

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

FILED AUG 25 '03 PM 12:32 USDCALS

KELLY MCGINLEY and RICHARD C.
DORLEY,

Plaintiffs,

vs.

GORMAN HOUSTON, Senior
Associate Justice of the Alabama
Supreme Court, HAROLD SEE,
Associate Justice of the Alabama
Supreme Court, CHAMP LYONS,
Associate Justice of the Alabama
Supreme Court, JEAN BROWN,
Associate Justice of the Alabama
Supreme Court, BERNARD
HARWOOD, Associate Justice of the
Alabama Supreme Court, THOMAS WOODALL,
Associate Justice of the Alabama Supreme
Court, LYN STUART, Associate Justice of the
Alabama Supreme Court, and DOUGLASS
JOHNSTONE, Associate Justice of the
Alabama Supreme Court,

Defendants.

Case No.: 03-0563-WS-M

APPLICATION FOR
TEMPORARY
RESTRAINING ORDER
WITH DECLARATIONS

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs make this Application for Temporary Restraining Order pursuant to Fed.R.Civ.P. 65, and is based on the facts set forth in the Declaration of Kelly McGinley and Pastor Richard C. Dorley included herewith. In addition, plaintiffs file simultaneously herewith their memorandum of law in support of the temporary restraining order.

Plaintiffs hereby apply for entry of a Temporary Restraining Order restraining the defendants, their agents, servants, employees, and attorneys, and those acting in active concert with them from removing the Ten Commandments Monument from the Alabama State Judicial Building and from removing the Ten Commandments Monument from the rotunda of that said building.

In support of this application, plaintiffs stress that (1) the issuance of a Temporary Restraining Order is necessary before a hearing on the plaintiffs Preliminary Injunction to prevent irreparable harm to plaintiffs and others; (2) there is a likelihood that plaintiffs will prevail on the merits of the Application for Preliminary Injunction; (3) the threatened injury to plaintiffs far outweigh any possible harm a Temporary Restraining Order could conceivably cause the defendants; and (4) issuing a Temporary Restraining Order will clearly serve the public interest by upholding the Constitution of the United States.

Unless this Court enjoins the defendants, plaintiffs' constitutional rights will be violated in that the Ten Commandments Monument will be removed from the Alabama State Judicial Building thereby establishing the religion of nontheistic beliefs, a violation of the Establishment Clause to the United States Constitution. Said action of removal will result in irreparable injury and deprivation to the plaintiffs of their First and Fourteenth Amendments rights guaranteed by the United States Constitution.

WHEREFORE, plaintiffs respectfully request that this Court enter a Temporary Restraining Order restraining defendants for a period of ten days or until the issuance of a

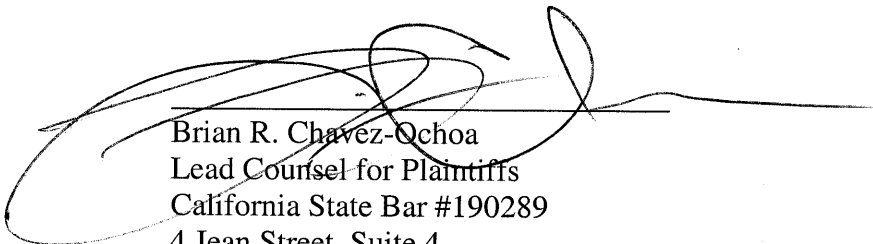
///

///

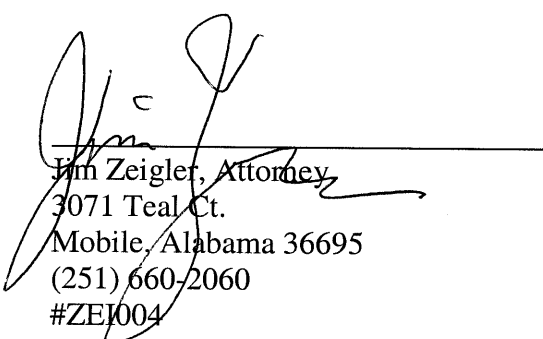
Preliminary Injunction, from the facts set forth above, and that a bond be waived or nominal bond be required.

