UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

Jeffrey M. Davis, *Plaintiff,* *v.* Jacob C. Shade, Creade V. Brodie, Jr., and William R. Valentine, *Defendants.*	)	Civil Action No. 1:16-cv-00689-GLR

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Jacob C. Shade, Creade V. Brodie, Jr., and William R. Valentine, pursuant to Fed. R. Civ. P. 12(b)(6), or alternatively, Fed. R. Civ. P. 12(b)(1), hereby move to dismiss Plaintiff Jeffrey M. Davis's Complaint in its entirety. The grounds for this motion are set forth in the accompanying Memorandum of Law.

Defendants respectfully request a hearing on this motion.

Dated: June 24, 2016

Respectfully submitted,

/s/ Christopher DiPompeo

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2016, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, causing it to be served on all registered users.

Respectfully submitted,

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Jeffrey M. Davis, *Plaintiff,* *v.* Jacob C. Shade, Creade V. Brodie, Jr., and William R. Valentine, *Defendants.*	Civil Action No. 1:16-cv-00689-GLR

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

Nearly six decades ago, the Fraternal Order of Eagles ("Eagles") donated a Ten Commandments Monument ("the Monument") to Allegany County, Maryland ("the County"), and it was placed on the lawn of the Allegany County Courthouse ("the Courthouse"). Today, the Monument remains at this location, tucked beneath a tree to the right of the Courthouse, and it sits many feet from both the Courthouse entrance and Washington Street, the street that runs directly in front of the Courthouse. Visible on the front surface of the Monument are the text of the Ten Commandments as well as carvings of the Eagles' insignia, a Star of David, and the Masonic all-seeing eye. At the base of the Monument reads: "PRESENTED TO THE PEOPLE OF CUMBERLAND BY FRATERNAL ORDER OF EAGLES 1957." Located adjacent to the Monument, on the same small plot of Courthouse land, rests a statue of George Washington.

From 1957 to 2004, the Monument sat on the Courthouse lawn without any known challenge. However, in 2004 Jeffrey Davis ("Plaintiff") requested that the Allegany County Commissioners[1] remove the Monument. He claimed that the Monument's presence on public property violated the Establishment Clause of the United States Constitution. On October 11, 2004, the then-commissioners temporarily removed the Monument for three days. The decision to temporarily

[1] None of the current Allegany County Commissioners sued in the present litigation were serving as county commissioners in 2004.

remove the Monument came amidst a period of judicial uncertainty, as several federal circuit courts and the Supreme Court were considering the constitutionality of Ten Commandments monuments on public grounds.[2] Indeed, on October 12, 2004, the Supreme Court granted certiorari in the Fifth Circuit case of *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2004), *cert. granted*, 72 U.S.L.W. 3702 (U.S. Oct. 12, 2004) (No. 03-1500), a case involving a Ten Commandments monument almost identical to the one in this case. Ultimately, the *Van Orden* Court determined that the Ten Commandments monument in question, located on the grounds of the Texas State Capitol, did not run afoul of the Establishment Clause.

Plaintiff presently brings the first and only known legal complaint against the Monument. In short, Plaintiff argues that current Allegany County Commissioners Jacob C. Shade, Creade V. Brodie, Jr., and William R. Valentine ("the Commissioners" or "Defendants") have violated the Constitution through their ownership, maintenance, and prominent display of the Ten Commandments on public property. He claims that such behavior amounts to an endorsement and advancement of religion. However, his broad stroke recitation of the elements of an Establishment Clause claim does not survive *Van Orden*, where the Supreme Court made abundantly clear that the presence of a Ten Commandments monument identical to the one at issue here—indeed, one that, like here, was donated by the

[2] *See Stone v. Graham*, 449 U.S. 39 (1980); *see also Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *Van Orden v. Perry*, 545 U.S. 677 (2005).

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Eagles—on public lands is not itself a violation of the Establishment Clause. Plaintiff does not have the law on his side, and he fails to plead facts sufficient to take this case outside the realm of squarely controlling Supreme Court precedent. Therefore Plaintiff's claim should be dismissed.

SUMMARY OF THE ALLEGATIONS

Plaintiff has failed to allege facts sufficient to support a legal claim. Even if Plaintiff could establish the veracity of each fact asserted in the Complaint, the facts alleged fail to demonstrate a violation of his constitutional rights. In short, Plaintiff asserts that Defendants' ownership, maintenance, and prominent display on the Courthouse grounds of the Monument, donated to Allegany County by the Eagles in 1957, amounts to the endorsement and advancement of religion. Cmpl. ¶ 24.

First, Plaintiff contends that the religious aspect of the Monument has "no secular component," and that Defendants' display of the Monument completely lacks a "secular purpose." *Id.* ¶¶ 25, 27. However, Plaintiff does not allege any purpose at all for which the Monument was erected and displayed, much less any non-secular purpose for why the County displays the Monument. Second, Plaintiff claims that Defendants' ownership, maintenance, and display of the Monument fosters "excessive government[] entanglement with religion." *Id.* ¶ 28. But again he does not plead any facts to support his contention that the government has maintained or otherwise taken any recurring physical or financial actions related to the Monument since its erection in 1957. Third, Plaintiff states that the reasonable

