without more, was not enough. *Id.* at 1071 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982)). The Court, citing other cases, stressed that a "generalized citizen interest" was insufficient for standing purposes. *Id.*

The Governor contends that the Court's brief *per curiam* opinion, which did not concern the Establishment Clause, or any other constitutional right, "fatally undermine[s]" *Woodring* and its predecessors because it is "irreconcilable with . . . offended observer [standing]." (Dkt. 126 at 21-22). That argument is flawed for multiple reasons. First, the Governor compares apples and oranges. A once-a-month visitor disagreeing with the government's design choices is a far cry from repeated, state-sponsored religious alienation. *Compare NPS*, 609 U.S. at 1070-71 (discussing aesthetic and historical objections as "mere offense"), *with Woodring*, 986 F.3d at 984-85 (rejecting characterization of religious interests as a "mere ideological offense"). There is a distinction between "mere offense," 609 U.S. at 1071, and the harm that the plaintiffs are suffering. For instance, Professor Tanford's efforts to spiritually connect with his stepfather would be inhibited as allowing the erection of the monument would be akin to putting something offensive next to the grave of a loved one. (Tanford Dep., Dkt. 114-11 at 35:2-18). Reverend Armstrong's frequent viewing of the monument would cause injury to his religious and theological beliefs as he views the placement of this sacred text on the

Statehouse grounds an establishment of religion by the State. (Armstrong Dep., Dkt. 114-12 at 15:5 – 16:21, 23:12-14; 24:7-8). Mr. Abduallah objects to the monument as it sets out a religious text that does not include him and tells him that he must believe in some way. (Abduallah Dep., Dkt. 114-13 at 24:1-11, 32:19-21). These harms appear comparable or greater than the injuries that the Court has recognized as sufficient in, for example, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) ("recreational interests"), and *Lujan*, 504 U.S. 562-63 (a "desire to use or observe an animal species," though plaintiffs failed to allege imminent harm to that interest).

Second, if the *NPS* Court intended to reject "offended observer" standing in all contexts, it would have said so more clearly. Indeed, Justices Gorsuch and Thomas had repeatedly voiced their stances against the doctrine in opinions leading up to *NPS*. *See City of Ocala, Fla. v. Rojas*, 143 S. Ct. 764, 764–65 (2023) (statement of Gorsuch, J.); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 84 (2019) (Gorsuch, J., joined by Thomas, J., concurring). *NPS* lacks any citation to those opinions or any use of the "offended observer" verbiage. Those gaps simply do not allow this court to make the weighty conclusion that *NPS* nullified *Woodring* and its predecessors.

The Governor next argues that the standing inquiry here was on "poor footing" even before *NPS*. (Dkt. 126 at 22). In support, he cites *Valley Forge Christian College* for the proposition that "a plaintiff cannot establish standing based solely on being offended by the government's alleged violation." (*Id.*). But *Valley Forge* is, again, inapposite as the plaintiffs there never directly encountered or were impacted by the government's behavior. 454 U.S. at 485-86. The Governor then cites the Justice Thomas/Justice Gorsuch line of argument regarding the origin of "offended observer" standing and its necessary demise post-*Lemon*. (Dkt. 126 at 22-23 [citing *City of Ocala*, 143 S. Ct. at 764–65]); *see also Am. Legion*, 588 U.S. at 84 (Gorsuch, J., concurring). But the Seventh Circuit has already explicitly rejected that backdoor attempt to roll back precedent.

> Amici . . . urge us to ditch "offended observer" standing based on *American Legion*. But only two Justices in *American Legion* addressed standing. The rest of the Justices

> addressed the merits without mentioning standing—even though . . . the plaintiffs in *American Legion* were also relying on "offended observer" standing. So *American Legion* does not call into question *County of Montgomery* or the *Books* cases.

Woodring, 986 F.3d at 986 (internal citations omitted).

At bottom, an assortment of statements, concurrences, and factually dissimilar opinions do not get the Governor across the finish line. *NPS* does not demand a re-write of Seventh Circuit precedent, nor do two Justices' arguments that lack majority buy-in. *Woodring* controls.