Dated: August 23, 2003.

Respectfully submitted,



Brian R. Chavez-Ochoa
Lead Counsel for Plaintiffs
California State Bar #190289
4 Jean Street, Suite 4
Valley Springs, California 95252
(209) 772-3013



Jim Zeigler, Attorney
3071 Teal Ct.
Mobile, Alabama 36695
(251) 660-2060
#ZEI004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

FILED AUG 25 '03 PM 12:32 USDCALS

KELLY MCGINLEY and RICHARD C. DORLEY,
Plaintiffs,

vs.

GORMAN HOUSTON, Senior Associate Justice of the Alabama Supreme Court, HAROLD SEE, Associate Justice of the Alabama Supreme Court, CHAMP LYONS, Associate Justice of the Alabama Supreme Court, JEAN BROWN, Associate Justice of the Alabama Supreme Court, BERNARD HARWOOD, Associate Justice of the Alabama Supreme Court, THOMAS WOODALL, Associate Justice of the Alabama Supreme Court, LYN STUART, Associate Justice of the Alabama Supreme Court, and DOUGLASS JOHNSTONE, Associate Justice of the Alabama Supreme Court,

Defendants.

Case No.: 03-0563-WS-M

MEMORANDUM IN
SUPPORT OF MOTION
FOR TEMPORARY
RESTRAINING ORDER

**MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER**

INTRODUCTION

The United States District Court for the Middle District of Alabama has issued an order to have removed from the Alabama State Judicial Building a monument to the Ten Commandments. This order for removal comes by manner of a plaintiff seeking redress for an alleged violation of his First and Fourteenth Amendment rights under the United

States Constitution. In *Glassroth v. Moore*, Civil Action 01-T-1268-N, before the United States District Court for the Middle District of Alabama, the plaintiff sought an injunction from the court wherein the Ten Commandments Monument would be ordered removed from the rotunda of the Alabama State Judicial Building. The federal court in Montgomery subsequent thereto issued the order for removal of the monument, however, the defendant in that matter, Chief Justice Roy s. Moore, has refused to remove said monument.

Chief Justice Moore was suspended from his position on Friday, August 22, 2003 by the Judicial Inquiry Commission for the State of Alabama. The remaining eight associate justices have voiced their clear intention to remove the Ten Commandments Monument from the Alabama State Judicial Building as soon as is practical. The plaintiffs in the instant matter recognize the Rule of Law and the adherence thereto, and for this reason, seek the relief from this Court that is noted herein. The plaintiffs in this matter are not acting in concert with the Chief Justice of Alabama, but rather instead seek their own redress for violation of their First and Fourteenth Amendment rights as guaranteed under the Constitution of the United States. This violation of the plaintiffs' rights is evidenced in that the removal of the Ten Commandments Monument is tantamount to discrimination of their religious beliefs in favor of the religion of nontheistic beliefs, the perceived religious beliefs of the plaintiff in *Glassroth v. Moore*.

ARGUMENT

PLAINTIFFS SATISFY THE STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER

The standard for issuance of a temporary restraining order under Fed.R.Civ.P. 65 is well established. It will issue if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition," and (2) the applicants attorney certifies to the efforts made to serve notice on opposing counsel. Id. Plaintiffs satisfy both of these elements.

A. Plaintiffs will suffer Immediate and Irreparable Injury unless a TRO Issues.

The threat of immediate and irreparable harm to plaintiffs is clear. The plaintiffs are threatened with the prospect of having their religious beliefs and rights removed not only from the Alabama State Judicial Building, but also from the public square, in favor of replacement by another religion; the religion of nontheistic beliefs. In a long line of attacks against the Christian religion, any mention of God in the public square has been sanctioned as an affront to the wall separating church from state. On most of these occasions where the mention of God or anything to do with his Kingdom has been addressed, ultimately with the removal of God from the challenged arena, the religion of nontheistic beliefs has replaced the religion of Christianity. If the religion of Christianity is an affront to the separation of church and state, then certainly the establishment of the religion of nontheistic beliefs is in violation of the Establishment Clause to the United States Constitution. This chilling effect on the First Amendment rights of the plaintiffs in this case, and Christians throughout this great nation, is undeniably acute. "The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes

irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); See also *New York Times Co. v. United States*, 403 U.S. 713 (1971).