1 observer, cognizant of "the context and history . . . surrounding the [Monument],"
2 would believe the Commissioners have endorsed a strictly religious purpose by
3
4 exhibiting the Monument. *Id.* ¶ at 26. Yet Plaintiff asserts no facts describing the
5 physical size, setting, design, or visibility of the Monument from the Courthouse
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7 entrance or Washington Street, nor does he plead any facts regarding the visibility
8 of the text and imagery inscribed on the Monument's surface.
9 Plaintiff attempts to mask these deficiencies in the pleadings by including
10
11 passing references to the fact that prior Allegany County commissioners have
12 considered and rejected a proposal for new Courthouse monuments in the past. *Id.*
13 ¶¶ 14, 16. Namely, Plaintiff alleges that those commissioners declined his proposal
14
15 to erect a new monument. But Plaintiff has brought no challenge to the decision
16 not to accept his proposed monument. He challenges only the Ten Commandments
17 Monument itself. The facts in the Complaint relating to Plaintiff's proposed
18
19 monument are wholly irrelevant to the Monument at issue in this case. Moreover,
20 even if the allegations related to Plaintiff's proposed monument were relevant, he
21 readily admits that an easement exists, signed by Allegany County and the
22
23 Maryland Historic Trust in 1999, that prohibits more than two monuments from
24 being placed on the Courthouse lawn at the same time. *Id.* ¶ 18.
25 Plaintiff also claims that Defendants are liable both in their personal and
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27 official capacities as county officials. However, he fails to include any allegations
28 as to why the Commissioners should be held personally liable. Thus, Plaintiff's

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claims against the Commissioners in their personal capacities should be dismissed.

Finally, Plaintiff alleges that he has standing to bring this action because he is a resident of Maryland, owns property in Allegany County, and is "offended" by the placement of the Monument. *Id.* ¶ 5. He claims that he has "regular" and "direct contact" with the Monument when he visits places in the neighboring area of the Courthouse for various activities. Nonetheless, Plaintiff offers no factual assertions regarding the attributes of the Monument that he finds offensive, nor does he discuss any specific aspect of the Monument that leads him to believe it is endorsing Christianity. *Id.* ¶ 5.

Plaintiff, lacking sufficient factual allegations to show that he could plausibly bring a claim under the Establishment Clause, hopes the Court will merely accept his high-level regurgitation of the elements of an Establishment Clause cause of action. However, actual facts are required to support Plaintiff's speculative and conclusive statements. Accordingly, the Commissioners respectfully move this Court to dismiss Plaintiff's allegations in their entirety.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE ESTABLISHMENT CLAUSE AS A MATTER OF LAW.

A. Legal Standard For Dismissal Under Rule 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, this Court need not accept as true "legal conclusions drawn from the facts . . . [nor] unwarranted inferences, unreasonable conclusions, or arguments," *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000), and the pleadings must provide more than "a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555. When discussing this standard in the context of the Establishment Clause, the Fourth Circuit has made clear that complaints must include sufficient allegations of fact to support a plausible legal argument that unlawful state action occurred. *Lambeth v. Bd. of Comm'rs. of Davidson Cty., N.C.*, 321 F. Supp. 2d 688, 694 (M.D.N.C. 2004), *aff'd sub nom*, 407 F.3d 266 (4th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3301 (U.S. Nov. 14, 2005) (No. 05-203). In other words, although it is not appropriate for courts to resolve factual disputes, they should analyze whether the facts alleged in the complaint demonstrate "a cognizable Establishment Clause claim" in light of existing law. *Id.* at 706.

B. *Van Orden* Controls The Result In This Case And Mandates That Plaintiff's Claim Be Dismissed.

Controlling precedent from the United States Supreme Court governs the outcome of this case and requires its dismissal. This Court need look no further than *Van Orden v. Perry*, 545 U.S. 677 (2005), for the proper constitutional

analysis to apply to this case. For most of the last four decades, courts regularly applied the test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed in Part I.C., *infra*, to assess Establishment Clause challenges. The Supreme Court's 2005 decision in *Van Orden*, however, set forth a different test to be used when analyzing passive monuments on public grounds, like the one at issue in *Van Orden*. 545 U.S. 677. Indeed, five Justices in *Van Orden* explicitly rejected the use of the *Lemon* test in the context of Ten Commandments monuments on government property. *See id.* at 686 (Rehnquist, J.) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.").

And in the wake of *Van Orden*, federal courts have consistently recognized *Van Orden* as the controlling precedent for cases involving the Ten Commandments, such as the one currently at issue. *See, e.g.*, *ACLU v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test [to the Ten Commandments Monument in this case]."); *Russelburg v. Gibson Cty.*, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, at *2 (S.D. Ind. Sept. 7, 2005) ("In light of the Supreme Court's decision in *Van Orden*, the court finds that the display of the Ten

Commandments monument that currently sits on the north-east side of the courthouse grounds in Gibson County, Indiana is not in violation of the First Amendment, Establishment Clause."); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 989 (D.N.D. 2005) ("Because of the monuments [sic] similitude [to the one in *Van Orden*], indeed, they are nearly uniform in appearance and character, this Court finds that the *Lemon* test, unused in *Van Orden* and *Plattsmouth*, is likewise inapplicable in properly determining the constitutionality of the Fargo Ten Commandments display."). Here, Plaintiff alleges facts virtually identical to those at issue in *Van Orden*, in which the Supreme Court held the monument was constitutional. *Van Orden* thus controls the resolution of this case.

In *Van Orden*, the Supreme Court addressed the question whether the Establishment Clause permits the display of a Ten Commandments monument on the Texas State Capitol grounds. 545 U.S. at 681. The monument consisted of a monolith whose primary content was the text of the Ten Commandments. *Id.* Engraved above the text of the Ten Commandments was an eagle grasping the American flag, an eye inside of a pyramid, and two small tablets containing ancient script. *Id.* Below the text were two Stars of David, and at the bottom of the monument bore the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." *Id.* at 681–82.

