UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JANE FELIX, and B.N. COONE,

Plaintiffs,

vs.

CITY OF BLOOMFIELD, et. al.,

Defendants.

NO: 1:12-cv-00125-JAP-RHS

Defendant's Post-Trial Brief

INTRODUCTION

Starting in 2006, Bloomfield officials have tried to create a venue for private citizens to erect numerous historical monuments on City Hall lawn (CHL). After approving the first of these monuments and before any monuments were erected, Bloomfield enacted a policy creating a public forum for citizens to erect historical monuments. Bloomfield has now neutrally enforced this policy for seven years, enabling private citizens to erect a Declaration of Independence, Gettysburg Address, Ten Commandments, and a soon to be Bill of Rights monument.

But Plaintiffs Felix and Coone ignore this policy and practice and try to unearth Bloomfield's secret religious motives from private parties' actions and city officials' religious affiliations. Like a child who discovers Santa Clause from noises on the roof but ignores her parents assembling toys in the den, Plaintiffs ask this Court to ignore the obvious in favor of the irrelevant and imagined. Bloomfield's policy and consistent practices deserve more respect than that. Based on this explicit policy, this consistent practice, and the CHL monuments' secular purpose, context, and history, Bloomfield can and did allow private parties to erect the CHL

monuments for secular, historical reasons. Therefore, Bloomfield asks the Court to enter final judgment in its favor thereby confirming its compliance with the Establishment Clause.[1]

ARGUMENT

I. Plaintiffs lack standing because they have not established sufficient contact with the message they find offensive and because offense does not create an Article III injury.

Although Plaintiffs disagree with text on the Ten Commandments monument (TCM) (Doc. 124, 3-5), standing based on disagreement admits no limit. Plaintiffs must show sufficient contact with the message they find offensive. But they cannot. Therefore, they do not differ from any other Bloomfield resident aware of the TCM. Nor can Plaintiffs create standing based on hurt feelings. As the Supreme Court recently explained, hurt feelings cannot justify an Establishment Clause violation and cannot create a justiciable injury either.

A. Plaintiffs have not established direct, frequent, imminent, personal, or unwelcome contact with any message they find offensive.

To obtain standing, offended observers must establish frequent, direct, personal, imminent, and unwelcome contact with the "practices against which their complaints are directed." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (requiring "imminent" injury); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (requiring "frequent[]," "personal," and "direct and unwelcome contact"). But Plaintiffs cannot satisfy these requirements since they object to the "message engraved" on the TCM (Doc. 108-1, #129) yet have observed this text only once (Doc.

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[1] This brief cites this Court's fact findings (Doc. 124) and the parties' stipulated facts (Doc. 108-1) since the latter "may not be disregarded and are to be considered as facts in the case without resort to further evidence." *F & D Prop. Co. v. Alkire*, 385 F.2d 97, 100 (10th Cir. 1967).

124, #8, 11) and cannot prove future contact with this text. Thus, Plaintiffs are just like any other Bloomfield resident who is aware of and objects to the TCM.

Nor do Plaintiffs cure this defect by walking and driving in "close proximity" to the TCM. (Doc. 124, #9, 11, 12). No court has substituted proximity for direct contact. Objectors do not have standing to challenge unseen acts just because they live in the same neighborhood, city, state, or country. Rather, they must have actually "observed, read, or heard" the offensive message. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (summarizing standing rules for religious display cases). *See also Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989) (relying on "the visual impact of seeing" item for standing). Without this rule, standing would depend on awareness, awareness of objects nearby or objects far away. The same limitless conceptual mechanism applies either way. But Article III does "not allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it." *Navy Chaplaincy*, 534 F.3d at 764.

The objectors in *Books v. City of Elkhart* are no exception to this rule because they became "aware of the words written on" a TCM from *repeatedly* viewing the TCM up close in the past and because they testified to being forced to directly contact the offensive TCM in the future. 235 F.3d 292, 297, 300 (7th Cir. 2000). In contrast, Plaintiffs have never seen the TCM's text except once, have stipulated to finding just this text objectionable, and have never identified any future situation where they will observe this text. (Doc. 124, #11). Standing based on past and future direct contact is obviously different from standing based on no direct contact at all.

For similar reasons, Felix cannot obtain standing because she avoids paying her water bill at City Hall. (Doc. 124, #10). Anyone can say they avoid a TCM. The real question is whether they

have altered behavior that actually creates contact with the source of offense. *See Doe v. Cnty. of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994) (denying standing to litigant claiming to avoid courthouse because no evidence he had seen or would see objectionable sign in courthouse). But paying the water bill at City Hall does not bring Felix into direct contact with the TCM's text. Indeed, Coone has repeatedly paid his water bill at City Hall and *never* read the TCM's text. (Doc. 124, #11). Felix cannot distinguish her experience from Coone's. Felix never says she always, usually, occasionally, or must read the TCM's text when visiting City Hall. To the contrary, Felix has only read this text once in all her City Hall visits. (Doc. 124, #8). Thus, Felix has not stopped any behavior that creates direct contact with the TCM's text.

While Felix did directly contact the TCM's text once in the past (Doc. 124, #8), a onetime contact does not confer standing. Such exposure is simply too "sporadic and remote," and not "frequent and regular" enough. *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1252 (9th Cir. 2007) (summarizing standing rules in challenge to cross image on city seal). *See also Newdow v. Eagen*, 309 F. Supp. 2d 29, 35 (D.D.C. 2004) (denying standing to litigant who observed Senate prayer once). Moreover, Felix's singular exposure does not create an imminent injury necessary for prospective relief. *See Lujan*, 504 U.S. at 564 (finding no imminent injury, although litigants had visited area with endangered species in past and intended to return to area in future, because "some day" intentions insufficient). Indeed, she "has no reasons or future plans to visit City Hall." (Doc. #108-1, #123). And nothing in the record proves that she or Coone will directly contact the TCM's text *in the future*.