This chilling effect on plaintiffs' religious rights under the First Amendment is evidence enough to satisfy the irreparable harm requirement. So also is the chilling effect suffered by third parties not before the Court who would otherwise exercise their First Amendment rights but have ultimately been denied said rights pursuant to the argument above. The prospect of one religion being replaced by another religion is not speculative, but actual and imminent. Moreover, the proof of irreparable harm suffered by plaintiffs is clear and convincing. The long line of cases that have been decided by the courts have made it abundantly clear that the Christian belief of one Sovereign God is not to be tolerated in the public square. Instead, either knowingly or unknowingly, the courts have established the religion of nontheistic beliefs that by principle hold that every individual is a god unto himself. The religion of nontheistic beliefs espouse the belief that no one god is sovereign. Practitioners of nontheistic religion have seized the opportunity of deceiving the courts into believing that removing God from society complies with the Establishment Clause. What these practitioners have forgotten to tell the courts is that by removing God from the public square, the nontheistic religion is advanced and in fact favored over any other religious belief. This is clearly in violation of the Establishment Clause. The plaintiffs' constitutional rights are in imminent danger of violation if the Ten Commandments Monument is removed or taken off display in the Alabama State Judicial Building. Plaintiffs point once again the *Elrod v. Burns* and the language previously cited (also see *National People's Action v. Village of Willmette*, 914 F.2d

1008, 1013 (7th Cir. 1990) cert denied, 499 U.S. 921 (1991) (even temporary deprivation of first amendment rights generally sufficient to prove irreparable harm).

1. Plaintiffs' Rights are Protected by the First Amendment

Plaintiffs intend only to peacefully exercise their right to religious speech and religious freedom in a public forum. There is not doubt that such “speech” is protected by the first amendment. *See, e.g. U.S. v. Grace*, 461 U.S. 171, 176 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). The deprivation or chill of plaintiffs’ federally protected rights, even for minimal periods of time, constitutes irreparable harm. In the instant matter, the Ten Commandments Monument is “speech”. Furthermore, “in religious-symbols cases, context is touchstone”, *King v. Richmond County*, No. 02-14146, slip op. 2541 at 2552 (11th Cir. May 30, 2003). The context of the Ten Commandments is clear indeed, it the word of God, written by God’s finger, and given to Moses for the Israelites to obey. The Ten Commandments has since been adopted by this nation as the cornerstone of jurisprudence. While one can certainly make the argument that the Ten Commandments is religious in nature, one can also advance the argument that the Ten Commandments is nothing more than laws that are at the foundation of the legal forum. Either way, the fact remains that if the Ten Commandments Monument is removed from the Alabama State Judicial Building pursuant to the current order of the federal court in Montgomery, religion is pervasive in its removal. The religion of the plaintiff is *Glassroth v. Moore* is perceived to be the religion of nontheistic beliefs. Therefore, the court has favored one religion over that of another.

Informed public discourse and political debate is the foundation to American democracy. A grant of temporary relief will assure that plaintiffs will remain free to exercise their right of freedom of religion, their own given choice of religion, not the religion of nontheistic beliefs.