In a plurality opinion, the Supreme Court affirmed the Fifth Circuit's

decision that the monument did not violate the Establishment Clause. Justice Breyer provided the controlling opinion of the Court. *Id.* at 700; *see Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing Justice Breyer's opinion as controlling). Before proceeding to analyze the constitutionality of the monument, Justice Breyer reasoned that the Court's prior Establishment Clause tests, including the test articulated in *Lemon*, were insufficient to analyze a passive monument on public grounds, like the one before the Court in *Van Orden*. *Van Orden*, 545 U.S. at 700. Instead, Justice Breyer announced a new "legal judgment" test to be applied to such monuments. *Id.* Rather than applying an "exact formula" to "dictate a resolution," this "legal judgment" test takes "account of context and consequences measured in light of [the] purposes" of the Establishment Clause. *Id.*; *see Myers v. Loudon Cty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (applying Justice Breyer's "legal judgment" test from *Van Orden* to an Establishment Clause challenge).

Justice Breyer began his analysis by recognizing that the Ten Commandments "have been used as part of a display that communicates not simply a religious message, but a secular message as well." *Van Orden*, 545 U.S. at 701. He noted that "focusing on the text of the Commandments alone [could not] conclusively resolve [the] case" because a display of the Ten Commandments could "convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of

courthouses throughout the Nation, including the Supreme Court of the United States." *Id*. Instead, "to determine the message that the text . . . conveys," Justice Breyer reasoned that courts "must examine how the text is *used*. And that inquiry requires [courts] to consider the *context* of the display." *Id.* (emphasis added).

In analyzing the context of the monument, Justice Breyer first found it relevant that the Eagles, which paid for and donated the display, was "a private civic (and primarily secular) organization [that] sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.* And Justice Breyer emphasized that the "prominent[ ] acknowledge[ment] that the Eagles donated the display . . . further distances the State itself from the religious aspect[s] of the Commandments' message." *Id.* at 701–02.

Second, Justice Breyer reasoned that "the physical setting of the monument, moreover, suggests little or nothing of the sacred," because "the setting d[id] not readily lend itself to meditation or any other religious activity," but instead "provide[d] a context of history and moral ideals," Justice Breyer concluded that "the context suggest[ed] that the State intended the display's moral message . . . to predominate." *Id.* at 702.

And third, Justice Breyer considered the legal history of the monument at issue in *Van Orden*. He found it to be "determinative" that forty years without any legal challenges had passed since the monument was erected. *Id.* Justice Breyer

observed that this long history in which the monument went unchallenged "suggest[ed] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to . . . promote religion over nonreligion." *Id.* For these three reasons, Justice Breyer concurred in the Court's judgment that the monument did not run afoul of the Establishment Clause. *Id.* at 704–05.

Van Orden controls this case. The monument itself and the context of the monument in *Van Orden* is virtually indistinguishable from the Monument at issue here. *See* Defs.' Mem. in Supp. of Mot. to Dismiss Compl., Ex. A (comparing the picture of the *Van Orden* monument cited in Justice Stevens's dissent in that case with the picture of the Allegany County Monument cited in Plaintiff's Complaint). This Court should accordingly apply Justice Breyer's "legal judgment" test to Plaintiff's claim. Under the law of *Van Orden*, Plaintiff fails to state a claim for an Establishment Clause violation as a matter of law, and his Complaint should be dismissed.

First, the Monument in this case was paid for and donated to the public by the same private organization that donated the monument in *Van Orden*. 545 U.S. at 682; Compl., Ex. 1. Like the monument in *Van Orden*, the bottom of the Monument here contains an inscription indicating that the Monument was donated by the Eagles. *Compare* Compl., Ex. 1 ("PRESENTED TO THE PEOPLE OF

1 CUMBERLAND BY . . . FRATERNAL ORDER OF EAGLES”), *with Van Orden*,
2 545 U.S. at 681–82 (“PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS
3
4 BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961”). The fact that
5 the Monument “prominently acknowledge[s] that the Eagles donated the display . . .
6
7 further distances the [County] itself from the religious aspect of the
8 Commandments’ message.” *Van Orden*, 545 U.S. at 701–02.
9 Second, the Monument’s “*context* suggests that the [County] intended the . . .
10
11 nonreligious aspects of the tablets’ message to predominate.” *Id.* at 701–02. The
12 Monument in this case—and the context surrounding its display—is virtually
13 identical to the monument in *Van Orden*. *See* Defs.’ Mem. in Supp. of Mot. to
14
15 Dismiss Compl., Ex. A. Both monuments are stone monoliths whose primary
16 content is the text of the Ten Commandments. Compl., Ex. 1; *Van Orden*, 545 U.S.
17 at 681. The Eagles, a private organization, paid for both monuments, and donated
18
19 them to the public. Compl., Ex. 1; *Van Orden*, 545 U.S. at 681–82. Like the *Van*
20 *Orden* monument, the Monument in this case is also adorned with an eagle grasping
21 the American flag, an eye inside of a pyramid, and two stars of David. Compl., Ex.
22
23 1; *Van Orden*, 545 U.S. at 681.
24 As in *Van Orden*, the physical setting of the Monument in this case “suggests
25 little or nothing of the sacred.” *Id.* at 702. The Monument sits on a small plot of
26
27 land in front of the County Courthouse along with a statue of George Washington.
28 The setting suggests that the County intended the Monument’s “moral message—an