In this respect, Plaintiffs' statements and stipulations have cooked their own goose on standing. For these statements and stipulations do not establish frequent, imminent, or direct

contact with the thing Plaintiffs stipulate to finding offensive. And with no sure basis establishing such contact, Plaintiffs cannot carry their burden to prove standing.

B. Disagreement with TCM does not create Art III injury.

Even if Plaintiffs sufficiently contact the TCM's text, they merely disagree with this text. (Doc. 124, #3-5). And disagreement does not create an Article III injury. As the Supreme Court recently confirmed, "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views…" *Town of Greece, v. Galloway,* 134 S. Ct. 1811, 1826 (2014). While *Greece* ruled on the merits rather than standing and confronted legislative prayer rather than a TCM, *Greece*'s logic cannot be limited to either scenario. *Greece* still rejected offense as a viable Establishment Clause harm on conceptual grounds, which makes sense because offense never creates an Article III injury in any other context. Thus, *Greece* logically unified standing doctrine, undercut prior Tenth Circuit cases allowing offended observer standing, and in turn undermined any basis for standing here.

II. Bloomfield has complied with Establishment Clause because the CHL monuments are private speech.

The Establishment Clause restricts speech attributable to the government, not private parties. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (noting the "crucial difference" between "government speech" and "private speech" for Establishment Clause analysis). Thus, Bloomfield can only violate the Establishment Clause if the CHL monuments are government speech. But these monuments are private speech under the Tenth Circuit's methodology for identifying private speech: private parties erected these monuments under a forum policy allowing private speech; private parties created, own, designed, maintain, and installed these monuments with

numerous messages disclaiming any connection to Bloomfield; and private parties edited and bore ultimate responsibility for their messages.[2]

A. This Court should apply the *Wells* test for identifying private speech.

Although the government speech doctrine is "recently minted," *Pleasant Grove City v. Summum,* 555 U.S. 460, 481 (2009) (Stevens, J., concurring), the Tenth Circuit has clarified how to identify private speech. There is no reason to disregard this guidance here.

The Tenth Circuit uses four factors to identify private speech: 1) the central purpose of the program in which the speech occurs, 2) the speaker's literal identity, 3) the degree of editorial control exercised by private parties over the speech's content, 4) whether private parties bear ultimate responsibility for the speech's content. *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1139-41 (10th Cir. 2001). This *Wells* test may also consider a fifth factor, the reasonable observer's perceptions. *Id.* at 1142 (analyzing this factor without accepting it). Almost every other circuit uses some version of this *Wells* test, either by applying its four factors or by incorporating these factors into a reasonable person standard.[3] And as its universal acceptance suggests, this flexible test is useful because identifying private speech heavily depends on facts and this issue arises in many different factual contexts. No single per se rule can distinguish government speech from private speech in the myriad of factual contexts courts encounter.[4]

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[2] Since Plaintiffs carry the burden to prove an Establishment Clause violation, they carry the burden to prove the existence of government speech as well.

[3] *See, e.g.*, *ACLU v. Tata*, 742 F.3d 563, 568 (4th Cir. 2014) (four factors); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (reasonable person incorporating four factors); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (reasonable person incorporating four factors); *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (four factors); *Chiras v. Miller*, 432 F.3d 606, 617-18 (5th Cir. 2005) (four factors).

[4] *See, e.g.*, *Tata*, 742 F.3d at 566 (license plates); *Miller v. City of Cincinnati*, 622 F.3d 524, 536 (6th Cir. 2010) (press conferences); *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354

This axiom still applies after *Pleasant Grove City v. Summum* found certain monuments to be government speech. 555 U.S. 460 (2009). *Summum* did not overturn *Wells* or create a per se monument rule for four reasons. First, *Summum* did not explicitly overturn *Wells* or explicitly reject *Wells*' four factors. And this "Court, as a district court, is not free to say that a recent Supreme Court decisions has implicitly overruled Tenth Circuit opinions; that latter task is one for the Supreme Court and the Tenth Circuit." *United States v. Courtney*, 960 F. Supp. 2d 1152, 1180 (D.N.M. 2013). *See also United States v. Allen*, 895 F.2d 1577, 1579 (10th Cir. 1990) (noting reluctance "to infer that the Supreme Court implicitly overruled our precedent").

Second, *Summum* did not implicitly overrule *Wells* because post-*Summum* courts continue to apply the *Wells* test and cite *Wells* as good law. *See, e.g.*, *Tata*, 742 F.3d at 569-71 (rejecting argument that *Summum* "implicitly overruled" four factor test); *Freedom from Religion Found. v. City of Warren*, 707 F.3d 686, 697 (6th Cir. 2013) (relying on *Wells* to find government speech). Third, *Summum* did not create a per se rule for all monuments. *Summum* merely found that "[p]ermanent monuments displayed on public property *typically* represent government speech" because of a variety of context-specific factors like a monument's permanence, the low number of monuments that can fit into an area, the government's "selectivity" in accepting monuments, and the government's "editorial control" in selecting monuments. 555 U.S. at 470-72 (emphasis added). But none of these factors were dispositive in *Summum*'s analysis.

For example, *Summum* did not rely solely on permanence to find government speech because *Summum* acknowledged that permanent monuments can be private speech. 555 U.S. at 480.