The United States Court of Appeals for the Eleventh Circuit recently declared that Establishment Clause challenges are not decided by bright-line rules, but more on a case-by-case basis with the result turning on the specific facts. *King v. Richmond County*, No. 02-14146, slip op. 2541 (11th Cir. May 30, 2003). The facts of this instant matter rely upon the underlying facts in the *Glassroth v. Moore* matter. As noted above, the plaintiffs perceive the religious beliefs of the plaintiff in *Glassroth* to be that of nontheistic religious beliefs. If this assertion is correct, the plaintiff in *Glassroth* has successfully replaced his religious beliefs to the detriment of the plaintiffs in this case by manner of the removal order germane to the Ten Commandments Monument. The establishment of the religion of nontheistic beliefs would be impermissible. Therefore, the order of the federal court in Montgomery may very well be in contradiction to the holding in *King*. Further inquiry is therefore necessary to determine whether or not the order from Montgomery to remove the monument is in keeping with the Eleventh Circuit decision in *King*. No harm will come the result of a temporary restraining order issuing in this matter so as to determine the above set of facts.

2. The Plaintiffs have Standing to Bring this Action

As to whether or not plaintiffs have standing to bring this action, it is well settled law:

To satisfy the case or controversy requirements of Article III, which is the “irreducible constitutional minimum” of standing, a plaintiff must, generally speaking, demonstrate that he has suffered “injury in fact” that the injury is “fairly traceable” to the actions of the defendant, and that the injury will likely be addressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 1161 (1997) (citation omitted). For Establishment Clause claims based upon non-economic harm, the plaintiff must identify a “personal injury suffered by them as a consequence of the alleged error, other than psychological consequence presumably produced by observation of conduct with which one disagrees.” *Valley Forge Christian Coll. V. Ams. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 485, 102 S.Ct. 752, 765 (1982). In this type of case, plaintiffs have standing if they are “directly affected by the laws and practices against [which] their complaints are directed,” *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (quoting *Sch. Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 224 n.9, 83 S.Ct. 1560, 1572 n.9 (1963), such as where the plaintiffs are “forced to assume special burdens” to avoid ‘unwelcome religious exercises,’” *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 (11th Cir. 1983) (per curiam) (quoting *Valley Forge*, 454 U.S. at 487 n.22, 102 S.Ct. at 766 n.22).

In the instant matter, in the event that the Ten Commandments Monument is removed, the plaintiffs will be burdened not only by a change in their behavior, said change evidenced by no longer visiting the Alabama State Judicial Building for reasons more fully set forth below, but will suffer the affect of being ostracized from the community because of their stand in support of the Ten Commandments. The stand of

the plaintiffs in support of the Ten Commandments supports God as well and if the monument is removed in favor of a nontheistic religious god, plaintiffs will suffer detriment as their chosen religion will have been discriminated against by the court. This in turn will reflect negatively upon the plaintiffs and will lower their standing in the community.

As noted above, in the event that the monument is removed, the plaintiffs will be forced to alter their behavior as to their visits to the court, as well as their support of an institution that is sworn to uphold and protect the laws of the State of Alabama. To the plaintiffs, removal of the Ten Commandments is not only the removal of God from the public square but additionally stands for the proposition of a turning away from the foundation that this country's laws have been founded upon. The plaintiffs assert that the court is prepared to recognize some other form of justice wherein litigants and parties will be forced to adhere to an offensive religious belief in order to secure justice from the courts in the State of Alabama. Based upon these beliefs and furthered by the plaintiffs' religious beliefs, upon the removal of the Ten Commandments Monument from the Alabama State Judicial Building, the plaintiffs would find it offensive to enter a judicial building that has turned its back on jurisprudence as established by the founders of this nation. Entry into the Alabama State Judicial Building by the plaintiffs, in the event that the monument is removed, would be symbolic of bending a knee to Baal, a false god recognized by some of the nations written about in the Old Testament of the Bible. The Bible is quite clear as to the punishment that those nations received the result of bending a knee to Baal; plaintiffs seek not the same treatment. Therefore, should the monument

be removed, the plaintiffs will be forced to alter their behavior of visiting the State Judicial Building.

Because of this nation's history and tradition of religious diversity that dates from the settlement of the North American Continent, the Founders included in the Bill of Rights an Establishment Clause which prohibits any law respecting an establishment of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 589, 109 S.Ct. 3086, 3099 (1989). The Supreme Court has arrived at an understanding of its general meaning, which is that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. *Id.* At 590-91, S.Ct. at 3099 (footnotes omitted).