1 illustrative message reflecting the historical 'ideals' of [the County]—to
2 predominate." *Id.* The placement of the George Washington statue adjacent to the
3 Monument in this case "provide[s] a context of history and moral ideals" that
4 "illustrat[es] a relation between ethics and law that the [County's] citizens,
5 historically speaking, have endorsed." *Id.*
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7 And third, while forty years passed in which the *Van Orden* monument went
8 unchallenged, almost fifty years passed before Plaintiff lodged the first recorded
9 complaint against the Monument at issue in this case. "[T]hose [forty-seven] years
10 suggest more strongly than can any set of formulaic tests that few individuals,
11 whatever their system of beliefs, are likely to have understood the monument as . . .
12 a government effort" to endorse religion. *Id.*
13
14 *Van Orden* clearly compels the conclusion that the Allegany County
15 Monument does not violate the Establishment Clause. As Justice Breyer opined in
16 *Van Orden*, "to reach a contrary conclusion here, based primarily on the religious
17 nature of the tablets' text would . . . lead the law to exhibit a hostility toward
18 religion that has no place in our Establishment Clause traditions." *Id.* at 704.
19 Removing "longstanding depictions of the Ten Commandments from public
20 buildings across the Nation . . . could thereby create the very kind of religiously
21 based divisiveness that the Establishment Clause seeks to avoid." *Id.*
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23 Indeed, since *Van Orden*, federal courts have been virtually uniform in
24 upholding public displays of Ten Commandments monuments as constitutional
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under the Establishment Clause. *See, e.g.*, *City of Plattsmouth*, 419 F.3d at 778 (affirming the constitutionality of a five-foot Ten Commandments monument, donated by the Eagles and standing alone in a city park because "we cannot conclude that [it] is different in any constitutionally significant way from . . . *Van Orden*," and specifically noting the "passive" nature of the monument, its isolated location, the absence of nearby benches or walkways, and decades without complaint); *Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008) (monument, one of several on city property, was constitutional despite participation of clergy at its dedication ceremony and paucity of other monuments on city ground); *ACLU v. Grayson Cty.*, 591 F.3d 837, 854 (6th Cir. 2010) (Ten Commandments display in courthouse building was constitutional); *ACLU of Ohio Found., Inc. v. Bd. of Comm'rs. of Lucas Cty., Ohio*, 444 F. Supp. 2d 805, 813 (N.D. Ohio 2006) (affirming the constitutionality of a Ten Commandments monument placed at main entry to the courthouse grounds and finding that "the express statement that the Eagles donated" the monument weighs against the probability that the reasonable observer would attribute a religious message to the state); *City of Fargo*, 388 F. Supp. 2d at 986 (affirming constitutionality of free-standing six-foot Ten Commandments monument on public mall, despite its proximity to city hall, the absence of other monuments, and the fact that clergy attended the dedication ceremony because it was passive, privately funded, and inscribed and donated by the Eagles for a secular, civic purpose); *Russelburg*, 2005 WL 2175527,

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at *2 (affirming constitutionality of a four-foot Ten Commandments monument—donated by the Eagles—on courthouse grounds, noting the presence of six other historical monuments, and concluding that "the similarities between this case and *Van Orden* are too vivid to dismiss").

The Monument in this case is materially indistinguishable from the monument in *Van Orden*. The facts alleged in the Complaint are therefore insufficient to state a claim under the Establishment Clause as a matter of law and Plaintiff's claim should be dismissed. *See Lambeth*, 321 F. Supp. 2d at 707.

C. The Monument Also Survives The *Lemon* Test.

Even if this Court does not apply *Van Orden*'s "legal judgment" test, the Monument also passes constitutional muster under the test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, the Monument poses a constitutional problem only if this Court determines that it (1) lacks a secular purpose; (2) has the primary effect of advancing religion; or (3) fosters excessive government entanglement with religion. 403 U.S. at 612–13; *see Lambeth*, 407 F.3d 266 (4th Cir. 2005). Therefore, to state a claim under *Lemon*, Plaintiff must "adequately allege that the display contravene[s]" at least one of these three prongs. *Id.* at 269 (affirming dismissal of complaint for failure to so allege). Under each prong, Plaintiff has failed to do so.

1. Plaintiff Fails to Allege an Entirely Religious Purpose in the Display.

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Plaintiff cannot satisfy *Lemon's* first prong. A display will pass muster under *Lemon*'s purpose test if there exists any "'legitimate secular purpose' supporting a challenged governmental action." *Id.* at 270 (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984)). At the 12(b)(6) stage, it is insufficient for Plaintiff merely to charge that the Commissioners have never provided "any overall secular purpose" for the Monument. Compl. ¶ 22. A court will only deem *Lemon*'s purpose prong to be contravened if the government's action "is *entirely* motivated by a purpose to advance religion." *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). Therefore, "in order to state a claim under the first prong of *Lemon*, [a plaintiff] must assert that the [government] had a *purely* religious purpose for approving the display." *Lambeth*, 321 F. Supp. 2d at 696 (emphasis added) (applying *Lemon* and dismissing the complaint for failure to state a claim).

Here, Plaintiff falls far short of this standard. He makes a conclusory statement that, in "exhibiting" the Monument, the Commissioners have been "entirely motivated" by a religious purpose. Compl. ¶ 26. Plaintiff, however, does not plead a single fact showing *any* kind of purpose on the part of the Commissioners, let alone a purely religious purpose. For example, Plaintiff provides no statements about, or action taken toward, the Monument by any county official in either 1957 or subsequent years. Nor does he provide a shred of detail about the text inscribed on the Monument or the Monument's setting that could be construed to suggest an impermissible purpose. Rather, Plaintiff baldly cites the

"religious aspect of the Ten Commandments" and, with no attempt at elaboration, describes the Monument "as a religious commemoration." *Id.* ¶¶ 25, 26. But the Supreme Court has made clear that the purpose inquiry should not focus exclusively on the religious nature of a challenged display. *See Lynch*, 465 U.S. at 680, 687 (rejecting a purpose inquiry that focuses exclusively on a challenged action's religious aspects, as this would lead to unnecessary invalidations under the Establishment Clause); *see also Lambeth*, 321 F. Supp. 2d at 696 (dismissing a complaint against "In God We Trust" motto on the front of a government building, and noting that merely "intentionally affix[ing] a display to a government building which Plaintiffs believe to be a 'prominent religious message' does not indicate that the Board's purpose was to endorse religion").