2. Plaintiffs have established standing under Seventh Circuit precedent

Plaintiffs have satisfied the mandate of *Woodring*, *County of Montgomery*, and *Books I* and *II*. The direct and unwelcome contact that the plaintiffs will encounter if the monument is placed on the Statehouse lawn is outlined above, and it is clear that all of them will have frequent contact with the monument. Plaintiff Tanford frequently travels past the Statehouse via Washington Street while in Indianapolis and visits the Statehouse, either on legal business or to see the stained glass that his stepfather worked on. (Tanford Dep., Dkt. 114-11 at 21:14 – 22:22, 91:2 – 92:22, 93:5-16). Similarly, Reverend Armstrong regularly runs by the Statehouse and goes there to attend legislative meetings, usually using the western entrance. (Armstrong Dep., Dkt. 114-12 at 15:23 – 16:21, 18:3-20, 48:19 – 49:5). Mr. Abduallah passes the Statehouse lawn by car on Washington Street and would have to change how he travels to avoid seeing it. (Abduallah Dep., Dkt. 114-13 at 18:12-22, 19:9-13, 25:5-11; 35:22 – 36:1).

In other words, these plaintiffs have presented concrete and particularized harms—they would come into "direct and unwelcome contact" with the Ten Commandments monument. And much more than a generalized grievance, these imminent encounters would directly discount the plaintiffs' individualized, closely held beliefs. That is an injury in fact. *Woodring*, 986 F.3d at 985. The Governor's attempt to dismiss these injuries by reference to *NPS* fails for the same reasons set out above. *See supra*, Subsection I.A.1.

The ACLU of Indiana has adequately established associational standing for similar reasons. "[A]n association must show that: (1) at least one of its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021) (internal quotations omitted).

The Governor takes issue with the first two elements. First, he contends that Ms. Conrad and Ms. Drake, who must frequently pass by the area where the monument will be while attending to business and observing and participating in government activities (Conrad Dep., Dkt. 114-15 at 17:1 – 18:2, 23:12-15; 24:1-10; Drake Dep., Dkt. 114-6 at 25:1 – 26:12, 30:14 – 31:8), lack standing because "each asserted only that they would suffer offense from viewing the monument." (Dkt. 126 at 20). But that argument fails for the same reasons that the Governor's attack on the individual plaintiffs fails above. *See Woodring*, 986 F.3d at 985 (requiring a "direct and unwelcome contact").

Rev. Lesesne, a member of the ACLU of Indiana, who is frequently at and by the Statehouse, described in great detail the harms that the monument would cause him, including being a direct affront to his faith and something that would require him to assume vocational and professional obligations by requiring him to expend additional pastoral and teaching efforts to correct the misrepresentation of a text central to his ministry. (Lesesne Dep., Dkt. 114-6 at 28:6-18, 31:12-16, 36:13 – 38:25). It would cause him stress and anxiety. (*Id.* at 37:6-8). The Governor contends that these injuries fail on two fronts: they are not interests "germane" to the ACLU's purpose, and they constitute "manufactured" standing. (Dkt. 126 at 20-21). These arguments are equally unpersuasive. First, the Governor overreads the requirement of aligned interests. Though Rev. Lesesne certainly alleged a diversion of pastoral resources, the Governor fails to explain why his underlying interest would not therefore be—like the ACLU of Indiana, (Dkt. 115 at 17)—prevention of state-sanctioned

religious exercises. And any argument that this resource diversion is "manufactured" falls flat. *See Woodring*, 986 F.3d at 985-86 ("We have previously rejected the argument that an avoidable injury cannot constitute injury in fact.") (citation omitted).[2] Moreover, it is difficult to see how a religious leader taking necessary steps to offset the effects of the Ten Commandment monument is "manufactured."

For these reasons, under binding Supreme Court and Seventh Circuit precedent, the plaintiffs have adequately established standing.

B. *Ex parte Young* and its progeny establish that the plaintiffs' case is not barred by sovereign immunity

In *Ex parte Young*, the Supreme Court established that if a state official seeks "to enforce an unconstitutional act to the injury of complainants," the state official can be sued for injunctive relief without offending the Eleventh Amendment, as the official is acting "without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. The *Ex parte Young* doctrine "rests on the premise—less delicately called a 'fiction,' . . . that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (citation omitted).

The Governor advances a novel interpretation of *Ex parte Young*. He argues that it only applies where a state officer is threatening to commence an enforcement action against the plaintiff, and as this case is not such an enforcement action, *Ex parte Young* does not apply. (Dkt. 126 at 24-25). This is simply incorrect.

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[2] The Governor provides no separate argument that ACLU member Professor Tanford lacks standing for associational standing purposes. (Dkt. 126 at 19-21). However, assuming the Governor rests on his "individual plaintiff" standing argument (*id.* at 18-19), that fails for the reasons set out above, *see supra*. So, Professor Tanford's injuries also establish associational standing for the ACLU of Indiana.