(4th Cir. 2008) (legislative prayers); *Chiras*, 432 F.3d at 617 (school textbooks); *Wells*, 257 F.3d at 1137 (displays outside city hall); *Knights of Ku Klux Klan v. Curators of Univ. of Missouri*, 203 F.3d 1085, 1087 (8th Cir. 2000) (advertising on public radio); *Cimarron Alliance Found. v. Oklahoma City*, 290 F. Supp. 2d 1252, 1256 (W.D. Okla. 2002) (banners on city utility poles).

Relying on permanence is not even logical since courts regularly find permanent speech to be private and temporary speech to be governmental. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (applying forum analysis to city's restriction on "permanent, freestanding" newsracks); *Warren*, 707 F.3d at 696 (finding temporary holiday display to be government speech); *Tong v. Chi. Park Dist.*, 316 F. Supp. 2d 645, 653 (N.D. Ill. 2004) (applying forum analysis to bricks permanently affixed to city property). Even Plaintiffs' attorneys (the American Civil Liberties Union) concede that emblems on *permanent* gravestones in national cemeteries are private speech.[5] If these permanent gravestones can contain private speech, so can permanent monuments.

Likewise, *Summum* did not categorize all speech in small forums as government speech because *Summum* acknowledged that a monument with finite messages could be private speech. 555 U.S. at 480. Nor is a small forum rule logical because many cases have found private speech in small forums that can only accommodate a few speakers. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (applying forum analysis to two person television debate); *Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) (recognizing private speech on "adopt a highway" signs near highway); *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1332-33 (11th Cir. 2001) (finding student's speech at graduation ceremony to be private speech); *Air Line Pilots Ass'n Int'l v. Dept. of Aviation*, 45 F.3d 1144, 1151-52 (7th Cir. 1995) (finding airport display case to contain private speech).

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[5] See https://www.aclu.org/files/images/asset_upload_file399_26244.pdf (last visited June 13, 2014). *See also Summum*, 555 U.S. at 487 (Souter, J., concurring) (acknowledging these gravestones to be private speech).

Thus, neither *Summum*'s logic nor holding creates a per se rule for monuments. As the Fourth Circuit has noted, *Summum* did not create a "blanket" one factor test for monuments but instead used "multi-faceted, context-specific reasoning" by assessing factors like permanency, control over the speech, perceived identity of the speaker, and context. *Tata*, 742 F.3d at 570-71. The *Wells* test uses similar factors. And therefore, *Summum* is not merely consistent with *Wells* but endorses *Wells*' multi-factorial, context-specific approach. Given this endorsement, *Wells* remains good law and provides the means to identify private speech in this case.[6]

B. Under the *Wells* test, the CHL monuments are private speech because private parties erected them under a forum policy allowing private speech, private parties funded, designed, installed, own, and maintain them in a forum with disclaimers, and private parties controlled and edited the messages on these monuments.

Each of the four *Wells* factors indicates the CHL monuments are private speech, especially the *Wells* factor emphasizing the significance of Bloomfield's forum policy.

First, private parties erected the CHL monuments under Bloomfield's forum policy which explicitly created a "limited public forum" for private speech. (Stipulated Exhibit I). *See also* (Doc. 124, #44, 49, 50) (noting that private party sought and received approval for TCM under forum policy). The Tenth Circuit defers to such explicit statements when identifying speech's purpose. *See Wells*, 257 F.3d at 1141 (accepting official's testimony about sign's purpose). Moreover, Bloomfield's policy empowers private parties to select and express different historical viewpoints in the forum *See* (Stipulated Exhibit I, §III.b) (forbidding viewpoint discrimination by Bloomfield). This factor legally prohibits Bloomfield from rejecting historical monuments for viewpoint-based reasons. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819,

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[6] The *Wells* test still allows this court to consider factors like permanence and forum size since they could be relevant to the reasonable onlooker. But these are not the only relevant factors. This court should apply the other *Wells* factors as well.

829-45 (1995) (finding viewpoint discrimination when university distributed funds for discussion of various topics except discussion about religion). For example, if Plaintiffs wanted to display a historical monument about wiccans, Bloomfield could not legally reject it because of its viewpoint. Bloomfield would not bind itself this way and allow different viewpoints if it wanted to express its own viewpoint. True, Bloomfield's policy sets the general topic for discussion and imposes other rules, but limited forum policies always do this. *See id. at* 829 (finding restrictive policy created limited public forum by distributing funds for student groups to discuss certain topics). So long as the policy empowers citizens to select different viewpoints, the policy intends to allow private speech. *See Tata*, 742 F.3d at 570-73 (finding private speech because policy enabled private parties to pick viewpoint from "wide array of specialty plates").

Second, the literal speakers are monuments owned, designed, funded, maintained, created, installed, and chosen for their specific location by private parties. Bloomfield played no role in any of these activities except approving the monuments under its forum policy. (Doc. 124, #41, 43, 44, 52, 115, 122, 124). Such private control over the literal speaker indicates private speech. *See Wells*, 257 F.3d at 1142 (analyzing who built, paid for, and erected holiday display); *Sons of Confederate Veterans, Inc. v. Comm'n of Va. Dep't of Motor Vehicles (SCV)*, 288 F.3d 610, 621 (4th Cir. 2002) (finding specialty plates to be private speech because they were owned by private parties). Moreover, text on each monument and on a sign in the forum explicitly associates the CHL monuments with private parties and disclaims any connection to Bloomfield. (Doc. 124, #54, 76, 77). Thus, the identity of the literal speaker could not be clearer to an onlooker. *See Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995) (noting that disclaimers prevent misattribution of speech to government).