With respect to the Commissioners' decision to restore the Monument after its brief removal in 2004, Plaintiff provides only a string of religious quotations from news articles, each attributed to a member of the public outraged at the removal, rather than by a county official. *See* Compl. ¶¶ 9, 12, 20. But the Fourth Circuit has emphasized that courts cannot "impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request." *Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir. 1998). For example, in an attempt to plead facts sufficient to satisfy the purpose prong, the *Lambeth* plaintiff focused on remarks by citizens who supported an "In God We Trust" display. 321 F. Supp. 2d at 697. The court

dismissed those allegations as "not relevant" and concluded it was "bound to consider only those allegations that impart an impermissible purpose to the Board itself." *Id.* (citing *Peck*, 155 F.3d at 281).

Other federal courts have expressed similar caution in imputing impermissible purposes to government entities. *See, e.g.*, *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005) (explaining that judicial scrutiny of purpose only makes sense "where an understanding of official objective emerges from readily discoverable fact"); *ACLU v. Mercer Cty.*, 432 F.3d 624, 630 (6th Cir. 2005) (noting that "a finding of impermissible purpose should be rare"); *Card*, 520 F.3d at 1019–20 (affirming constitutionality of an Eagles monument and refusing to "infer a non-secular purpose" from silence: "The City's intent is the key here, and nothing apart from the monument's text suggests a religious motive on the City's part"). Notably, in *Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 950 (8th Cir. 2014), the court held constitutional a city's decision to restore an Eagles monument in response to a petition movement. In so holding, the court rejected the notion that the movement's religious overtones meant that the city's commissioners "adopt[ed] a religious point of view" by responding favorably to the petition. *Id.* (quotation omitted). The fact that some members of the public may have made religiously-charged statements regarding the Monument's removal is therefore irrelevant to whether the Commissioners themselves were motivated by a purely religious purpose.

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Plaintiff's account of his failed proposal for a new Constitution monument on the Courthouse grounds also does not show a religious purpose on the part of the Commissioners. Plaintiff accuses the County of a religious "rationale" in placing wording restrictions on the proposed display. Compl. ¶ 16. But Plaintiff does not reference any conversation with any of the Commissioners that would reveal a religious rationale behind any alleged wording restriction. And Plaintiff does not challenge the denial of his monument proposal as unconstitutional; he challenges only the Monument itself. Plaintiff's defunct monument proposal is therefore irrelevant to whether the Commissioners were motivated by a purely religious purpose in maintaining the Monument at issue in this case.

Finally, even if Plaintiff had adequately alleged that the Commissioners sought to advance religion in accepting or keeping the Monument, he would still fail to state a claim if the Commissioners also had a secular purpose in doing so. *See Lynch*, 465 U.S. at 680; *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001). The *Van Orden* majority held, as a matter of law, that the Ten Commandments display had a "dual significance, partaking of both religion and government," and Justice Breyer's plurality opinion in that case held that the Monument had a "primarily nonreligious purpose". *Van Orden*, 545 U.S. at 692 (Rehnquist, J.); *Id.* at 703 (Breyer, J., concurring). Therefore, even if Plaintiff here had adequately pleaded a religious purpose, his Complaint would still fail the first prong of the *Lemon* test because the Monument has a clearly nonreligious purpose as well.

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2. Plaintiff Fails to Allege a Primary Effect of Endorsing Religion.

Plaintiff similarly fails to meet the second prong of the *Lemon* test because he has not adequately alleged that this Monument has the principal effect of endorsing religion from the perspective of a reasonable observer. The reasonable observer is presumed to be aware of "the history and context of the community and forum," *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001), as well as the historical use of the religious symbol at issue and its "particular setting" in the instant case, *Lambeth*, 407 F.3d at 270–72 (affirming constitutionality after considering the display's "full context": physical setting, religious content, and use in many prominent governmental spaces). This is clearly a context- and detail-driven inquiry, and yet, like the unsuccessful plaintiff in *Lambeth*, Plaintiff here "alleges no circumstances—such as an inappropriate context or character"—that would suggest the Monument has the principal effect of endorsing religion. *Id.* at 272.

The reasonable observer is presumed to be familiar with the display's physical setting. Here, as shown in the exhibits attached to Plaintiff's Complaint, the Monument is not ostentatious or particularly large. *See* Compl. Ex. 1. It does not have a special status as the only monument on the Courthouse grounds. *See* Compl. ¶ 15. Nor does it occupy a prominent location on those grounds. *Cf. Lambeth & Smith v. Cty. of Albemarle*, 895 F.2d 953, 955 (4th Cir. 1990) (finding

endorsement effect where an illuminated nativity scene with "large figures" was placed in a "highly visible location" on the front lawn of the county building at one of the town's busiest intersections, and noting the absence of any other displays or artifacts). Plaintiff also does not allege "that any plaque or other identifying inscription suggests that the display endorses religion." *Lambeth*, 321 F. Supp. 2d at 703.

Further, Plaintiff does not point to a single dedication ceremony or religious event featuring the Monument since it was erected over sixty years ago. The *Lambeth* court noted the absence of such a ceremony as an indication that the reasonable observer would not perceive a display as a religious endorsement. *Lambeth*, 321 F. Supp. 2d at 703. Plaintiff also pleads no facts demonstrating that the Commissioners have attempted to reemphasize or add to any part of the sixty-year-old Monument, which the *Lambeth* court also found relevant to the Establishment Clause analysis. *See id.* at 702; *see also Cty. of Allegheny v. ACLU*, 492 U.S. 573, 598–600 (1989) (stating that the reasonable observer is more likely to perceive religious endorsement when the government adds a Bible quotation to a public display); *Staley v. Harris Cty.*, 461 F.3d 504, 514 (5th Cir. 2006) (holding that a donated Bible display near courthouse became clearly impermissible only after an official "refurbish[ed]" it by adding a red neon light as a frame).

