

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

KELLY MCGINLEY and RICHARD C.)
DORLEY,)

Plaintiffs,)

v.)

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

BRIEF IN SUPPORT OF MOTION TO DISMISS

Gorman Houston in his official capacity as senior associate justice and acting chief justice of the Supreme Court of Alabama, Harold See, Champ Lyons, Jean Brown, Bernard Harwood, Thomas Woodall, Lyn Stuart, Gorman Houston, and Douglass Johnstone, in their official capacities as associate justices of the Supreme Court of Alabama, defendants in this action (the “associate justices” unless otherwise stated), submit this Brief in support of their Motion to Dismiss. For the reasons stated in their Motion and this Brief, this Court should dismiss this action.

The associate justices submit their Motion and Brief notwithstanding the belief of many, if not all of them, that it is constitutional for public officials to acknowledge God in public spaces and to display the Ten Commandments in courthouses. They all believe themselves bound, however, by a Final Judgment and Injunction issued by a federal court that has not been stayed. The United States District Court for the Middle District of Alabama has held that the “Ten Commandments” monument at issue in this case cannot be constitutionally displayed in the rotunda of the State Judicial Building and directed that the monument be removed from public space. The associate justices believe themselves to be bound by that injunction notwithstanding their personal beliefs.

FACTUAL BACKGROUND

In this lawsuit, Plaintiffs Kelly McGinley and Richard C. Dorley seek, among other things, to enjoin the removal of “a large religious monument” that contains, among other things, the text of the Ten Commandments from the Rotunda of the State of Alabama’s Judicial Building. The United States District Court for the Middle District of Alabama has entered a permanent injunction directing Roy S. Moore, in his official capacity as Chief Justice of Alabama to remove the monument from the non-private areas of the Judicial Building. *Glassroth v. Moore*, 242 F. Supp. 2d 1067 (M.D. Ala. 2002). The Eleventh Circuit Court of Appeals has affirmed the judgment of the District Court. *Glassroth v. Moore*, 335 F. 3d 1282 (11th Cir. 2003). Chief Justice Moore has stated that he intends to file a petition for writ of certiorari in the United States Supreme Court.

The injunction directing that the monument be removed has not been stayed. The Middle District entered a stay pending Chief Justice Moore’s appeal to the Eleventh Circuit and, after the Eleventh Circuit affirmed the District Court’s judgment but before

the mandate was issued, asked whether a motion to stay the mandate in accordance with Federal Rule of Appellate Procedure 41(d)(2)(A) had been filed. No such motion had then been filed, nor had one been filed when the mandate issued. Accordingly, in a Final Judgment and Injunction entered on August 5, 2003, the District Court lifted and dissolved the stay. *Glassroth v. Moore*, ___ F. Supp. 2d ___, 2003 WL 21892927 (M. D. Ala. Aug. 5, 2003). After the Eleventh Circuit issued its mandate, Chief Justice Moore asked the Eleventh Circuit to recall it, but, by Order dated August 19, 2003, the Court denied that motion. See Attachment 1. In a separate Memorandum on the same date, the Circuit Clerk advised counsel that the Chief Justice's motion to stay the Final Judgment and Injunction could not be "filed and processed." See Attachment 2. Chief Justice Moore then filed an application to recall the mandate and to stay enforcement of the final judgment in the United States Supreme Court, but the Court denied that application. *In re Moore*, 539 U.S. ___, 2003 WL 21978095 (U.S. Aug. 20, 2003).

On August 22, 2003, the Judicial Inquiry Commission of the State of Alabama filed a six-count Complaint against Chief Justice Moore in the Court of the Judiciary of Alabama. Pursuant to Section 6.19 of Amendment 328 of the Constitution of Alabama (1901), Chief Justice Moore has been disqualified "from acting as a judge, without loss of salary" while the Complaint is pending. With that disqualification, the administrative and adjudicative powers, duties, and authority of the office of Chief Justice of Alabama devolved to associate justice Gorman Houston, the senior associate justice of the Supreme Court of Alabama.

In its decision, the United States District Court for the Middle District of Alabama noted that, among other things, "[T]he Judicial Building is not a public forum,

and... other groups may not place their own displays in the rotunda.” *Glassroth v. Moore*, 229 F. Supp. 2d at 1303; *see also Glassroth v. Moore*, 335 F. 3d at 1287 (“The rotunda is open to the public, but it is not a public forum where citizens can place their own displays.”)

ARGUMENT

The complaint against the associate justices should be dismissed on at least three grounds. First, this Court lacks subject-matter jurisdiction over those claims. Second, venue in this District is improper. Third, the Plaintiffs have failed to state a claim upon which relief can be granted.