Third, Bloomfield's forum policy gives private parties editorial control to select their text, not Bloomfield. *See* (Stipulated Exhibit I, §III.b) (forbidding viewpoint discrimination by Bloomfield). Bloomfield's practice proves this point since private parties exercised complete editorial control over the CHL monuments' text by designing and selecting their text. *See* (Doc. 124, #41, 44, 64) (noting that private party selected "text and images" for TCM). While Bloomfield approved the monuments under its forum policy, Bloomfield's "regulatory discretion (deciding whether to display the [monument]) should not be confused with editorial discretion (deciding what message the [monument] will convey)." *Cimarron Alliance*, 290 F. Supp. 2d at 1258. Bloomfield merely exercised its regulatory discretion since it never edited the monuments' text but approved the prior editorial choices of private parties. As a result, private parties exercised editorial control, not Bloomfield. *See Stanton,* 515 F.3d at 966 ("While the Commission determined whether Life Coalition met the statutory guidelines for gaining access to the license plate forum, Life Coalition determined the substantive content of their message."); *SCV*, 288 F.3d at 621 (noting that state exercised de minimus editorial control over specialty plates because state usually accepted designs submitted by private groups).

Fourth, private parties bore ultimate responsibility for the monuments by creating, owning, funding, designing, selecting the location for, proposing, maintaining, and installing these monuments under Bloomfield's forum policy. *See* (Doc. 124, #41, 43, 44, 52, 115, 122, 124). Without private parties, the monuments would never be displayed. And private parties contributed much more to displaying the monuments than Bloomfield did. Bloomfield just approved the monuments under its forum policy. So as the "but for" and proximate causes for the monuments, private parties bore ultimate responsibility for these monuments. *See Tata*, 742 F.3d

at 574 (finding private parties bore ultimate responsibility because they "must apply for" and "pay for" the specialty plate and so "'but for' the private individual's action, the specialty license plate would never exist…").

The result of the *Wells* test is no shock. Even one of the Plaintiffs views two of the three CHL monuments as private speech. (Doc. 108-1, #130). Wanting to avoid the hat trick, Plaintiffs ask this Court to ignore the *Wells* factors because cases have found privately created, funded, and owned displays to be government speech. *See, e.g., Summum,* 555 U.S. at 470 (TCM funded and designed by private parties); *American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1115-16 (10th Cir. 2010) (crosses funded, designed, and owned by private parties); *Green v. Haskell Cnty. Bd. of Com'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009) (TCM created and funded by private parties). But none of these cases considered displays erected under a public forum policy or surrounded with numerous disclaimers erected before litigation.[7]

This disclaimer distinction matters because disclaimers erected in a forum before litigation effectively clarify who is speaking. *Compare Pinette*, 515 U.S. at 769 (accepting usefulness of disclaimer appearing on displays in forum) *with Davenport*, 637 F.3d at 1112 (downplaying state's post-litigation disclaimer that did not appear on or near roadside crosses); *Green*, 568

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[7] *Summum* and *Green* also did not consider temporary monuments like the CHL monuments. Although this Court found the CHL monuments to be "effectively permanent" (Doc 124, #129), these monuments are still *legally* temporary because Bloomfield's revised forum policy requires these monuments to be reapproved every 10 years. (Doc. 124, #87). Without re-approval, the monuments will be removed. This policy revision is not a sham, and Bloomfield has the power to clarify and even "change the nature of any nontraditional forum as it wishes." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004). *See also* (Doc. 77, pp. 10-12) (explaining significance of re-approval provision in forum policy).

F.3d at 808-09 (downplaying disclaimer erected after litigation).[8] And the policy distinction matters because written policies reveal the government's intent --- the determinative factor in forum analysis. *See Cornelius v. NAACP*, 473 U.S. 788, 802 (1985) (noting that government creates public forum "by *intentionally* opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it *intended* to designate a place not traditionally open to assembly and debate as a public forum.") (emphasis added); *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) ("government intent is the essential question" in forum analysis).

Now deferring to government intent in the forum context enables the government to control its property. If the government cannot use explicit policies to control its property, the government could not achieve valuable, democratically authorized objectives. Relying on government intent also "encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Forbes*, 523 U.S. at 680. Deferring to intent, in other words, maximizes free speech. Thus, deferring to government intent allows the government to do things like commemorate veterans through a policy enabling private individuals to place religious emblems on permanent headstones in national cemeteries. *See* 38 U.S.C. § 2306; 38 C.F.R. §§ 38.630-38.632.[9] As this example shows, courts should heavily defer to written policies to determine if governments have created a public forum for private speech. Indeed, no court has found government speech when

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[8] The disclaimers on the CHL monuments appeared well before litigation in locations visible to those viewing the lawn. (Doc. 124, #54, 76).

[9] For the application form to select gravestone emblems, see http://www.va.gov/vaforms/va/pdf/VA40-1330.pdf, and for the visual list of the permissible emblems, see http://www.cem.va.gov/cem/docs/emblems.pdf (last visited June 9, 2014).

that speech was approved under a policy explicitly creating a public forum.[10] Nor should this Court be the first. Rather, this Court should follow the well-established rules of forum analysis, defer to the stated intent in Bloomfield's forum policy, and allow Bloomfield to open its property for private parties to express many different historical viewpoints.

III. Bloomfield has complied with the Establishment Clause because Bloomfield intended to create a public forum for numerous historical monuments and because Bloomfield allowed numerous monuments that convey historical messages.

Although the CHL monuments speak for private parties, Bloomfield complies with the Establishment Clause even if these monuments speak for Bloomfield because A) Bloomfield allowed these monuments to facilitate historical messages and because B) these monuments convey historical messages. Thus, these monuments have a secular purpose and effect. *See Green*, 568 F.3d at 796-97 (requiring a secular purpose and effect).