As an initial matter, it is not clear what the Governor means by "enforcement." If the General Assembly passed a statute that authorized the Governor to put the monument on the Statehouse grounds and the Governor stated that he was going to enforce the law and put the Ten Commandments there, that would appear to be an "enforcement action." But it is uncontested that the Governor has determined to put the Ten Commandments monument on the grounds of the Statehouse. (*See* Answer, Dkt., 102 at 11 ¶ 40 ["Defendant admits that Governor Braun has announced his intention to move the monument to the Statehouse from its current location."]). So, what is the difference? Litigation against either action would seek an identical injunction—to prohibit an unconstitutional action by the Governor.

The Governor cites *Charlton-Perkins v. Univ. of Cincinnati*, 185 F. 4th 626 (6th Cir. 2026), which did not concern an injunction against unlawful action, but a request that the plaintiff be hired for a job that the defendants had decided not to fill. *Id.* at 630-31. Rather than ratify the limiting principle on *Ex parte Young* that the Governor advances, the court in *Charlton-Perkins* cited favorably to its prior case, *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956 (6th Cir. 2013), where it found that a former state employee could maintain an action for reinstatement to her job because of an allegation of a violation of federal law. *Id.* at 966. The court held there that "[i]n order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Id.* at 964. (citation omitted).

Therefore, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (cleaned up). Thus, "[t]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United

States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160). As this Court has recognized, "[t]he *Ex parte Young* doctrine allows a plaintiff to seek a prospective injunction to prevent a state official from enforcing an unconstitutional state law or from engaging in some other unconstitutional action." *See, e.g., 3C, LLC v. Rokita*, No. 1:23-cv-01115-JRS-MKK, 2024 WL 4348299, at *6 (S.D. Ind. Sept. 29, 2024) (citing *Edelman v. Jordan*, 415 U.S. 651, 677 (1974)).

Absent an injunction from this Court, the Governor will engage in unconstitutional action. Given that the Governor intends to violate the First Amendment, his planned illegal action may be enjoined under the *Ex parte Young* doctrine. *See, e.g.*, *Broomfield v. Pritzker*, No. 22-cv-1628-NJR, 2025 WL 2675497, at *3 (S.D. Ill. Sept. 18, 2025) ("To satisfy the requirements of the *Ex parte Young* exception, a plaintiff must allege facts showing the governor's specific involvement in the unconstitutional policy or practice." (citations omitted)). The plaintiffs' litigation is not barred by sovereign immunity. To accept the State's argument would mean that virtually every case that has challenged a state's religious display should have been barred by sovereign immunity. This is obviously not the case.

II. The planned display of the Ten Commandments would violate the First Amendment

A. The Supreme Court's current Establishment Clause jurisprudence focuses on history and tradition and not exclusively on whether certain hallmarks of religious establishment are met

The Governor appears to argue in his memorandum that there are only six "hallmarks" of an Establishment Clause violation, that one must be met to demonstrate an Establishment Clause violation, and since the Ten Commandments monument does not fit within one, there is no violation here. (Dkt. 126 at 26--27). But the Supreme Court has not adopted a "hallmarks" test to measure an Establishment Clause violation.

It is true that in *Kennedy* the Court stated that coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." 597 U.S. at 537. In a footnote appended to that text, the Court cited to a concurring opinion of Justice Gorsuch in *Shurtleff v. City of Boston, Mass.*, 596 U.S. 243 (2022), which discussed "coercion and certain other historical hallmarks of an established religion." *Kennedy*, 597 U.S. at 537, n.5. In his *Shurtleff* concurrence, joined only by Justice Thomas, Justice Gorsuch cited to certain "telling traits" or "hallmarks" of establishment to prove his argument that "government control over religion offends the Constitution." 596 U.S. at 286-87 (Gorsuch, J., concurring). However, there is no suggestion by the *Kennedy* Court that it adopted a freestanding "hallmarks" test. Even Justice Gorsuch stated that he was only describing "some helpful hallmarks." *Id.* at 285 (Gorsuch, J., concurring).

Recently, in *Catholic Charities Bureau, Inc. v. Wisc. Labor & Industry Rev. Comm'n*, 605 U.S. 238 (2025), the Court, without mentioning any "hallmarks" test, reiterated that "'[t]he clearest command of the Establishment Clause' is that the government may not 'officially prefe[r]' one religious denomination over another." *Id.* at 247 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Although the parties disagree on what particular denomination's version of the Ten Commandments is on the monument, it is clear that the Governor wishes to install a monument that contains an "undeniably . . . sacred text in the Jewish and Christian faiths, . . . [that] do not confine themselves to arguably secular matters." *Stone v. Graham*, 449 U.S. 39, 41 (1980) (footnote omitted). It is also clear that "[m]any religions do not accept the Ten Commandments as authoritative doctrine and/or do not consider it to be a part of their religious tradition." (Green Rep., Dkt. 114-5 at 25 ¶ 43). Obviously, the Ten Commandments monument contains a particular text that is sacred to some religious adherents, but not to others, or to those who do not adhere to any religion. This certainly appears to be a religious

preference and it is reasonably perceived as such by the plaintiffs. (Tanford Dep., Dkt. 114-11 at 32: 11-22; Armstrong Dep., Dkt. 114-12 at 34:8-15; Abduallah Dep., Dkt. 114-13 at 25:5-11).[3]