A. This Court Lacks Subject-Matter Jurisdiction.

This Court lacks subject-matter jurisdiction because this lawsuit represents an attempt to interfere with a continuing injunction entered by another federal district court of competent jurisdiction, with which the associate justices do not necessarily agree but are bound to follow. The United States District Court for the Middle District of Alabama has directed that the monument be removed, the Eleventh Circuit Court of Appeals has affirmed, and the associate justices are bound by that ruling despite their personal beliefs. In this context, this Court lacks subject-matter jurisdiction.

In *Gregory-Portland Independent School District v. Texas Education Agency*, 576 F.2d 81 (5th Cir. 1978), the former Fifth Circuit held that an action seeking to enjoin the application of an order entered by another district court should have been filed in the district court that entered the order.¹ The Fifth Circuit explained:

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit held that decisions of the Fifth Circuit Court of Appeals rendered prior to September 30, 1981 constituted binding authority in the Eleventh Circuit.

When a court is confronted with an action that would involve it in a serious interference with or usurpation of the continuing power [of another district court to supervise its injunction], “considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction . . . and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.”

Id. at 82-83 (quoting *Lapin v. Shulton, Inc.*, 333, F.2d 169, 172 (9th Cir. 1964), *cert. denied*, 379 U.S. 904 (1964)).

The monument at issue is in the Middle District of Alabama, and that court has taken jurisdiction over that thing. Wright, Miller, and Cooper state:

[I]n all cases involving a specific piece of property, real or personal (including intangible property), the federal court’s jurisdiction is qualified by the ancient and oft-repeated rule--often called the doctrine of prior exclusive jurisdiction--that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court.

14 Charles A. Wright et al., *Federal Practice and Procedure* § 3631 (3d ed. 1998).

While this rule customarily applies to competing claims of jurisdiction over a res made by state and federal courts, prudential reasons support applying the same rule where federal courts make competing claims to the same property. Alternatively, the “first-filed doctrine” supports the vesting of jurisdiction in the Middle District. That doctrine gives the first of two lawsuits filed in different federal district courts priority over the second absent special circumstances. In *West Gulf Maritime Assoc. v. ILA Deep South Local 24*, 751, F. 2d 721 (5th Cir. 1985), the Fifth Circuit pointed out that application of the doctrine avoids wasteful duplication of federal judicial resources, avoids rulings that may trench on the authority of sister courts, and avoids piecemeal resolution of issues that call

for uniform results. *Id.* 729. This lawsuit implicates all of those principles and should be dismissed.

B. Dismissal is Appropriate Because Venue In This District Is Not Appropriate.

Plaintiffs assert that this Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 1343. Because they do not found their claim to jurisdiction solely on diversity, venue is controlled by 28 U.S.C. § 1391(b), which states, in pertinent part, that an action founded on such a jurisdictional basis

may, except as otherwise provided by law, be brought only in a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Id. Measured against these standards, venue in the Southern District is not appropriate. In their official capacities, which is the only capacity in which they have been sued, the associate justices are residents of the Middle District, and the monument, which is “the property that is the subject of the action,” is situated in the Middle District. The placement and the removal of the monument will occur in the Middle District. Accordingly, the Middle District is the proper venue.

Plaintiffs’ contentions to the contrary lack merit. The residence of Plaintiff McGinley, *see* Complaint at ¶ 3, is irrelevant to the § 1391(b) calculus. The claim that the Judicial Building affects all citizens of Alabama, *see* Complaint at ¶ 3, ignores the fact that the Building and the monument are located in the Middle District. That claim

also ignores the criteria of § 1391 (b). Accordingly, there is no statutory basis for venue in this District.

Accordingly, this Court should dismiss this action because venue in this District is improper.

C. Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted.

In their Complaint, Plaintiffs rely on § 1983 to assert rights under the First and Fourteenth Amendments to the United States Constitution. They seek to assert these rights by continuing the placement of the monument in the rotunda of the Judicial Building. Their complaint fails because the associate justices are merely following an injunction, with which they do not necessarily agree, entered by another federal district court and affirmed by the Eleventh Circuit.

The Supreme Court has held that citizens cannot force certain speech by the federal government. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the United States Supreme Court held that regulations promulgated by the Department of Health and Human Services that limited recipients of public funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The court rejected the contention that the regulations discriminated invidiously on the basis of viewpoint in violation of the First Amendment. The federal government chose to fund a program dedicated to the advancement of certain goals. When it does so, it is not obligated to “subsidize analogous counterpart parts,” 500 U.S. at 194, much less an opposing viewpoint. Rather, “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *Id.*

Put differently, in *Rust*, the court declined to permit the plaintiffs to require the federal government to speak in a certain way. That is precisely what McGinley and Dorley seek to do in this case, to appropriate public space, more particularly, a nonpublic forum, to deliver a particular message that the federal courts have ordered removed. The Middle District, and the Eleventh Circuit, have noted that other viewpoints have been excluded from the rotunda of the Judicial Building.