A. Bloomfield's secular purpose for allowing monuments is to empower its citizens to commemorate Bloomfield's heritage.

Bloomfield satisfies *Lemon*'s purpose prong so long as its conduct has "a plausible secular purpose" as seen through the eyes of the objective observer considering external signs like statutory text, legislative history, and statutory implementation. *Davenport*, 637 F.3d at 1118. Bloomfield's secular purpose for the CHL monuments appears in its forum policy: to allow private citizens to commemorate "the history and heritage of [Bloomfield's] law and government." (Stipulated Exhibit I; Doc. 124, #83). This stated purpose is unquestionably secular. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("an open-forum policy…would have

[10] While the city in *Summum* did not unintentionally create a public forum against its wishes by allowing monuments on city property, *Summum* did not foreclose the possibility of a city affirmatively creating a public forum through a forum policy. *Summum*, 555 U.S. at 464-67. And as this Court has acknowledged, *Green* did not consider a situation like the one here where private parties received approval and erected a TCM under a forum policy. (Doc. 108, p.17 n.7).

a secular purpose…"); *Green*, 568 F.3d at 798-99 (noting that government could use TCM to commemorate history). And this Court "must [] consider" and "defer to the government's professed purpose." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008). Therefore, Plaintiffs must prove this stated purpose is a "sham." *Id*. But Plaintiffs cannot carry their extremely high burden to prove a sham purpose for four reasons.

First, Bloomfield's professed secular purpose appears in a written policy approved by Bloomfield's legislative body. Such policies deserve even more deference than other acts. *See Mueller v. Allen*, 463 U.S. 388, 394–395 (1983) (noting "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). Second, Plaintiffs cannot identify any statements in the forum policy's legislative history or elsewhere indicating Bloomfield's religious purpose. And mere silence cannot prove a sham purpose. *See ACLU v. Grayson Cnty*., 591 F.3d 837, 852-54 (6th Cir. 2010) (explaining that evidentiary silence supports secular purpose); *Davenport*, 637 F.3d at 1118 n.10 (noting that lack of evidence does not undermine professed secular purpose).

Third, Bloomfield officials confirmed their secular purpose and denied any religious purpose in their trial testimony. (Doc. 124, #139-141). Fourth, Bloomfield has neutrally implemented its forum policy for seven years and allowed numerous historical monuments. (Doc. 124, #64). As a result, Plaintiffs must turn a blind eye to Bloomfield's professed position, legislative text, legislative history, legislative enforcement, and uncontradicted trial testimony to prove a sham purpose. But overlooking pictures of earth from outer space does not prove the earth is flat.

Unfazed, Plaintiffs cast their gaze at trial on irrelevant information, like the beliefs of Bloomfield officials, the actions of private parties, and the distant pre-policy actions of

Bloomfield. The reasonable observer is not so easily fooled. None of this information indicates anything religious about the purpose for CHL monuments, and none of it proves a sham purpose.

1. **The reasonable observer considers Bloomfield's official actions, not the general background beliefs or religious affiliations of Bloomfield officials.**

In their first efforts to confuse, Plaintiffs emphasize officials' general beliefs about religion and the Ten Commandments. *See* (Doc. 124, #142-146) (noting that some Bloomfield officials are "devout Christians" who think of their "faith as an anchor" and view the Ten Commandments as morally significant). But Bloomfield officials never mentioned much less relied on any of these beliefs when discussing or approving the TCM. Thus, Plaintiffs must impute a religious purpose to Bloomfield's particular monument decisions just because some Bloomfield officials are Christians and follow the Ten Commandments.

Officials' general background beliefs, however, reveal nothing about their motives for a particular decision. Officials can be religious and believe in the Ten Commandments yet still vote for a TCM for secular reasons. As the Tenth Circuit has noted, the gap between an official's general religious beliefs and her particular decisions is too large for an Establishment Clause violation to bridge. *See Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997) (refusing to consider teacher's "psychological *motives vis à vis* his past conduct, underlying belief system or religious character" as basis to prove Establishment Clause violation because only activity that is "temporally connected to the challenged activity" is relevant).

This gap only widens in the legislative context because the motives of particular legislators never reveal a legislature's objective purpose in Establishment Clause analysis. *See Mergens*, 496 U.S. at 249 ("…what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.") (emphasis in original). Courts could

not even discern legislative purpose from legislators' beliefs if they wanted to because legislators vote for legislation for different reasons. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (collecting cases explaining difficulty and impropriety of evaluating legislative motive). Nor should courts want to discern legislators' beliefs and motives. If legislators' background religious beliefs could invalidate legislative action, then religious believers would be driven from office by a de-facto anti-religious test oath. *See* U.S. Const. art. VI, cl. 3 (forbidding religious tests as qualification for public office); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (enjoining state constitutional provision barring ministers from serving in state legislature). Perhaps this is what Plaintiffs want to achieve with this lawsuit.[11] But this is not the law. *See Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) (scolding district court for relying on fact that school board members "had at some time expressed the view that their individual religious backgrounds favored" facially neutral policy to enjoin policy).

2. The reasonable observer considers Bloomfield's official policies and practices, not the behavior of private parties.

Besides attributing officials' beliefs to Bloomfield, Plaintiffs also attribute the actions of private parties to Bloomfield. But the reasonable person can easily distinguish actions of private parties from the government's official policy, custom, and practices.

