

No. 03-1693

IN THE
Supreme Court of the United States

—◆—
McCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF AFTER ARGUMENT AND SUPPLEMENTAL
BRIEF AFTER ARGUMENT FOR PETITIONERS**

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Petitioners McCreary County, Kentucky, Blaine Phillips, Pulaski County, Kentucky, and Darrell BeShears hereby move this Court, pursuant to Rules 21 and 25.5, for leave to file the accompanying supplemental brief after argument. The purpose of this Brief is to advise the Court of intervening events that occurred after oral argument and to respond to specific questions of the Court raised during oral argument with information counsel for Petitioners only became aware of after argument. In support of this Motion, Petitioners state:

1. This Court heard oral argument in this matter on March 2, 2005.

2. At oral argument, a question arose concerning whether the 1999 Resolution regarding the second display should guide the Court's disposition of this case if the membership of the Board had changed in intervening years. Tr. 35. Petitioners already advised this Court after argument, pursuant to Rule 35, that the County Judge Executive for McCreary County has changed. Additionally, Petitioners wish to advise this Court that two of the other members of the McCreary County Fiscal Court have also changed. Therefore, three of the five Fiscal Court members in 1999 who signed the 1999 Resolution have since left the Fiscal Court and have been replaced by three new members.

3. This information is highly material to the question of the present purpose of the Petitioners. *See* Brief for Petitioners at 8-16; Reply Brief for Petitioners at 3-16.

4. Additionally, several questions arose at oral argument concerning the 1999 Resolution regarding the second display and whether it had been repealed or what effect should be given to the 1999 Resolution. *See, e.g.*, Tr. 47-50. Petitioners wish to bring to this Court's attention the fact that the 1999 Resolution regarding the second display was repealed and repudiated after oral argument. Although Petitioners believed that the 1999 Resolution was fact specific and applied only to the second display, that it already had been repudiated and abandoned, and that it did not apply to the Foundations Display, Petitioners have expressly and explicitly repealed and repudiated the 1999 Resolution so as to alleviate any question. Petitioners request that this Court take judicial notice of the repeal of the 1999 Resolution regarding the second display. The Resolutions repealing the 1999 Resolution regarding the second display are included in the Appendix to the accompanying Supplemental Brief (1a-8a).

5. Petitioners submit the present Supplemental Brief to

clarify the facts and the posture of this case.

WHEREFORE, this Court should grant Petitioners leave to file the accompanying Supplemental Brief.

Respectfully Submitted,

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**SUPPLEMENTAL BRIEF AFTER
ARGUMENT FOR PETITIONERS**

Petitioners submit the present Supplemental Brief for the purpose of bringing to the Court's attention facts which came to the attention of Petitioner's counsel after oral argument as well as intervening events that occurred after oral argument which address certain questions raised during the argument.

The purpose of the Foundations Display is a significant aspect of this case. *See* Brief for Petitioners at 8-16; Reply Brief for Petitioners at 3-16. Several questions during oral argument focused on the purpose of the Foundations Display and whether that purpose should be viewed in light of the

previous displays and any intervening changes since the first display was erected. *See, e.g.*, TR. 35, 47-50.

At oral argument, a question arose concerning whether the 1999 Resolution regarding the second display should guide the Court's disposition of this case if the membership of the Board had changed in the intervening years. Tr. 35.

Petitioners' counsel, by letter pursuant to Rule 35, advised this Court after argument that Jimmie Greene, named as a Defendant in his official capacity as County Judge Executive for McCreary County, Kentucky, was no longer County Judge Executive and had been replaced through election by Blaine Phillips, who is the current County Judge Executive for McCreary County, Kentucky.

Petitioners also wish to advise this Court that two other members of the McCreary County Fiscal Court have changed since the 1999 Resolution regarding the second display was passed. Specifically, Ronnie Haynes and Ed Brooks, who were members of the McCreary County Fiscal Court when the 1999 Resolution regarding the second display was signed, have been replaced through elections by Roger Phillips and Stanley Cox. Therefore, three of the five members of the McCreary County Fiscal Court who were members when the 1999 Resolution regarding the second display was passed have been replaced by new members who were not part of the Fiscal Court when the 1999 Resolution was passed.