The reasonable observer is also presumed to be familiar with a display's history and context. *Good News Club*, 533 U.S. at 119; *see also Capitol Square*

Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[P]roper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby."). A perception of religious endorsement is unlikely here, as this Monument is one of hundreds sprinkled about the country years ago by a charitable organization—it is not a publicly-commissioned display unique to Allegany County. *Cf. McCreary Cty.*, 545 U.S. at 866 (concluding that because the government itself had affirmatively required a new Ten Commandments display to be placed in a busy area of the courthouse, the reasonable observer could not help but infer a religious message); *Mercer Cnty.*, 432 F.3d 624 (distinguishing *McCreary* and finding no endorsement effect because a private citizen proposed and hung the display and there was no public dedication ceremony). This history is further accentuated by the Monument's inscription identifying it as an Eagles donation. *See Card*, 520 F.3d at 1019–20 (noting that the Eagles' inscription shows viewers that despite the public location, the monument "did not sprout from the minds of City officials and was not funded from City coffers").

And the Monument's forty-seven-year history without legal complaint further emphasizes the fact that no one perceived the Monument as improperly endorsing religion. Indeed, Justice Breyer determined that the Ten Commandments monument at issue in *Van Orden* would also satisfy *Lemon*'s effect test because the monument's context and 40-year history without legal complaint "suggest[ed] more

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strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion." *Van Orden*, 545 U.S. at 702–03. In short, nothing in the Complaint even approaches the threshold of factual allegations necessary to support a claim of religious endorsement under *Lemon*.

3. Plaintiff Fails to Allege Excessive Entanglement with Religion.

The purpose of *Lemon*'s final prong is to effectuate the Constitution's protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). When conducting this inquiry, the Fourth Circuit has looked for whether government funds were expended on challenged displays, or whether there existed any "ongoing, day-to-day interaction between church and state" prompted by the display. *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1152 (4th Cir. 1991) (quoting *Lynch*, 465 U.S. 668, 684). The Complaint fails to allege either.

Plaintiff does not assert that the Monument causes the Commissioners to interact with religious groups, or that Allegany County has allocated any funds or personnel to the Monument's installation or maintenance. *See Lambeth*, 321 F. Supp. 2d at 704–05 (finding no entanglement where county board approved

installation of "In God We Trust" seal and subsequently performed only minimal, "routine upkeep"). Indeed, the Commissioners were even less involved here than was the board in *Lambeth*, as this Monument was donated intact, requiring no funds or installation efforts from the county. With respect to subsequent government attention, Plaintiff does not even suggest that the County cleans the Monument, grooms the surrounding shrubs, or otherwise contributes to the upkeep of the Monument and its surrounding area.

Regardless, it is clear that *de minimis*, routine upkeep does not pose an Establishment Clause problem. *Id.* (citing *Lynch*, 465 U.S. at 684 (finding no impermissible entanglement where a crèche display did not require the government to have contact with church authorities and no maintenance expenditures were necessary); *Suhre v. Haywood Cty.*, 55 F. Supp. 2d 384, 398 (W.D.N.C. 1999) (finding no impermissible entanglement where funds spent maintaining a courthouse Ten Commandments display were "minute" cleaning costs not used to support religious organizations)). Indeed, on virtually identical facts, Justice Breyer determined that the monument at issue in *Van Orden* did not create an excessive entanglement with religion and would thus pass muster under *Lemon*'s entanglement test. 545 U.S. at 703. Because Plaintiff wholly fails to plead any facts that could support an inference of government entanglement, his Establishment Clause claim must be dismissed.

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II. THE COMMISSIONERS ARE ENTITLED TO QUALIFIED AND LEGISLATIVE IMMUNITY FROM SUIT AND PLAINTIFF'S CLAIM AGAINST THEM IN THEIR INDIVIDUAL CAPACITIES SHOULD ACCORDINGLY BE DISMISSED.

A. The Commissioners Are Entitled To Qualified Immunity.

The doctrine of qualified immunity "shield [government] officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-pronged approach for determining whether officials are immune from suit. Under the first prong, the court must assess whether the facts alleged establish that the defendant official violated a constitutional right. *Id.* at 201. If the Court determines that no constitutional violation has occurred, qualified immunity applies. *Id.* If, however, the plaintiff establishes that the defendant official violated his constitutional right, the court next assesses whether the right at issue was "clearly established" at the time of the defendant's unlawful conduct. *See id.* If the right was not clearly established, the official is immune from suit. *Id.*

1. Plaintiff Failed to Allege a Constitutional Violation.

Public officials are immune from suit in their personal capacity for an alleged constitutional violation if a plaintiff fails to establish a violation of constitutional rights. *See, e.g.*, *Figg v. Schroeder*, 312 F.3d 625, 635–37 (4th Cir. 2002) (granting qualified immunity because no underlying Fourth Amendment violation occurred); *Yacovelli v. Moeser*, No. 1:02-cv-596, 2004 WL 1144183, at *10–15 (M.D.N.C.

May 20, 2004) (granting qualified immunity where official's action was found not to violate the Establishment Clause). For the reasons discussed in Part I, *supra*, Plaintiff here has failed to demonstrate any constitutional violation, and thus the Commissioners are entitled to qualified immunity.

2. The Commissioners Reasonably Believed That the Monument was Constitutional.

Even if Plaintiff had adequately pleaded a cognizable constitutional violation, the Commissioners are still entitled to qualified immunity because they reasonably believed that their actions were lawful. Public officials remain immune from personal liability for unlawful acts unless they violated "clearly established" "constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Mellen*, 327 F.3d at 365. Thus, officials are entitled to qualified immunity if a reasonable person in their position "could have failed to appreciate that his conduct would violate those rights." *Meyers v. Baltimore Cty.*, 731 F.3d 723, 731 (4th Cir. 2013) (citation omitted). The state of the law at the time the alleged violation was committed determines whether the right was so clearly established that a "reasonable person" would have understood the unconstitutional nature of his actions. *See, e.g.*, *Mellen*, 327 F.3d at 376 (granting qualified immunity for college superintendent who, based on the case law at the time, "could reasonably have believed that the supper prayer was constitutional"); *Summers v. Adams*, 669 F. Supp. 2d 637, 672 (D.S.C. 2009)

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(granting qualified immunity because "despite the predictability [that defendant's actions would be found unconstitutional], there was no prior controlling precedent specifically addressing [the] application of the Establishment Clause to [the defendant's conduct]").

