Case No. 04-4136

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOCIETY OF SEPARATIONISTS, et al.,

PLAINTIFFS/APPELLANTS

vs.

PLEASANT GROVE, et al.,

DEFENDANTS/APPELLEES.

REPLY BRIEF OF APPELLANTS

AN APPEAL FROM A DISMISSAL OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
The Hon. Bruce S. Jenkins, Judge Presiding
Trial Court Case No. 2:03-CV-0839 BSJ

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS -cont-

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES -cont-

Cases **Page**

Constitutions and Statutes

Rules of Civil and Appellate Procedure

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOCIETY OF SEPARATIONISTS, et al.,

PLAINTIFFS/APPELLANTS

vs.

PLEASANT GROVE CITY, et at.,

DEFENDANTS/APPELLEES.

REPLY BRIEF OF APPELLANTS

PLAINTIFFS/APPELLANTS, Society of Separationists, et at., by and through counsel, submit the following REPLY BRIEF:

RECENT ACTION BY UNITED STATES SUPREME COURT

On October 12, 2004, the United States Supreme Court granted *certiorari* in two (2) cases dealing with governmental displays of the Ten Commandments. Those cases are: Van Orden v. Perry, Sup. Ct. Case No. 03-1500 and McCreary County v. ACLU, Sup. Ct. Case No. 03-1693. Van Orden involves the permanent display of a Ten Commandments monument on the grounds of the Texas State Capitol. Van Orden, 351 F.3d 173 (5th Cir. 2003). That monument, donated by the Fraternal Order of Eagles is comparable to the

monument at issue in this action. McCreary involves the display of Ten Commandments in county courthouses and in certain public schools in Kentucky. McCreary, 354 F.3d 438 (6th Cir. 2003).

The Supreme Court decisions in those cases will substantially effect the outcome of this case.

ISSUES PRESENTED FOR REVIEW

Defendants/appellees, Pleasant Grove City and its officials, did not appeal the decision of the court below. Their recitation of perceived issues on appeal is not helpful nor appropriate. The issues on appeal are set out in appellants' opening brief (Brief of Appellants, p. 2-3).

REPLY TO STATEMENT OF THE CASE & PERTINENT FACTS

1. Defendant-Appellees (hereinafter "The City" or "defendants") make much of plaintiffs' (hereinafter "Society of Separationists" or "SOS") acknowledgment of the current state of law in the Tenth Circuit as to the display of the Ten Commandments on government property. Rule 11 of the Federal Rules of Civil Procedure demands that SOS reveal that status. That rule reads in part:

> By presenting a pleading, written motion, or other paper to the court . . ., an attorney . . . is certifying that to the best of the person's

> knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses, and other legal contentions therein are warranted by exiting law or by a nonfrivolous argument for the extension, modification, or reversal of exisiting law or the establishment of new law.

Fed. R. Civ. Pro., Rule 11 (underlined emphasis added).

No where does SOS take the position that the holding in Anderson is correct. SOS consistently states that Anderson should be reconsidered and overruled.

As set forth in the Amended Complaint, there is strong basis for the reversal of Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973), cert denied, 414 U.S. 879 (1973). The Court must be made aware of the current state of the law and the reason for the requested reversal. SOS clearly stated below, "Plaintiffs seek a reconsideration and reversal of the law in [Anderson]." Amended Complaint, p. 7 (Aplt. App., 15).

2. Although this Court in Summum v. Ogden, 297 F.3d 995 (10th Cir. 2002) affirmed the "district court's ruling in so far as that ruling granted summary judgment in favor of the City of Ogden as to Summum's Establishment Clause claim . . ." (id. at 1011)[1], the Court noted the significant

[1] Of note, the Establishment Clause claim made by Summum against the City of Ogden was that the City "violated the Establishment Clause of the First Amendment when it adopted the expressions located on the monuments in the

change in the legal landscape regarding this issue and called into question the 1973 analysis and holding of Anderson. Id. at 1000 n.1.