As noted, answering the question of whether this religious preference violates the Establishment Clause must focus not on hallmarks but on "historical practices and understandings." *Kennedy*, 597 U.S. at 535. The historical search must focus on whether the particular practice has historical provenance, *Town of Greece,* 572 U.S. at 577, or whether, if there is not direct historical linkage, it nevertheless conforms to a "historically sensitive understanding of the Establishment Clause" that "faithfully reflect[s] the understanding of the Founding Fathers." *Kennedy*, 597 U.S. at 536-37 (cleaned up).

B. The yet-to-be erected monument has no longstanding history and there is no longstanding tradition of posting Ten Commandments monuments on public property

The required focus on history makes it obvious that from a constitutional perspective, "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones." *Am. Legion*, 588 U.S. at 57. Even though there is no monument on the Statehouse lawn currently, the State argues that "Indiana's monument is itself sufficiently longstanding." (Dkt. 126 at 35). It is true that there was an Eagles monument on the Statehouse grounds from 1958 until 1981, but it is not there now. That should be the end of that line of argument: to the extent that anything is "longstanding," it is the absence of a monument for the past 45 years.

The Governor's only response to this obvious fact is to argue that but for the vandalism, removal of the former monument, and the prior injunction in this case, the monument would still be on the Statehouse lawn. (*Id.* at 36). But it is not there, has not been for 45 years, and the planned

[3] Although there is no "hallmarks" test, this sort of preference is closely related to what Justice Gorsuch characterized as a hallmark: "financial support for the established church, often in a way that preferred the established denomination over other churches." *Shurtleff*, 596 U.S. at 286. (Gorsuch, J., concurring).

monument would therefore be a new display—one that would "be[ ] erected only recently." *Am. Legion*, 588 U.S. at 67 (Breyer, J., concurring). The Supreme Court has not "adopt[ed] a 'history and tradition test' that would permit any newly constructed religious memorial on public land." *Id.* at 68 (Breyer, J., concurring). Therefore, the Governor's reference to *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality), in this regard is not helpful as, in that case the Eagles Ten Commandments monument had been on the grounds of the Texas statehouse for 40 years, and the plaintiff waited six years after confronting the monument to initiate litigation. *Id.* at 682. By contrast, a preliminary injunction preventing the new posting of a Ten Commandments display was upheld in *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005).

The Governor argues that the frequency of statues and other representations of the Ten Commandments in public places demonstrate the requisite longstanding history. (Dkt. 126 at 31-32). However, none of these statues and artistic representations include discernible English text, and they are frequently placed in context with other figures. (*See* Dkt. 115 at 11). There simply is no longstanding tradition of posting the text of the Ten Commandments in public spaces prior to the relatively recent placement of monuments created by the Fraternal Order of the Eagles. Justin Shubow, one of the Governor's experts, "agree[s] that prior to the Eagles' placement of Ten Commandments monuments on courthouses and other public grounds in the 1950s, there was not a history or tradition in the United States of placing monuments with the full text [of the Ten Commandments] on public grounds." (Shubow Dep., Dkt. 114-8 at 18:21 – 19:3). Something that began in the 1950s certainly does not have a "historical foundation" stretching back to the Founders. *Greece*, 572 U.S. at 576.

C. The placement of the Ten Commandments monument is not consistent with a more general but historically sensitive understanding of the Establishment Clause

Regardless of the fact that posting the Ten Commandments was not something with which the Founders were familiar, the Governor argues that the fact that there is "an unbroken history of official acknowledgment . . . of the role of religion in American life since at least 1789," *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), supports the constitutionality of the monument. (Dkt. 126 at 31). Citing *Van Orden*, the Governor alludes to congressional and presidential proclamations at the birth of our county that involved prayer and acknowledgment of a Supreme Being, as well as "many judicial pronouncements recognizing the centrality of religion to American society." (*Id.*).

As the plaintiffs have previously argued, if alluding to evidence of general religious statements at the time of the United States's founding was sufficient to satisfy the history and traditions test, then there would be no need for a test. (*See* Dkt. 115 at 26-27). Indeed, the Governor's expert, Dr. Hall, established this, as he stated in his deposition that "I'm not coming up in my mind with any religious images, language, or symbols placed on public property that would constitute an establishment of religion in the eyes of the founders." (Dr. Hall Dep. at 35 at 3:14-25 [attached to this memorandum as Exhibit 1]).