Here, Plaintiff makes only one allegation that pertains to the actions of the individually named Commissioners in this case. Plaintiff alleges that, on February 25, 2016, he attended a public meeting of the Commissioners and presented two of the three Commissioners with a letter requesting that they remove the Monument. Compl. ¶ 29. Plaintiff claims that the Commissioners "stated that they did not need any time to discuss [Plaintiff's] request, as the Commandments monument would not be removed." *Id.* Thus, the only action relevant to the question of personal liability is the Commissioners' alleged decision not to discuss the Monument's removal at the February 25, 2016 meeting. Importantly, none of the named Commissioners were serving on the Board of County Commissioners when the Monument was erected in 1957, or when the Monument was temporarily removed and then replaced in 2004. Compl. ¶¶ 8, 10–13. Plaintiffs' allegations regarding the erection of the Monument, its temporary removal, and its replacement are therefore irrelevant to the personal liability of the three Commissioners named in this case.

At the time the Commissioners allegedly denied Plaintiff's request to discuss the Monument's removal, the Supreme Court's decision in *Van Orden* was over ten

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years old. 545 U.S. at 681. And federal courts across the country were virtually uniform in rejecting Establishment Clause challenges to Ten Commandment monuments in the wake of *Van Orden*. *See, e.g.*, *City of Plattsmouth*, 419 F.3d at 778; *Card*, 520 F.3d at 1020; *Grayson Cty.*, 591 F.3d at 854; *ACLU of Ohio Found., Inc.*, 444 F. Supp. 2d at 813; *City of Fargo*, 388 F. Supp. 2d at 985; *Russelburg*, 2005 WL 2175527, at *2. It was therefore reasonable for the Commissioners to believe that the constitutionality of the Monument had been settled by the Supreme Court and did not need to be discussed at the February 25, 2016 meeting. The Commissioners are accordingly entitled to qualified immunity for their reasonable belief that their conduct was lawful, and Plaintiff's claim against them in their personal capacities should be dismissed.

B. The Commissioners Are Entitled To Legislative Immunity.

Alternatively, Plaintiff's claim against the Commissioners in their individual capacities should also be dismissed under a theory of legislative immunity. As discussed in Part II.A.2., *supra*, the only official action Plaintiff alleges with respect to these individual Commissioners is their decision not to entertain further discussion of the Monument's removal at the February 25, 2016 board meeting. Compl. ¶ 29. Because this decision was legislative in nature, the Commissioners are entitled to legislative immunity from suit.

Under the doctrine of legislative immunity, county legislators are given absolute immunity from suit for decisions made in their capacity as legislators. *See*

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Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989); *Suhre v. Bd of Comm'rs*, 894 F. Supp. 927 (W.D.N.C. 1995), *reconsidered by* 55 F. Supp. 2d 384 (W.D.N.C. 1999) ("*Suhre II*"), *rev'd on other grounds*, 131 F.3d 1083 (4th Cir. 1997) ("*Suhre III*"). Legislative actions involve "adopt[ing] . . . legislative-type rules" that "impact the general community or that establish a general policy." *See Pathways Psychosocial v. Town of Leonardtown, MD*, 133 F. Supp. 2d 772, 794 (D. Md. 2001) (citing *Roberson v. Mullins*, 29 F.3d 132, 134 (4th Cir. 1994)).

For example, in *Suhre*, a marble tablet containing the Ten Commandments had been part of a courtroom display since 1931. 894 F. Supp. at 931. In 1994, the plaintiff requested the removal of the Ten Commandments during a public session meeting. *Id.* at 932. The commissioners denied the request at that meeting and later reiterated their denial at a subsequent meeting session. *Id.* The district court found that because the board of commissioners had engaged "in the process of adopting a prospective rule"—*i.e.*, that the Ten Commandments could and would be displayed in the courtroom—the commissioners had acted in their legislative capacity in ordering the tablet to be maintained in the courtroom. *Id.* ("Such action constituted a policy making decision on behalf of the citizens of Haywood County."). The commissioners, in their individual capacity, were accordingly granted legislative immunity. *Id.*; *Suhre II*, 55 F. Supp. 2d at 386.

Like the commissioners in *Suhre*, the Commissioners here took actions that

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"constituted a policy making decision on behalf of the citizens" of Allegany County. *See Suhre*, 894 F. Supp at 932. This decision created a "prospective rule": that the Monument could and would continue to be displayed on the courthouse lawn. *See id*. Thus, because the Commissioners' decision to deny further discussion of the Monument's removal was legislative in nature, the Commissioners should be granted legislative immunity, and Plaintiff's claim against them in their individual capacities should be dismissed.

III. PLAINTIFF LACKS STANDING AND HIS CLAIMS SHOULD BE DISMISSED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1).

This Court lacks jurisdiction over Plaintiff's claim and his Complaint should be dismissed. "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting U.S. Const., art. III, § 2). One "essential and unchanging part of the case-or-controversy requirement of Article III" is the requirement that a plaintiff has standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because the standing requirement is jurisdictional, a standing challenge is properly raised in a Rule 12(b)(1) motion to dismiss. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005).