For example, the reasonable person would not object to the TCM being the first monument approved and erected under Bloomfield's forum policy. Bloomfield did not make that decision; private parties did. (Doc. 124, #44) (noting it was "solely" Kevin Mauzy's idea to propose TCM). Bloomfield did nothing wrong by neutrally administering its forum policy to allow

[11] Given this goal, Kevin Mauzy unsurprisingly viewed this lawsuit as an attack on his religious freedom. (Doc. 124, #145).

private parties to act under that policy. *See Galloway,* 134 S. Ct. at 1824 (finding no problem that "nearly all" legislative prayer givers "turned out to be Christian" because "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 285-86 (4th Cir. 1998) (denying that forum policy violated Establishment Clause just because "the first speaker in the forum happens to deliver a religious message…"). In fact, Bloomfield could not stop private parties from erecting a TCM first without committing illegal viewpoint discrimination. *See Rosenberger*, 515 U.S. at 829-45 (forbidding university from excluding viewpoints about topics otherwise permitted in limited public forum).

Likewise, even though the TCM dedication ceremony contained numerous religious references (Doc. 124, #102), the reasonable person would understand this ceremony was private speech: no city official spoke or participated in this ceremony, planned this ceremony, or influenced the ceremony's content; Bloomfield did not fund or sponsor this ceremony; no City Councilor attended the ceremony; and a ceremony speaker explicitly distanced the ceremony from Bloomfield. (Doc. 124, #94, 101; Doc. 108-1, #99). Bloomfield officials merely allowed the ceremony to occur outside City Hall and monitored the ceremony to ensure public safety. (Doc. 124, #96, 103-105). But Bloomfield neutrally offers the same services to everyone. *See* (Doc. 108-1, #98) (confirming Bloomfield's "practice to let anyone use CHL for events so long as those events are safe"); (Doc. 124, #64) (noting two other dedication ceremonies that occurred outside City Hall); (Doc. 124, #96, 103-105) (confirming Bloomfield's neutral practice to have police/fire personnel monitor privately organized events to ensure safety). Such neutral treatment

of private action does not indicate any religious purpose of Bloomfield. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (noting that provision of "general government benefits" services by "police and fire departments" complies with Establishment Clause); *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979); (holding that outdoor Mass conducted by Pope John Paul II on the National Mall did not violate the Establishment Clause even though government provided police and sanitation services).[12]

For similar reasons, the reasonable observer will not attribute the private capacity actions of City Councilors to Bloomfield. These Councilors only work for Bloomfield part time.[13] So they unquestionably can and often do act in their private capacities. For example, while two City Councilors contributed funds to the TCM (Doc. 124, #111, 112), they did so in their private capacities in their private time with their own private funds. (Doc. 124, #115) (noting that Bloomfield contributed no funds to TCM).[14] And while one Councilor requested TCM construction to begin, coordinated fundraising for the TCM, and initially asked churches to accept monument donations (Doc. 124, #34-36, 107-108), he did so in his private time and private capacity since Bloomfield only approved allowing private citizens to erect and pay for monuments. (Doc. 108-1, #82; Stipulated Ex. VI). Indeed, the Councilor's actions did not occur during a Council meeting or any other official work time. And Plaintiffs never specify any facts

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[12] Nor do religious references transform the ceremony into a religious event. This ceremony was overwhelmingly patriotic and used religious references to solemnize the patriotic celebration. *See Galloway,* 134 S. Ct. at 1823 (allowing sectarian prayers to solemnize event); *Harris v. City of Chicago*, 218 F.Supp.2d 990, 994 (N.D. Ill. 2002) (finding no religious purpose for 9/11 ceremony even though ceremony involved prayer).

[13] For example, Councilor Morin worked as a preacher while serving on the Council. (Doc. 124, #143).

[14] While Councilor Morin also contributed funds, this Court's findings do not indicate he did so while on the Council. (Doc. 124, #113). In reality, he contributed only after leaving the Council.

suggesting a final policymaker like the City Council ordered, ratified, or even knew about any city employee contributing money, fundraising donations, asking churches to hold funds, or otherwise facilitating monuments. Without such proof, Plaintiffs cannot identify a *Monell* policy or widespread practice connecting the Councilors' actions to Bloomfield. *See Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996) (noting that city can only be held liable under §1983 if the actions "can be characterized as representing an official policy or custom of the City.").

Rather, the City Councilors acted like public school teachers acting in their own personal time after work. If a reasonable person can distinguish teachers acting in their official capacities on school premises during school from teachers acting in their personal time on school premises after school, then certainly a reasonable person can distinguish a Councilor acting at a Council meeting or in an official role from a Councilor acting in his personal time and in his private capacity. *See Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 815 (8th Cir. 2004) (attributing teacher's religious activity on school premises during personal time after school to teacher, not school). A contrary conclusion would force governments to unconstitutionally ban all non-work related employee expressive activity done outside of work. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457 (1995) (enjoining law prohibiting federal employees from accepting compensation for making speeches or writing articles unrelated to work). And the reasonable observer should not be construed to force employees to surrender their rights or to ignore a distinction citizens readily grasp when interacting with off-duty city employees.

3. The reasonable observer considers Bloomfield's policy and post-policy actions, not its distant pre-policy actions.

Even if onlookers could confuse officials' off-duty behavior with Bloomfield's official actions, this off-duty behavior and Bloomfield's 2007 TCM approval occurred before

Bloomfield passed its forum policy, before Bloomfield approved the TCM under its policy, and before this litigation began. Therefore, these actions reveal little about Bloomfield's purpose for approving monuments under its forum policy in 2011.

While Plaintiffs want to highlight the April 3, 2007 TCM approval, no one erected a TCM under this April 2007 approval. Rather, private parties erected the TCM in 2011 after Bloomfield passed a forum policy, after four years passed, after private parties sought approval under Bloomfield's forum policy, and after Bloomfield provided that approval on June 13, 2011. (Doc. 124, #37-40, 44, 49). And because the monuments actually arose under Bloomfield's forum policy, this policy, its legislative history, and Bloomfield's post-policy actions provide the relevant data set for analysis. *See Bauchman*, 132 F.3d at 559-60 (refusing to consider teacher's actions from prior school years when evaluating teacher's recent actions under Establishment Clause). Any other conclusion would be to act as if Bloomfield never passed a forum policy or approved monuments under its policy at all.