Although the Governor notes that *Woodring* was decided before *Kennedy*, there is nothing in *Kennedy* that alters the propriety of *Woodring*'s recognition that the historical approach requires an analysis of whether the challenged display "comports with a broader pattern of government recognition." 986 F.3d at 996. After all, that is precisely what *American Legion* held in concluding that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional." 588 U.S. at 63.

The posting of the Ten Commandments must comport with "historical practices and understandings" that would include a tolerance of the Governor's plan to put the monument on the

Statehouse lawn. *Town of Greece*, 572 U.S. at 576 (quotation and citation omitted). Therefore, what is relevant is not some amorphous historical religiosity. "[T]he specific practice" must tie into history. *Id.* at 577. Although that might be demonstrated by showing that the monument fits into some historic tradition, it is not demonstrated by a discussion of general religious statements or by theorizing about what the Founders believed in and understood concerning religion in the abstract.

There is no evidence that the installation of the Ten Commandments monument on the Statehouse lawn would be something with which the Founders would be familiar and would support. Although the Governor argues that the plaintiffs' analysis takes "a myopic view of what traditions may be relevant" (Dkt. 126 at 32), the plaintiffs, consistent with the decisions of the Supreme Court, have demonstrated that there simply is not "a historically sensitive understanding of the Establishment Clause, *Kennedy*, 597 U.S. at 537, that is capacious enough to encompass a Ten Commandments monument emblazoned with the complete biblical text.

The Governor turns to *Van Orden* and the plurality's discussion of the "role the Decalogue plays in America's heritage." 545 U.S. at 678. But, as the plaintiffs noted in their original memorandum, the plurality did not provide any citations from history for that role, and the various representations of the Ten Commandments noted by the plurality do not appear to contain any English text. *Id.* at 688-89; (*see also* Shubow Dep., Dkt. 114-8 at 14:24 – 15:8).[4] When the entire text of the Ten Commandments is presented by itself on a massive monument, it is not some anodyne reference to

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[4] Q. You would agree that none of the representations of the Ten Commandments that you refer to in your report have the full text of the Ten Commandments in them in English; is that correct?
A. Yes.
Q. In fact, to the best of my knowledge, none of them have any discernible text in English, although some have Roman numerals without text; is that correct?
A. Yes.

(Shubow Dep., Dkt. 114-8 at 14:24 – 15:8).

"law," but is "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction." *McCreary Cty.*, 545 U.S. at 869.

In his controlling concurrence in *Van Orden*, Justice Breyer stressed that the context of the display communicated a secular message that was conveyed both by its physical setting and its 40-year history, with the long history of its existence being the "determinative" factor. 545 U.S. at 702 (Breyer, J., concurring). Of course, there is no history here. This is a new monument. And there is very little near where the Governor intends to place the monument on the southwest corner of the Statehouse lawn (Dkt. 59-3 at 6 ¶ 28; Dkt. 80-1 at 2; Dkt. 102 at 5 ¶ 19), except for a small monument commemorating 9/11 that is only 22 inches high (Dkt. 59-8 at 4; Blackwelder Dec., Dkt. 114-1 at 1 ¶ 3). The context is that persons who view the southwest portion of the Statehouse lawn or use the west entrance of the building will see a seven-foot high Ten Commandments monument that weighs nearly six tons. This is not *Van Orden.*

As stressed, the question is whether the Ten Commandments monument is "consistent with a historically sensitive understanding of the Establishment Clause" that "faithfully reflect[s] the understanding of the Founding Fathers." *Kennedy,* 597 U.S. at 536-37 (cleaned up). There is no evidence that erecting monuments with the full text of a version of the Holy Scriptures is in any way consistent with that history. Instead, it represents a display of "an unmistakably religious statement." *McCreary Cty.*, 545 U.S. at 869. Placing the Ten Commandments monument on the Statehouse lawn would violate the First Amendment.

Conclusion

There are no contested issues of material fact. The plaintiffs have standing, and *Ex parte Young* establishes that the Governor does not have sovereign immunity. As the new Ten Commandments monument is unsupported by any specific history of erecting these or similar monuments, and is not "consistent with a historically sensitive understanding of the Establishment Clause," *Kennedy*, 597 U.S.

at 537, its placement would offend the Establishment Clause. The plaintiffs are therefore entitled to summary judgment and a permanent injunction prohibiting the erection of the contemplated monument.

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