This Court made clear that although "the municipality at issue in Anderson (Salt Lake City) [may have] maintained a proper purpose in displaying that municipality's Ten Commandments Monument does not establish that the City of Ogden maintained such a proper purpose." Summum v. Ogden, 297 F.3d at 1000 n.1. Thus, Anderson does not stand for the proposition that Pleasant Grove's monument is necessarily maintained for a proper purpose nor that it is immune to challenge.

3. The City asserts that SOS did not plead proper specific allegations to state a claim. Brief of Appellees, p. 5. The City ignores the well plead facts in the Amended Complaint.[2] Plaintiffs state: "The presence of the Ten

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Municipal Gardens, particularly the text of the monument donated by the Eagles and at the same time rejecting Summum's proffered gift to erect and display a permanent monument containing its own religious expressions." Summum v. Ogden, 152 F.Supp.2d at 1294 (footnote omitted). That is not the same claim made herein.

[2] Defendants acknowledge, "[A]ll well-pleaded allegation of the amended complaint are accepted as true, and the allegations are construed in the light most favorable to plaintiff." Brief of Appellees, p. 3 (citing Aspenwood Investment Co. v. Martinez, 355 F.3d 1256 (10th Cir. 2004)); see also, Brief of Appellees, p. 7.

Commandments Monument on the lawn of the City Park as described above violates the First Amendment and the Utah Constitution (Art. I, § 4)." Amended Complaint, p. 7 (Aplt. App., 15). The individual plaintiffs assert, "The presence of the Ten Commandments Monument on the lawn of the City Park as described above has caused harm to the . . . plaintiffs . . . ." Amended Complaint, p. 7 (Aplt. App., 15). "The visual impact of seeing the Monument as part of an officially sanctioned city display has and continues to greatly offend, intimidate and affect them." Amended Complaint, p. 6 (Aplt. App., 14). Notice pleading is all that is required under the Federal Rules of Civil Procedure; detailed facts are not required in a complaint. Fed. R. Civ. Pro. 8(a). The Amended Complaint provides notice and sufficiently articulates plaintiffs' claims.

4. The City incorrectly intimates that plaintiffs below asked for a dismissal. Brief of Appellees, p. 6. Plaintiffs did not. Plaintiffs requested a ruling as to an affirmative defense raised by defendants. Aplt. App., 18. Nevertheless, plaintiffs maintained throughout the proceedings below that Anderson should be overruled, and requested that the lower court do so. Given the district court's ruling in Summum v. Ogden, 152 F.Supp.2d 1286 (D.

Utah 2001)[3], plaintiffs desired an early ruling in this matter. See Fed. R. Civ. Pro. 12(d). If a complaint fails to state a cause of action, judicial economy would urge a quick consideration of the complaint. Id.

5. The City asserts that SOS conceded that they "could prove no set of facts in support of their claims that would entitle them to relief." Brief of Appellees, p. 10. The City also asserts that plaintiffs conceded "defendants' argument that their claims are barred by the governing law of this circuit." Id. Those assertions are inaccurate. As noted by defendants, "all well-plead allegation of the amended complaint are accepted as true, and the allegations are construed in light most favorable to plaintiffs." Brief of Appellee, p. 3 (quoting Aspenwood Investment Co. v. Martinez, 355 F.3d 1256, 1259 (10th Cir. 2004)). That was the posture when the motions for judgment on the pleadings were presented to the court below.[4]

Plaintiffs' Amended Complaint makes clear that "The presence of the Ten Commandments Monument on the lawn of the

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[3] Summum v. Ogden was decided by the same district court judge who heard this case below.

[4] That plaintiffs and defendants mutually moved for judgment on the pleadings does not change the manner in which the court is to consider the sufficiency of the plaintiffs' complaint. Nor does a motion for judgment on the pleadings waive factual disputes that may be present.

City Park . . . violates the First Amendment and the Utah Constitution (Art. I, § 4)." Amended Complaint, p. 7 (Aplt. App., 15). Plaintiffs' complaint makes clear that plaintiffs consider the monument to promote and endorse religion. Amended Complaint, p. 4-5 (Aplt. App., 12-13).