Nor does this conclusion allow Bloomfield to rewrite the past. *See McCreary Cnty. v. ACLU,* 545 U.S. 844, 869-74 (2005) (ignoring display alterations made after litigation began). Bloomfield has not attempted to cleanse its improper goals by changing course *after litigation began* like McCreary County. Rather, Bloomfield clarified its secular goals by passing and administering its forum policy *before litigation began*. And courts have always accepted "pre-litigation evidence" unlike "post hoc rationalizations" because the former are more trust worthy allow the government to experiment or change course in good faith to comply with the constitution. *Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002). *See also Grayson Cnty.*, 591 F.3d at 852-53 (considering later motion about TCM rather than earlier about TCM

because second motion occurred before litigation).[15] Thus, Bloomfield's policy and post-policy actions speak much louder than any pre-policy acts and effectively hush Plaintiffs' effort to prove a sham purpose based on murmurs and figments of imagination.

B. The monuments' secular effect is to commemorate Bloomfield's heritage.

Given its purpose to create a forum for historical monuments, Bloomfield logically acted to allow monuments that convey historical messages. These efforts do not have "a principal or primary effect of advancing or endorsing religion" when analyzed through the eyes of the reasonable observer aware of the history and context of the challenged conduct and the community in which the conduct occurs. *Green*, 568 F.3d at 799 (setting forth test for effect). Rather, the CHL monuments' purpose, history, and context convey a historical effect. *See Davenport*, 637 F.3d at 1119 (relying on these factors to assess effect).

1. Purpose: Bloomfield has already established its secular purpose for allowing CHL monuments. *See* § III.A. This proof settles the matter since the government's purpose, not the donors' purpose, matters. *Davenport*, 637 F.3d at 1118. But even if the donors' purpose were relevant, they also had a secular purpose. Not only did these donors state their secular purpose on the monuments (Doc. 124, #76), they repeatedly proclaimed this purpose to others and at trial. (Doc. 124, #27, 59, 64, 100, 139). Thus, in this rare instance, the government and the monument donors share similar secular goals: Bloomfield tried to allow historical messages, and the donors tried to convey historical messages.

[15] In fact, pre-litigation behavior is so powerful it can even "purge" a prior impermissible purpose. *ACLU v. Rutherford Cnty.*, No. 3:02 0396, 2006 WL 2645198, at *9-10 (M.D. Tenn. Sept. 14, 2006). *See also ACLU v. Rowan Cnty.*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (noting that "genuine changes in constitutionally significant conditions" can remove the "taint" of prior unconstitutional behavior).

2. History: Like their secular purpose, the CHL monuments also have a secular history since Bloomfield attempted to allow numerous historical monuments on CHL before its forum policy and actually did so after its forum policy.

As noted above, the reasonable observer will only consider post-policy history which is completely secular because Bloomfield allowed CHL monuments by passing and neutrally enforcing its forum policy for seven years. *See* § III.A.3 (explaining forum policy's history and relevance). Indeed, Plaintiffs cannot identify a single statement indicating a religious purpose for this policy or the monuments erected under this policy. Nor can Plaintiffs blame Bloomfield for the TCM dedication ceremony or erecting a TCM first. Private parties held this ceremony and erected the TCM first under Bloomfield's neutral policies. *See* § III.A.2. Therefore, although the TCM stood alone for a mere four months, Bloomfield did not choose this and could not prevent it. *Id*. Nor did Bloomfield need to stop it. If governments can allow private parties to express religious messages alone in forums for the holiday season, Bloomfield can allow private parties to display historical messages alone in a forum for four months. *See Pinette*, 515 U.S. at 758 (allowing cross to be displayed in front of a city hall during December).

Likewise, Bloomfield did not need to advertise its forum policy or articulate the TCM's "exact" historical significance. (Doc. 124, #92, 147). A media campaign on either topic would merely waste money since we expect citizens and the reasonable observer to know the law as well as a display's "purpose, context, and history." *Weinbaum*, 541 F.3d at 1031.[16] And congresses, presidents, the Supreme Court, and Plaintiffs have acknowledged the Decalogue's

[16] The informed observer also knows why Bloomfield's mayor and city manager were present at the TCM's installation (Doc. 124, #53): they both work at City Hall. Nothing indicates they were present *for* the installation or "posed for photographs" with the TCM. *Green*, 568 F.3d at 801.

exact historical significance. (Doc. 108-1, #95) (admitting that "Ten Commandments have shaped the law and government of the United States."); *Van Orden v. Perry*, 545 U.S. 677, 689 (2005) (identifying those who have acknowledged Decalogue's role in "America's heritage"). In light of this background, Bloomfield's media silence does not convey a religious message.

TCM's pre-policy history does not either. Although irrelevant, this pre-policy history reveals a secular record where Bloomfield officials initially wanted displays to beautify the city, came to the monument idea upon seeing numerous historical monuments in Roswell, discussed numerous historical monuments with private citizens, discussed numerous historical monuments at the April 2007 Council meeting, and approved the TCM at this meeting "as a historical and art display." (Doc. 124, #25-28; Stipulated Exhibit VI). While Plaintiffs think approving a TCM first looks suspicious, "the simple desire to post the Ten Commandments cannot, in isolation, demonstrate religious purpose on the part of those desiring the posting." *Grayson Cnty.*, 591 F.3d at 850. What matters is why, not if, Bloomfield approved a TCM in 2007. And Bloomfield did so to create the "start of a series" of "historical and art" displays, as discussion at the April 2007 Council meeting shows. (Doc. 124, #28-29; Stipulated Exhibit VI). *See also* (Doc. 108-1, #79) (noting that Mauzy proposed TCM first "since the Ten Commandments were so old and provided a foundation for later documents.").