In *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), the Court of Appeals for the Federal Circuit held that the Department of Veterans Affairs could exclude Confederate flags from a cemetery where Confederate soldiers were buried. The United States flag flew daily, and the National League of Families POW/MIA flag flies daily at all national cemeteries that are staffed on a daily basis and otherwise in accordance with statute. The Federal Circuit observed:

Because the government has established national cemeteries as shrines to honor the memory of those who served, maintaining an atmosphere of tranquility and respect is necessarily central to the purpose of the forum. Consequently, the government may need to decide what forms of expression are compatible with this atmosphere of solemnity in order to preserve the forum for the purpose it was established.

Id. at 1324. The court went on to address the implications of flying some flags and not others, deeming that to be federal government speech:

We have no doubt that the government engages in speech when it flies its own flags over a national cemetery, and that its choice of which flags to fly may favor one viewpoint over another. Such speech, and such discrimination between competing viewpoints, does not, however, implicate the First Amendment *rights* of others. The *government* is entitled to full control over its own speech, whether it *speaks* with its *own voice* or enlists private parties to convey its message, and the remedy for

dissatisfaction with its choices is political rather than judicial.

Id. at 1324-25.

The result in *Griffin* is directly applicable here. Just as Griffin had no right to require the Department of Veterans Affairs to allow him to fly a Confederate flag over a national cemetery where Confederate soldiers were buried, McGinley and Dorley have no right to tell the associate justices to disobey a federal court order with which the Justices do not necessarily agree. *Cf. Arkansas Educ. Television Com'n.* 522 U.S. at 681 (“Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”) Accordingly, the Plaintiffs have failed to state a claim upon which relief may be granted.

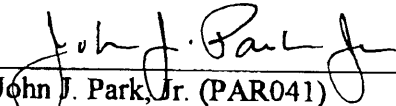
CONCLUSION

For the reasons stated in the associate justices’ Motion to Dismiss and this Brief, this Court should dismiss this action.

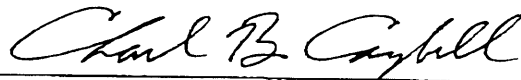
Respectfully submitted,

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ATTORNEY GENERAL

BY:



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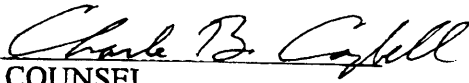
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has this the 26th day of August, 2003 been furnished by facsimile and United States mail to:

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OF COUNSEL

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 02-16708-DD & 02-16949-DD

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 19 2003
THOMAS K. KAHN
CLERK

(CV-01-T-1268-N)

STEPHEN R. GLASSROTH,

Plaintiff-Appellee,

versus

ROY S. MOORE,
Chief Justice of the Alabama Supreme Court,

Defendant-Appellant.

Cons. w(CV-01-T-1269-N)

MELINDA MADDOX,
BEVERLY J. HOWARD,

Plaintiffs-Appellees,

versus

ROY S. MOORE, in his official capacity
as Administrative Head of the Alabama
Judicial System,

Defendant-Appellant.

ATTACHMENT 1

On Appeal from the United States District Court for the
Middle District of Alabama

BY THE COURT: EDMONDSON, Chief Judge, CARNES, Circuit Judge, and
STORY*, District Judge.

BY THE COURT:

Federal Rule of Appellate Procedure 41(b) provides that a federal appellate court's mandate "must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later." Because the appellant did not file anything in this Court after our opinion was released on July 1, 2003, the mandate of this Court issued on July 30, 2003, as required by law. Earlier today, appellant filed a motion to recall the mandate of this Court.

The burden that an appellant must carry before a mandate can be recalled once it has issued is far more onerous than the showing that will justify staying the issuance of a mandate initially under Rule 41(b). The United States Supreme Court has instructed us that a federal appellate court's power to recall a mandate

*Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

“can be exercised only in extraordinary circumstances,” because “it is one of last resort, to be held in reserve against grave, unforeseen contingencies.” Calderon v. Thompson, 523 U.S. 538, 550, 118 S.Ct. 1489, 1498 (1998). Because the appellant in this case has not made the requisite showing, his motion to recall the mandate is DENIED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

August 19, 2003

MEMORANDUM TO ALL PARTIES AND COUNSEL:

NO. 02-16708 - GLASSROTH vs. MOORE

The Court has received by fax a time-sensitive motion for stay in the referenced appeal. As the mandate in this case issued on July 30, 2003, and the appeal is closed, this motion cannot be filed and processed.

Sincerely,

THOMAS K. KAHN, CLERK

By: Nicole Jones, Deputy Clerk
Briefing/Case Closing Section
(404) 335-6173

ATTACHMENT 2