6. The City concedes that "Jews and Christians believe that the Ten Commandments were personally directed by God, directly revealed by God to Moses as mandates of the Jewish faith . . . ." Aplee. Supp. App., p. 51. Furthermore, the City admitted "that the Ten Commandments are believed by Jews and Christians to be religious writings and instructions that form the basis of their religion." Id.

7. During oral arguments below, counsel for SOS again made clear that SOS sought to overturn Anderson. See Aplee. Supp. App., p. 53-54 ("there have been other cases not decided by the United States Supreme Court which have held that the Ten Commandments are in fact religious in nature, and overwhelmingly religious in nature such that their presence on the courthouse lawn would violate Establishment Clause . . . .").

8. Defendants Harmer and Corry were sued in their personal capacities. SOS sought money damages against them as a result of their refusal to remove the Ten Commandments

monument and the harm suffered. Amended Complaint (Aplt. App., 9); Objection to Substitution of Defendants (Aplt. App., 61).

9. The monument in question is primarily a religious display. Amended Complaint, pp. 4-5 (Aplt. App., 13).

10. Among other recitations and religious symbols, the monument contains the Ten Commandments. Amended Complaint, p. 4 (Aplt. App., 12). The Ten Commandments are religious writings and instructions which form the basis for both the Jewish and the Christian religions. Amended Complaint, pp. 4-5 (Aplt. App., 12-13).

11. The monument also contains symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Phoenician alphabet, and the initials of Jesus Christ. The content (except for its dedication to the city and county) is identical to the monument considered in Anderson v. Salt Lake City, 475 F.2d 29, 30 (1973). Amended Complaint, p. 5 (Aplt. App., 13).

SUMMARY OF REPLY ARGUMENT

The panel is not necessarily bound by Anderson V. Salt Lake City, 475 F.2d 29 (10th Cir. 1973). This Court should review the clear, intervening legal precedent decided since

Anderson and reverse that decision. Thirty (30) years of intervening legal history that has significantly changed the jurisprudential landscape herein.

Decisions by the United States Supreme Court since 1973, cause substantial question as to the continued validity of Anderson that a Ten Commandments monument is not primarily religious in character. Furthermore, this Court has indicated that Anderson is of questionable continued validity.

The Ten Commandments are undeniably religious in nature and their display on a permanent monument in the Pleasant Grove public park implicates the Establishment Clause. The Supreme Court has recognized that the Ten Commandments do not confine themselves to solely secular matters. Rather, that Court explicitly recognized the Ten Commandments religious nature.

The Pleasant Grove monument's primary and principal effect is to advance religion. The City's intended effect is to promote religious ideals. As such, the presence of that monument in a public park and sanctioned by the City is a violation of the Establishment Clause. This Court, therefore, should determine that the monument violates the Establishment Clause.

If the Court does not overrule Anderson, the Court must reverse based upon the lower court's failure to make the factual inquiry necessary under Lemon. A Rule 12(b)(6) motion to dismiss will be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief. The query is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims.

The Court below determined that plaintiffs' Amended Complaint failed to state a cause of action. That ruling implies an unequivocal and conclusive determination from Anderson that under no circumstances could a permanent display of the Ten Commandments on government property ever raise the possibility of an Establishment Clause violation.

Summum v. Ogden strongly urges against such a conclusive and unequivocal determination under Anderson that a Ten Commandments monument in a city park is *never* subject to challenge under the Establishment Clause. The court below did not engage in any factual inquiry. That was error.

The Court below erred in dismissing two defendants. Automatic substitution of a government defendant is not appropriate when the official is sued in her personal

capacity. A review of the Amended Complaint, the Answer and the course of the proceedings establishes that these defendants were sued in both their official and personal capacities.

REPLY ARGUMENT

I. THE PANEL IS NOT NECESSARILY BOUND BY ANDERSON V. SALT LAKE CITY, 475 F.2d 29 (10th Cir. 1973).

A. THE COURT SHOULD REVIEW THE CLEAR, INTERVENING LEGAL PRECEDENT DECIDED SINCE ANDERSON AND REVERSE THAT DECISION.

The City asserts that the "panel may not overrule the judgment of the Anderson panel because this panel is bound by Anderson absent *en banc* reconsideration or a superseding contrary decision of the United States Supreme Court . . . ." Brief of Appellees, p. 15.[5] While that rule is generally applicable, the instant case may well be the exception.[6] Thirty (30) years of intervening legal history

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[5] *En banc* consideration is not necessary if Stone, Lynch and Allegheny have already overruled Anderson.