Here, the federal court in Montgomery has, in effect, respected one religion over another. By forcing out the Ten Commandments and replacing it with nothing (but in reality the nothing is the false god of nontheistic religion), the court has declared that the Lord God shall be removed from the public square and that the false god of nontheistic religion shall be the false god that the Alabama Supreme Court and society shall serve. This also places a burden upon the plaintiffs not to enter the State Judicial Building for reasons noted above.

Finally, the Lemon test, however demonized, is still applied by the courts today. The test applies the following:

1. The challenged practice have a secular purpose;
2. The practice not have the effect of advancing or inhibiting religion; and

3. Not foster excessive government entanglement with religion.

Applying this test to the instant matter, the plaintiffs contend the following:

1. The Ten Commandments Monument represents the foundation of jurisprudence as given to this nation by our Founding Fathers for purposes of establishing laws not religion;
2. The Ten Commandments Monument does not advance nor inhibit religion; the purpose behind the display is one of reminding the citizens of the State of Alabama and visitors to the Alabama State Judicial Building of the foundation of the jurisprudence system in this nation; and
3. No entanglement by the government with religion can be evidenced if the meaning prescribed by the Ten Commandments Monument is one of a recognition of the founding of the legal jurisprudence system in our nation.
4. Finally, the Ten Commandments Monument cannot be in violation of the Establishment Clause and therefore must be in compliance with the Lemon test evidenced by the fact that the Supreme Court of the United States publicly displays the Ten Commandments chiseled into a marble wall located within the United States Supreme Court Building.

B. Plaintiffs' Counsel has Provided Oral Notice of the Application for Temporary Restraining Order.

The second prong of the temporary restraining order analysis is a showing of counsel's efforts to serve notice of the application on opposing counsel. See Fed.R.Civ.P. 65(b). This element is easily satisfied here. Plaintiffs' counsel received a

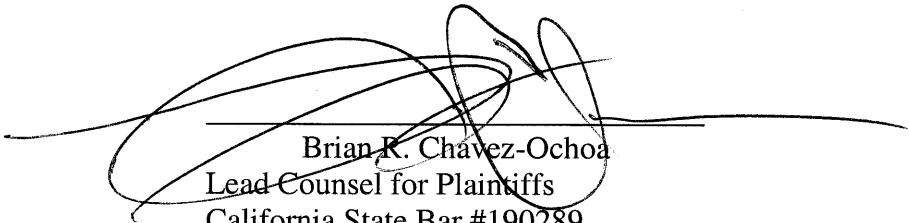
telephone call from Mr. Tom Parker of the Alabama Supreme Court on Saturday, August 23, 2003 at 11:00 a.m. This telephone call was in response to two messages that plaintiffs' counsel had left with the Alabama Supreme Court on Friday, August 22, 2003. During that telephone conversation I informed Mr. Parker of plaintiffs' intention to seek a temporary restraining order on Monday in the United States District Court in Mobile, Alabama. Mr. Parker is a staff attorney for the Alabama Supreme Court and spokesman for Chief Justice Roy Moore.

CONCLUSION

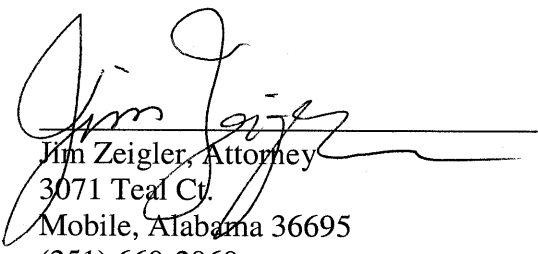
For the foregoing reasons, plaintiffs' Application for Temporary Restraining Order should be granted.

Dated: August 24, 2003.

Respectfully submitted,



Brian R. Chavez-Ochoa
Lead Counsel for Plaintiffs
California State Bar #190289
4 Jean Street, Suite 4
Valley Springs, California 95252
(209) 772-3013



Jim Zeigler, Attorney
3071 Teal Ct.
Mobile, Alabama 36695
(251) 660-2060
#ZEI004