Additionally, several questions arose at oral argument concerning whether the 1999 Resolution regarding the second display had been repealed or what effect it should be given. *See, e.g.*, Tr. 47-50. Petitioners wish to advise this Court that the 1999 Resolution regarding the second display was repealed and repudiated after argument by both the McCreary and Pulaski Fiscal Courts. This Court can take judicial notice of the repeal and repudiation of the 1999 Resolution regarding

the second display as an official act of the McCreary and Pulaski County governments. *See Portsmouth Harbor Land & Hotel Co. v. U.S.*, 260 U.S. 327, 335 (1922)(taking judicial notice of Resolution of Congress); *Owings v. Hull*, 34 U.S. 607, 625 (1835)(requiring court to take judicial notice of laws of a state); *The Appollon*, 22 U.S. (9 Wheat.) 362, 374 (1824)(Court must take judicial notice of public documents); *see also Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999)(court must take judicial notice of public records and government documents because they are generally considered “not to be subject to reasonable dispute”); *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977)(“[M]atters of public record such as state statutes, city charters, and city ordinances fall within the category of ‘common knowledge’ and are therefore proper subjects for judicial notice”).

McCreary County repealed and repudiated the 1999 Resolution regarding the second display on March 8, 2005, and Pulaski County repealed and repudiated the 1999 Resolution regarding the second display on March 10, 2005. Attached as an Appendix to this Supplemental Brief are the Resolutions of McCreary and Pulaski Counties repealing and repudiating the 1999 Resolution regarding the second display. (1a-8a). Petitioners believed it was not necessary to repeal the 1999 Resolution because, as stated during oral argument, that Resolution was fact specific only for the second display. Petitioners believed they had already abandoned and repudiated the 1999 Resolution along with the second display. However, Petitioners wish to leave no doubt in this Court’s mind that they have abandoned and repudiated the 1999 Resolution. Petitioners have expressly and explicitly repealed and repudiated the 1999 Resolution regarding the second display so as to clarify and leave no doubt that the 1999

Resolution regarding the second display does not apply to the Foundations Display. Petitioners wish to make it abundantly clear that they have one purpose for the Foundations Display that is stated in the explanation of the Foundations Display itself and in the undisputed testimony before this Court. *See* J.A. 57, 62. That purpose is to display some documents that played a significant role in the development of American law and government.

The repeal of the 1999 Resolution regarding the second display is material to the questions raised during oral argument as Respondents, *for the first time in this litigation*, focused heavily on the 1999 Resolution in both their Brief to this Court and at argument. The 1999 Resolution regarding the second display has now been repealed and repudiated in order to clarify and make abundantly clear Petitioners' secular purpose for the Foundations Display.

Respectfully Submitted,

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APPENDIX

McCREARY COUNTY RESOLUTION

**RESOLUTION REPEALING PRIOR RESOLUTION
DATED DECEMBER 8, 1999**

A RESOLUTION repealing and repudiating a prior resolution dated December 8, 1999 (hereinafter “1999 Resolution”); noting that a resolution is not required to post documents on the walls of the courthouse; that it was assumed the 1999 Resolution had been abandoned and repudiated when the federal district court enjoined the display which was the subject of the 1999 Resolution; that in the event there is any doubt whether the 1999 Resolution had been abandoned and repudiated, this Resolution explicitly repeals, abandons, and repudiates the 1999 Resolution; and this Resolution furthermore states that the purpose and intent of the Foundations of American Law and Government display was and remains an educational display of some documents and symbols that influenced American law and government or reflect such influence.