[6] The City cites United States v. Marquez-Gallegos, 217 F.3d 1267 (10th Cir. 2000) and In re Smith, 10 F.3d 723 (10th Cir. 1993) in support of the rule. Marquez-Gallegos was a criminal case challenging sentencing after an illegal immigration re-entry. The Court was asked to review and overturn a case decided a mere year previously. The Court, rightfully, declined to review the recent decision.

In re Smith was a 1993 disbarment case against an attorney for filing frivolous appeals (filed contemporaneously with the 1993 disciplinary action). Several panels

that has significantly changed the jurisprudential landscape herein. Indeed, the Court is asked to review an important First Amendment Claim where three (3) decades of intervening legal history has clearly called Anderson into question. Summum v. Ogden, 297 F.3d 995 (10th Cir. 2002)("In light of Stone v. Graham, 449 U.S. 39, 41-42 (1980), and Summum v. Callaghan, 130 F.3d 906 n.2, 913 n.8 (10th Cir. 1997), the health of our Anderson precedent is subject to question.").

This Court need not accept the City's rigid suggestion of limited review. Rather, based upon the significant intervening legal history, the panel herein should overturn. Alternatively, the panel can suggest *en banc* reconsideration.

B. PLAINTIFFS AND *AMICUS* ACCURATELY REPRESENT THE HOLDING IN ANDERSON.

The City suggests that SOS and *Amicus* "misrepresent the holding in Anderson." Brief of Appellees, p. 16. That is not accurate. As set forth in Appellants' opening brief, the Anderson court stated, "an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular

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had found Smith's various appeals to be frivolous, which Smith contested in the disciplinary action. That panel indicated, in essence, that it would not disturb the other panels' contemporary findings.

attributes." Anderson, 475 F.2d at 33. The court also stated, "[T]he Decalogue is at once religious and secular . . . ." Id. Finally, the court held "that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief." Id. at 34.

Anderson may well be unclear as to whether the monument is primarily secular or the Ten Commandments are primarily secular. In Summum v. Ogden, the trial Judge summarized the holding in Anderson as "characteriz[ing] that roster of statements as secular in nature." 152 F.Supp.2d at 1294. "As the Anderson court noted, the Ten Commandments is at one and the same time, a secular symbol and an ecumenical symbol." Id.

Any attempt to distinguish the monument from its predominate feature and content, the text of the Ten Commandments, is academic. The text on the monument is framed and decorated with symbols[7] which add to (and do not detract from) the religious nature and presentation of the Ten Commandments. Those additions make the monument more religious and not less religious. The monument in Anderson

[7] Those include the All Seeing Eye of God, Stars of David, the initials of Jesus Christ, a pyramid, an eagle, an American flag and some Phoenician letters (of no meaning). See Anderson, 297 F.3d at 998.

stood solitaire on the lawn of the Salt Lake City and County Courthouse. If that monument is predominately secular under the analysis of Anderson, then so too must be the Ten Commandments. See Anderson, 475 F.2d at 33-34.

Decisions by the United States Supreme Court since 1973, cause substantial question as to the continued validity of this Court's determination in Anderson that a Ten Commandments monument is not primarily religious in character. See Lynch v. Donnelly, 465 U.S. 668, 677 (1984); see also Stone v. Graham, 449 U.S. 39, 41 (1980)(statute requiring posting of Ten Commandments in public school classrooms violates Establishment Clause).

Furthermore, this Court has indicated that Anderson is of questionable continued validity. In Summum v. Callaghan, 130 F.3d 906, 910 n.2 (10th Cir. 1997), this Court stated:

> Since Anderson was decided, however, more recent cases, including a Supreme Court case, cast[] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature.