This secular history does not change because a few people objected to the TCM. (Doc. 124, #131-138). Even if popularity contests decided Establishment Clause cases, the TCM would still pass muster since the "vast majority" of people supported it. (Doc. 124, #130). Hence, the TCM was not divisive. More importantly, actual people's beliefs do not control Establishment Clause propriety, whether majority support or minority dissent. The fictitious reasonable observer

controls. And this observer does not ask if any or some people perceive a religious endorsement because "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). So objections merely indicate that some, perhaps unreasonable people object to the TCM for some undefined or even incorrect reason. They do not indicate a reasonable person would object. That is why courts routinely uphold TCMs despite past objections and lawsuits. *E.g., Grayson Cnty.*, 591 F.3d at 841-42; *Books v. Elkhart Cnty.*, 401 F.3d 857, 858-60 (7th Cir. 2005); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 626-27 (6th Cir. 2005).

What matters more than objections is how Bloomfield acted. And Bloomfield went the extra mile to placate objectors by passing a forum policy declaring a secular purpose for all to see and legally binding Bloomfield to accept different historical viewpoints, even those Bloomfield disagreed with. (Doc. 124, #37, 83). *See* (Stipulated Exhibit I, §III.b) (forbidding viewpoint discrimination by Bloomfield). Bloomfield officials allayed objectors as well. For when an objector confronted one official, this official "denied having a religious motive" and affirmed his historical understanding of the TCM. (Doc. 124, #146) (stating that "[o]ur nation was founded on these principles."). True, this official could have been more courteous in his response, but his answer's forcefulness and substance accentuate his secular motives for the TCM.

Thus, Bloomfield did not blindly adopt anyone's religious motives, allow a TCM "without clarifying its purposes," or fail to "affirmatively" discourage "any mistaken impression" created by religious statements. *Green*, 568 F.3d at 801-02. Rather, Bloomfield officials always wanted to erect numerous historical monuments for secular reasons, Bloomfield officials never made religious statements about the TCM, Bloomfield passed a forum policy clarifying its secular

purpose and discouraging any mistaken impression about that purpose, and Bloomfield then neutrally administered its forum policy allowing private parties to erect numerous historical monuments. This history overwhelmingly conveys a secular effect.

3. Context: Lastly, the context of the CHL monuments confirms their secular effect. Five aspects of this context are particularly significant.

First and foremost, the TCM appears or will soon appear nearby other historical monuments like a Declaration of Independence, Gettysburg Address, and Bill of Rights monument. (Doc. 124, #70; Doc. 108-1, #116). Courts have repeatedly emphasized how this factor favors a secular effect. *See, e.g., Van Orden*, 545 U.S. at 702; *Card v. City of Everett*, 520 F.3d 1009, 1020-21 (9th Cir. 2008); *Ogden*, 297 F.3d at 1011; *Mercer Cnty.,* 432 F.3d at 637. Next, the TCM is not more prominent than any other monument. (Doc. 124, #75). Third, the CHL monuments share a similar appearance. They have similar dimensions, use similarly sized text, are made of similar materials, and contain similar titles, texts, dedications, and disclaimers. (Doc. 124, #77, 79).[17]

Fourth, each CHL monument proclaims its historical purpose, and a separate sign in the forum does so as well. (Doc. 124, #73, 76, 77). This text "help[s] the reader interpret the intended relationship between" the monuments. *Green*, 568 F.3d at 808. And coupled with the monuments' similar appearance, this text creates a "unifying, cohesive secular theme." *Id.* at 806 n.16. Nor does this theme dwindle because private parties, designed, purchased, funded, and erected the disclaimer sign. (Doc. 124, #90, 91). They did the same for all the CHL monuments. The reasonable observer is not schizophrenic. He cannot attribute the monuments to Bloomfield and then attribute the nearby sign to private parties. To the contrary, this observer would attribute

[17] Though the TCM uses a summary text derived from the King James Version (Doc. 124, #41), this is not a "material consideration" for the reasonable observer. *Green*, 568 F.3d at 790 n.3.

the monuments to private parties and the sign to Bloomfield because the former arose under Bloomfield's forum policy and professes to speak for private parties while the latter professes to speak for Bloomfield, appeared in the forum with the first monument before litigation, and has remained in the forum three years with approval of Bloomfield officials. (Doc. 124, #91). *See Green*, 568 F.3d at 804 (refusing to consider disclaimer erected after litigation). Fifth, Bloomfield only allowed monuments after approving them under its forum policy which requires all monuments to address Bloomfield's history and heritage. (Doc. 124, #64, 83).

Thus, a reasonable observer would know that each monument complied with Bloomfield's forum policy, would see a grouping of similar looking monuments each with historical documents, and would notice each monument and a separate sign both stating the monuments' intent to communicate historical messages. In this context, a reasonable observer would have to suffer from glaucoma to miss the monuments' historical messages.

CONCLUSION

For the foregoing reasons, Bloomfield asks this Court to award it final judgment on all counts so that it can continue to provide a forum for Bloomfield citizens to honor Bloomfield's history and heritage. The historical messages in this forum should not be silenced just because Plaintiffs shut their eyes to Bloomfield's secular policy and practices and go out of their way to see a religious mirage of their own making.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 19th day of June 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/ Jonathan Scruggs