WHEREFORE, there are numerous documents and pictures on the walls of the courthouse of a historical nature that reflect various aspects of history relative to the county, the state and the Nation;

WHEREFORE, no resolution is necessary to post a display or picture on the walls of the courthouse;

WHEREFORE, resolutions do not carry the force of law and are thus unlike ordinances;

WHEREFORE, resolutions are by their very nature limited to specific facts, times, places, persons or events, their application is thereby limited and temporary, they historically

have never been repealed, and thus there are an inestimable amount of resolutions dating back to the beginning of the county;

WHEREFORE, in 1999 a single copy of the Ten Commandments was posted on the walls of the courthouse among the already existing numerous other historical documents and pictures on the walls;

WHEREFORE, no resolution was passed regarding the posting of this single display of the Ten Commandments;

WHEREFORE, posting the original display of the Ten Commandments was merely educational in nature, as the Ten Commandments have been frequently posted or displayed in many courthouses throughout America as a recognized symbol of law;

WHEREFORE, following the posting of the single copy of the Ten Commandments among the other existing historical documents, the county was sued;

WHEREFORE, following suit, the single copy of the Ten Commandments was modified by posting other documents of a historical nature, some of which were excerpted, and this display was accompanied by the 1999 Resolution that was specific only for that display;

WHEREFORE, the intent of the county was not to endorse religion but an effort to follow what the county officials believed at that time was consistent with United States Supreme Court decisions, and the 1999 Resolution was designed to explain what the county had done was permissible according to the best opinion the county officials had at the time;

WHEREFORE, following the federal district court's enjoining the second display, the county accepted the decision and chose not to contest the ruling;

WHEREFORE, since the 1999 Resolution was fact-

specific to that second display, and since the second display was found to be unconstitutional and the county accepted the ruling on that display, the county assumed that along with abandoning the second display, it also had abandoned the 1999 Resolution, as the 1999 Resolution was specific to that display and none other;

WHEREFORE, since resolutions historically have never been repealed and since they are fact specific and limited solely to the stated facts in the resolution, the county until now never considered it necessary to repeal the 1999 Resolution in that the county assumed that the 1999 Resolution was automatically repudiated when the county accepted the ruling of the federal district court regarding the second display;

WHEREFORE, although the county had abandoned the second display and the 1999 Resolution, in order to make it explicitly and unequivocally clear, this Resolution hereby repeals the 1999 Resolution, completely abandons the second display and the 1999 Resolution, and repudiates both;

WHEREFORE, neither the second display nor the 1999 Resolution that was fact-specific to that display reflect the intent or purpose of the county;

WHEREFORE, the 1999 Resolution never applied to the subsequent Foundations of American Law and Government display;

WHEREFORE, the Foundations of American Law and Government contains the Foundations Document which stated the purpose of the display as follows: “The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government,”and this display with its stated purpose superceded any prior display or resolution;

WHEREFORE, the Foundations of American Law and

Government display is educational in nature and is not intended to endorse religion;

WHEREFORE, the Foundations of American Law and Government display does not focus on any one document, but presents a display of some documents that have influenced American law and government;

THEREFORE BE IT RESOLVED that the 1999 Resolution, and the second display to which the 1999 Resolution applied, which was enjoined by the federal district court, are explicitly and expressly repealed, abandoned and repudiated,

BE IT FURTHER RESOLVED that the county's purpose regarding the Foundations of American Law and Government display was stated in the Foundations Document contained in the display and was not intended to endorse religion.

DONE at the city of Whitley City, County of McCreary, Commonwealth of Kentucky, on this 8th day of March, 2005, in witness whereof we have hereunto set our hands.

/s/ Blaine Phillips

Judge Executive of McCreary County

/s/ Coy Taylor

Magistrate of McCreary County

/s/ Judy Neal Redden

Magistrate of McCreary County

/s/ Roger Phillips

Magistrate of McCreary County

/s/ Stanley Cox

Magistrate of McCreary County

PULASKI COUNTY RESOLUTION

**RESOLUTION REPEALING PRIOR RESOLUTION
DATED DECEMBER 14, 1999**

A RESOLUTION repealing and repudiating a prior resolution dated December 14, 1999 (hereinafter “1999 Resolution”); noting that a resolution is not required to post documents on the walls of the courthouse; that it was assumed the 1999 Resolution had been abandoned and repudiated when the federal district court enjoined the display which was the subject of the 1999 Resolution; that in the event there is any doubt whether the 1999 Resolution had been abandoned and repudiated, this Resolution explicitly repeals, abandons, and repudiates the 1999 Resolution; and this Resolution furthermore states that the purpose and intent of the Foundations of American Law and Government display was and remains an educational display of some documents and symbols that influenced American law and government or reflect such influence.