The Court further stated:

> We note, however, that our decision in Anderson has been called into question by the Supreme Court in Stone v. Graham, 449 U.S. 39 (1980)(*per curiam*) (holding statute requiring posting of Ten Commandments in public school classrooms violates Establishment Clause). In Stone, the Court observed:

> "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths . . "

Id.[8,9]

In Summum v. Ogden, 297 F.3d 995 (10th Cir. 2002) this Court stated

> . . . the Establishment Clause issue is certainly not so straightforward as the City would presume. First, in light of Stone v. Graham, 449 U.S. 39, 41-42, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980), and Summum v. Callaghan, 130 F.3d 906, 910 n.2, 913 n.8 (10th Cir. 1997), the health of our Anderson precedent is subject to question.

Id., at 1000 n.3. The Summum cases were resolved upon Free Speech Clause challenges, and avoided consideration of any Establishment Clause violation. However, the Establishment Clause claim is squarely and exclusively before the Court in the present action.

The Ten Commandments are undeniably religious in nature and their display on a permanent monument in the Pleasant Grove public park implicates the Establishment Clause. This Court should reconsider and overrule the contrary holding of

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[8] As noted, defendants below conceded the religious nature of the Ten Commandments. However, they argue the monument at issue is not predominately religious in nature.

[9] The City seeks to dismiss these comments of the Court in Callaghan and Ogden as *dicta*. SOS suggests those comments are highly persuasive.

Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973).[10]

C. SUPREME COURT PRECEDENT CALLS INTO QUESTION THE HOLDING OF ANDERSON.[11]

The Supreme Court has firmly rejected the contention that the Ten Commandments "[are] the fundamental legal code of Western Civilization and the Common Law of the United States." Stone v. Graham, 449 U.S. 39, 41 (1980) (holding this "avowed" purpose did not establish a secular purpose for posting the Ten Commandments on public classroom walls); see also Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963) (holding that the "promotion of moral values, contradiction of materialistic trends of our times, perpetuation of our institutions and teaching literature did not establish a secular purpose for daily reading of Bible verses and the Lord's Prayer in public schools").[12]

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[10] Contrary to Appellees' suggestion, the Anderson court did not strictly apply the Lemon test. See Lemon v. Kurtzman, 403 U.S. 602 (1971). The use and interpretation of Lemon has changed and evolved since Anderson. Lemon as applied in Anderson is not the Lemon as now applied. Today in the Lemon test, courts must consider *purpose* and *effect* from the standpoint of a reasonable observer. This Court has so applied Lemon. See Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989).

[11] *Amicus* Americans United takes a stronger position contending that Anderson has already been overruled by decisions of the United States Supreme Court.

[12] Stone v. Graham was not a public school prayer case as asserted by Appellees. See Brief of Appellee, p. 24 &

In Stone, the Supreme Court recognized that the Commandments do not confine themselves to "arguably secular matters", such as killing or murder, adultery, stealing, false witness, and covetousness. Stone, 449 U.S. at 41-42. "Rather, the first part of the Commandments concern the religious duties of believers; worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." Stone, 449 U.S. at 42 (citing Exodus 20:1-11; Deuteronomy 5:6-15).

The Supreme Court explicitly recognized their religious nature stating, "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone, 449 U.S. at 41. The Court concluded that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Stone, 449 U.S. at 41 (footnote omitted); Lynch v. Donnelly, 465 U.S. 668, 677 (1984).

Save a dissent from the denial of *certiorari*, with no precedential value, in City of Elkhart v. Books, 121 S.Ct. 2209 (2001)(Rehnquist, C.J., joined by Scalia, J., and

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27. It dealt directly with the display of the Ten Commandments in a public school. Stone has been repeatedly cited and relied upon in non-school cases involving governmental displays of the Ten Commandments.

Thomas, J., dissenting from denial of *certiorari*), appellees cannot cite any Supreme Court decision challenging or overturning Stone, or restricting Stone solely to public school settings.

D. THE MONUMENT'S PRESENCE IN A PLEASANT GROVE PARK VIOLATES THE ESTABLISHMENT CLAUSE.

The Pleasant Grove Ten Commandments monument's primary and principal effect is to advance religion. The monument is not simply "government acknowledgment of religious heritage" in our society. The City's intended effect, to promote religious ideals, violates Lemon's second and third prongs. Amended Complaint, ¶ 19 (Aplt. App., 15). As stated by this Court in Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989), "irrespective of the government's actual purpose[, does] the practice . . . convey[] a message of endorsement or disapproval" of religion? The answer herein is "Yes." The Court must "inquire [as to] what an average observer would perceive when viewing the action of the City." Id.