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable

decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560–61). The injury must be "fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). In the context of the Establishment Clause, the Fourth Circuit has found Article III standing when the plaintiff can demonstrate "direct contact with an unwelcome religious exercise or display." *See Suhre III*, 131 F.3d at 1086. Mr. Davis cannot satisfy that burden here.

As an initial matter, the Complaint is entirely devoid of allegations of a cognizable injury, and Plaintiff therefore lacks Article III standing to challenge the constitutionality of the Monument. First, Plaintiff does not allege that he lives in the City of Cumberland—or even in Allegany County—which decreases any "abstract interest" he might otherwise have in ensuring that the government observes the Constitution. *Id.* at 1087 (noting that, where the challenged display is located in a plaintiff's "*home community*, standing is more likely to lie" (emphasis added)). Second, the only allegation Plaintiff makes to show he has contact with the Monument is his statement that he is present in the City of Cumberland as a result of "visiting the public library directly across from the monument, attending performances at local theaters, viewing exhibits at the Allegany County Arts building, visiting a friend who lives on the same street as the courthouse, and doing chores at a nearby rental house." *See* Compl. ¶ 5. None of these activities requires

1 direct contact with the Courthouse, let alone the Monument. These facts therefore
2 fail to show the kind of "regular personal and professional contact" with the
3 Monument that is required for Article III standing. *Lambeth*, 321 F. Supp. 2d at
4 693; *see also Grayson Cty.*, 591 F.3d at 843 (phrasing the standard as "direct,
5 unwelcome contact with a government-sponsored religious object during business
6 or recreational activities").
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9 In cases where this Court has found standing for an Establishment Clause
10 challenge, the plaintiffs experienced significantly more contact with the unwelcome
11 display than those Plaintiff alleges here. For example, in *Suhre III*, the plaintiff
12 directly contacted a Ten Commandments display inside the courtroom where he
13 participated as a plaintiff and a witness in at least two civil suits, and as a defendant
14 in a criminal bench trial and a criminal jury trial. 131 F.3d at 1090. Similarly, in
15 *Lambeth*, the plaintiffs were attorneys who had direct, professional contact with an
16 allegedly unconstitutional display that was located in a government center where
17 they regularly practiced law. *Lambeth*, 321 F. Supp. 2d at 690. Unlike the
18 plaintiffs in *Suhre* and *Lambeth*, Mr. Davis fails to assert any facts to support that
19 he has "regular personal or professional contact" with the Monument. *Id.* at 693.
20 Plaintiff's allegations that he occasionally passes the Courthouse are not enough.
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25 At best, the Complaint alleges only a generalized objection to the Monument,
26 which is insufficient to confer standing under Article III. "[S]tanding to sue may
27 not be predicated upon . . . the generalized interest of all citizens in constitutional
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1 governance." *Lujan*, 504 U.S. at 575; *Valley Forge Christian Coll. v. Ams. United*
2 *for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) ("[T]he
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4 psychological consequence presumably produced by observation of conduct with
5 which one disagrees . . . is not an injury sufficient to confer standing under Art. III,
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7 even though the disagreement is phrased in constitutional terms."). Accordingly, a
8 citizen of Allegany County who finds the Monument offensive in the abstract lacks
9 standing to challenge it. *Suhre III*, 131 F.3d at 1086. Plaintiff's factual allegations
10
11 fail to "set[] him apart from the man on the street," *United States v. Richardson*,
12 418 U.S. 166, 194 (1974), and therefore amount to nothing more than a generalized
13 grievance that is not cognizable under Article III.
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15 Finally, to the extent that Plaintiff attempts to plead municipal taxpayer
16 standing, he fails to do so. Plaintiff asserts that "[h]e is a municipal taxpayer,
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18 owning property in Allegany County," presumably in an attempt to establish
19 municipal taxpayer standing. Compl. ¶ 5. A plaintiff asserting municipal taxpayer
20 standing, however, must "allege[] improper expenditure of municipal funds."
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22 *Koenick v. Felton*, 190 F.3d 259, 263–64 (4th Cir. 1999). In the absence of the
23 local government's expenditure of taxpayer funds, municipal taxpayer standing
24 cannot exist. *See id.*; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349–53
25
26 (2006). Here, Plaintiff wholly fails to plead any facts tending to show a financial
27 expenditure by the County. By Plaintiff's own admission, the Monument was a gift
28 from the Fraternal Order of Eagles in 1957, *see* Compl. ¶ 8, and he has not alleged

any facts to suggest that the County has spent additional funds to maintain the Monument. Plaintiff therefore lacks standing under a municipal taxpayer theory as well. *Koenick*, 190 F.3d at 263–64.

IV. AS A *PRO SE* LITIGANT, PLAINTIFF IS NOT ENTITLED TO ATTORNEYS' FEES.

It is well settled law that *pro se* plaintiffs are not entitled to attorneys' fees. As the Supreme Court has decisively held:

> A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Kay v. Ehrler, 499 U.S. 432, 438 (1991) (holding that a *pro se* plaintiff was not entitled to attorneys' fees in a 42 U.S.C. §§1983, 1988 suit). The Fourth Circuit has since adopted this rule and expanded it to prohibit *pro se* plaintiffs from collecting attorneys' fees in other circumstances beyond the §1988 context. *See Doe v. Bd. of Educ. of Baltimore Cty.*, 165 F.3d 260, 265 (4th Cir. 1998). Because Plaintiff is proceeding *pro se*, he is not entitled to attorneys' fees under §§ 1983 and 1988 as a matter of law. The portion of the Complaint that requests such relief should therefore be dismissed. Compl. at p.11.

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CONCLUSION

For the foregoing reasons, the Commissioners respectfully request that the Court grant this Motion to Dismiss Plaintiff's Complaint.

Dated: June 24, 2016

Respectfully submitted,

/s/ Christopher DiPompeo
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2016, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, causing it to be served on all registered users.

Respectfully submitted,

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