WHEREFORE, there are numerous documents and pictures on the walls of the courthouse of a historical nature that reflect various aspects of history relative to the county, the state and the Nation;

WHEREFORE, no resolution is necessary to post a display or picture on the walls of the courthouse;

WHEREFORE, resolutions do not carry the force of law and are thus unlike ordinances;

WHEREFORE, resolutions are by their very nature limited to specific facts, times, places, persons or events, their application is thereby limited and temporary, they historically have never been repealed, and thus there are an inestimable amount of resolutions dating back to the beginning of the

county;

WHEREFORE, in 1999 a single copy of the Ten Commandments was posted on the walls of the courthouse among the already existing numerous other historical documents and pictures on the walls;

WHEREFORE, no resolution was passed regarding the posting of this single display of the Ten Commandments;

WHEREFORE, posting the original display of the Ten Commandments was merely educational in nature, as the Ten Commandments have been frequently posted or displayed in many courthouses throughout America as a recognized symbol of law;

WHEREFORE, following the posting of the single copy of the Ten Commandments among the other existing historical documents, the county was sued;

WHEREFORE, following suit, the single copy of the Ten Commandments was modified by posting other documents of a historical nature, some of which were excerpted, and this display was accompanied by the 1999 Resolution that was specific only for that display;

WHEREFORE, the intent of the county was not to endorse religion but an effort to follow what the county officials believed at that time was consistent with United States Supreme Court decisions, and the 1999 Resolution was designed to explain what the county had done was permissible according to the best opinion the county officials had at the time;

WHEREFORE, following the federal district court's enjoining the second display, the county accepted the decision and chose not to contest the ruling;

WHEREFORE, since the 1999 Resolution was fact-specific to that second display, and since the second display was found to be unconstitutional and the county accepted the

ruling on that display, the county assumed that along with abandoning the second display, it also had abandoned the 1999 Resolution, as the 1999 Resolution was specific to that display and none other;

WHEREFORE, since resolutions historically have never been repealed and since they are fact specific and limited solely to the stated facts in the resolution, the county until now never considered it necessary to repeal the 1999 Resolution in that the county assumed that the 1999 Resolution was automatically repudiated when the county accepted the ruling of the federal district court regarding the second display;

WHEREFORE, although the county had abandoned the second display and the 1999 Resolution, in order to make it explicitly and unequivocally clear, this Resolution hereby repeals the 1999 Resolution, completely abandons the second display and the 1999 Resolution, and repudiates both;

WHEREFORE, neither the second display nor the 1999 Resolution that was fact-specific to that display reflect the intent or purpose of the county;

WHEREFORE, the 1999 Resolution never applied to the subsequent Foundations of American Law and Government display;

WHEREFORE, the Foundations of American Law and Government contains the Foundations Document which stated the purpose of the display as follows: “The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government,”and this display with its stated purpose superceded any prior display or resolution;

WHEREFORE, the Foundations of American Law and Government display is educational in nature and is not intended to endorse religion;

WHEREFORE, the Foundations of American Law and Government display does not focus on any one document, but presents a display of some documents that have influenced American law and government;

THEREFORE BE IT RESOLVED that the 1999 Resolution, and the second display to which the 1999 Resolution applied, which was enjoined by the federal district court, are explicitly and expressly repealed, abandoned and repudiated;

BE IT FURTHER RESOLVED that the county's purpose regarding the Foundations of American Law and Government display was stated in the Foundations Document contained in the display and was not intended to endorse religion.

DONE at the city of Somerset, County of Pulaski, Commonwealth of Kentucky, on this 10th day of March, 2005, in witness whereof we have hereunto set our hands.

/s/ Darrell BeShears

Judge Executive of Pulaski County

/s/ James Cothron

Magistrate of Pulaski County

/s/ James Girdler

Magistrate of Pulaski County

/s/ Mike New

Magistrate of Pulaski County

/s/ Ralph Troxtell

Magistrate of Pulaski County

/s/ Kenneth Isaacs

Magistrate of Pulaski County

/s/ Darrell Wilson

Magistrate of Pulaski County

/s/ Howard Hansford

Magistrate of Pulaski County