The Supreme Court held that "what viewers may . . . understand to be the purpose of the display," County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) is relevant in the inquiry. Indeed, whether "the challenged governmental

action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their religious choices." Id. at 597.

In application herein, the Pleasant Grove monolith's primary and principal effect is to advance religion. As such, SOS requests this Court to reconsider or distinguish Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973) and determine that the monument violates the Establishment Clause.

II. DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM.

Plaintiffs below did not move this court to enter judgment against themselves as suggested by the City. Contra Brief of Appellee, p. 31. The City cites plaintiffs' motion for judgment on the pleadings to support this claim. That motion made a neutral request for a ruling on an affirmative defense asserted by defendants.[13] The vehicle to precipitate such a ruling was a Motion for Judgment on the Pleadings. Aplt. App., 18.

SOS maintained throughout the proceedings below that Anderson should be overruled, and requested that the lower

[13] That a party requests a ruling on another party's motion does not mean the first party agrees with the motion.

court do so:

1. Amended Complaint, p. 7 (Aplt. App., 15) ("The presence of the Ten Commandments Monument on the lawn of the City Park . . . violates the First Amendment and the Utah Constitution (Art. I, § 4)"; "Plaintiffs seek a reconsideration and reversal of the law in [Anderson & Summum I]");

2. Reply Re: Request for Preliminary Hearing & Motion for Judgement on the Pleadings, p. 2 (Aplt. App., 37) ("Plaintiffs have not asked and do not ask that their Amended Complaint be dismissed"; "Plaintiffs have asked the court to determine the validity of defendants' First Defense");

3. Plaintiffs' Response Re: Defendants' Motion for Judgment on the Pleadings, p. 2 (Aplt. App., 51)("The claims made by plaintiffs in this action are contrary to the decision of the United States Court of Appeals for the Tenth Circuit in Anderson v. Salt Lake City, 475 F.2d 29 (1973). [SOS seeks] a review and an overturning of that decision."); and,

4. Transcript of Proceedings on April 6, 2004 (Aplee. App., 53-54)("there have been other cases not decided by the United States Supreme Court which have held that the Ten Commandments are in fact religious in nature, and over-

whelmingly religious in nature such that their presence on the courthouse lawn would violate Establishment Clause . . . .").

The City is inaccurate in asserting that plaintiffs requested that the district court enter judgment against themselves.[14]

III. THE AMENDED COMPLAINT STATES A CLAIM UPON WHICH RELIEF SHOULD BE GRANTED.

If the Court does not overrule Anderson, the Court must reverse the court below because of its failure to make the factual inquiry necessary under Lemon.

To evaluate a Rule 12(c) motion for judgment on the pleadings, the court employs the same standard that it uses to analyze a Rule 12(b)(6) motion to dismiss. Ramirez v. Dep't of Corr., 222 F.3d 1238, 1240 (10th Cir. 2000). A Rule 12(b)(6) motion to dismiss will be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her theory of recovery. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the

[14] Had a mere dismissal been plaintiff's goal, such an end could have been accomplished by plaintiffs not filing their suit.

plaintiff is entitled to offer evidence to support her claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Relying on Anderson, the Court below determined that plaintiffs' Amended Complaint (Aplt. App., 9) on its face failed to state a cause of action. Aplt. App., 69. That ruling implies an unequivocal and conclusive determination from Anderson that under no circumstances could the permanent display of the Ten Commandments on government property ever raise the possibility of an Establishment Clause violation. See id. That dismissal did not include leave to amend plaintiffs' complaint. See id.

The conclusiveness in the trial court's reading and application of Anderson is contrary to recent comments by this Court regarding the constitutional analysis required of a permanent Ten Commandments monument on government property. In Summum v. Ogden, the Court stated:

> . . . the Establishment Clause issue is certainly not so straightforward as the City would presume. First, in light of Stone v. Graham, 449 U.S. 39, 41-42, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980), and Summum v. Callaghan, 130 F.3d 906, 910 n.2, 913 n.8 (10th Cir. 1997), the health of our Anderson precedent is subject to question. Second, even to any extent to which Anderson remains good law, the fact that Anderson considered an identical Ten Commandments Monument is not necessarily controlling. Establishment

> Clause inquiry considers, amongst other factors, the purpose and effect of the religious speech at issue. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (developing a three-pronged Establishment Clause analysis, the first two prongs of which consider, respectively, the purpose and effect of the religious speech at issue); . . . The fact that the municipality at issue in Anderson (Salt Lake City) maintained a proper purpose in displaying that municipality's Ten Commandments Monument does not establish that the City of Ogden maintained such a proper purpose. Nor, particularly in light of Allegheny's fact-intensive inquiry, does the fact that Salt Lake City's Ten Commandments Monument did not have an improper effect establish that the City of Ogden's Monument was not likely to have such an improper effect.

Summum v. Ogden, at 1000, n.3.

These comments from Summum v. Ogden strongly urge against a conclusive and unequivocal determination under Anderson that a Ten Commandments monument in a city park is *never* subject to challenge under the Establishment Clause. The court below did not engage in any factual inquiry, but ruled solely on the face of the Amended Complaint. Applt. App. 75. That is error.

When strong religious symbols (*e.g.*, the All Seeing Eye of God, the initials of Jesus Christ, Stars of David, etc.) are emblazoned on a monument in addition to the clearly religious text that is the Ten Commandments, something else must be present to nullify the overwhelming religious nature of the display. Such apparently was the case in Anderson.

Such may be the case at bar, however that can not be determined absent a detailed factual inquiry, which the court below precluded.

The lack of a factual inquiry by the Court below as to "the purpose and effect of the religious speech at issue," was error.

IV. THE COURT BELOW ERRED IN DISMISSING TWO DEFENDANTS.

Automatic substitution of a government defendant is not appropriate when the official is sued in her personal capacity. The City claims that defendants Harmer and Corry were sued only in their official capacity. Brief of Appellee, p. 35. That is inaccurate. A review of the Amended Complaint, the Answer and the course of the proceedings establishes that these defendants were sued in both their official and personal capacities. Objection to Substitution of Defendants (Aplt. App., 61).

Defendants' actions harmed plaintiffs. For that reason, Harmer and Corry were sued personally. Leaving office did not absolve Harmer and Corry as to plaintiffs' claim for monetary damages. SOS's claims for damages against Harmer and Corry personally remain viable.

The court below erred in dismissing[15] Harmer and Corry from the lawsuit in light of claims personally against them.

CONCLUSION AND RELIEF SOUGHT

BASED UPON THE FOREGOING, appellants request this Court reconsider and overrule Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973) and determine that the Ten Commandments are religious in nature such that their permanent presence on government property may be challenged under the Establishment Clause.

Appellants request this Court to reverse the order of dismissal by the trial court, determine that plaintiffs' Amended Complaint states a cause of action, reinstate plaintiffs' claims under the Utah Constitution, reinstate former City Council members Harmer and Corry as defendants

[15] The City incorrectly asserts that "the district court acted properly in automatically substituting [defendants]." Brief of Appellees, p. 38 (emphasis added). The court did not do so automatically, but did so upon motion by defendants. Aplt. App., 58. Plaintiffs below objected. Aplt. App., 61.

and remand this matter for further proceedings in the court below.

RESPECTFULLY SUBMITTED this 14th day of OCTOBER 2004.

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CERTIFICATE UNDER FED. R. APP. P. 32(a)(7)(B)(i) & (C)(i)

Appellants' counsel certifies under Federal Rule Appellate Procedure 32(a)(7)(B)(i) and (C)(i) that this Reply Brief of Appellants contains ~5,900 words. Counsel relied upon the word count function of WordPerfect 10 to ascertain that number.

DATED this 14th day of OCTOBER 2004.

ATTORNEYS FOR APPELLANTS

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JAMES L. HARRIS, Jr.

CERTIFICATE OF MAILING

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