

# H.R. 2679 - The Public Expression of Religion Act (PERA)

Introduced by Rep. John Hostettler

- Currently, plaintiffs in Establishment Clause cases (usually the ACLU or like-minded legal groups) have the right to collect attorney's fees if they win the lawsuit.
- Under 42 U.S.C. § 1983, parties can sue state and local governments claiming their individual rights were violated and demand attorneys' fees in the case if they prevail at any stage of judicial review.
- Under these federal statutes, parties can threaten to file lawsuits claiming cities and towns have violated the Establishment Clause. Some examples include threatening litigation over Ten Commandments monuments, veteran's memorials, and other religious symbols such as the miniscule cross in the LA County seal.
- The towns know that a single adverse judgment at any level of the court system will require them to pay not only their own legal fees, but the plaintiffs' as well and that *these legal fees will come at the cost of local taxpayers*.
- Added to the town's frustration is that Establishment Clause jurisprudence is about as clear as mud. Even well-known Constitutional scholars agree that it is difficult – if not impossible – to determine which way a court will rule in any given Establishment Clause case. Just think of last year's Supreme Court decisions in *McCreary* and *Van Orden* – both were Ten Commandments cases, but the court randomly chose different Establishment Clause “tests” to determine the outcome, thus the opposite results in similar cases.
- Under the current law, the ACLU and its affiliates have a win-win situation. They often get their desired result just by threatening these localities. It is the localities who must decide whether to roll the dice and gamble by going to court where jurisprudence is unclear, or to capitulate to the ACLU. If they do go to court, the localities might be vindicated, but they will still have to pay their own legal fees since these statutes do not give attorney's fees to the winners – just the plaintiffs if they win the case. If the localities lose, they must not only pay to change the monument AND their own attorney's fees, BUT ALSO the fees of the ACLU.
- H.R. 2679 amends 42 U.S.C. § 1983 to make clear that, while Establishment Clause cases can continue to be brought against State and local governments, they can be brought only for injunctive relief, which means the only relief a court could order in those cases is that the State or local government stop doing whatever it was doing that was an alleged violation of the Establishment Clause.
- PERA will ensure that each party in an Establishment Clause lawsuit shoulders its own cost. When the carrot (attorney's fees) is taken away from the ACLU and other like-minded groups, they will be less likely to file frivolous Establishment Clause suits. If lawsuits are filed, this bill will ensure that the states and localities are on equal footing with those who are suing them.

## *Examples of the attorney's fees ACLU and its affiliates have received...*

- The ACLU received \$950,000 in a settlement with the City of San Diego in a case involving the San Diego Boy Scouts. *See* Seth Hettena, “City of San Diego Settles Boy Scout Suit,” AP Online (January 8, 2004).
- The ACLU received \$150,000 from Barrow County, Georgia, after a federal judge ordered the county to remove a framed copy of the Ten Commandments from a hallway in the County Courthouse. *See* Cameron McWhirter, “10 Commandments: Barrow Removes Religious Display; County Complies with U.S. Judge,” *The Atlanta Journal-Constitution* (July 20, 2005) at 1B.

- The ACLU received \$121,500 from Kentucky in a case to remove a Ten Commandments monument outside the Capitol. *See* Jack Brammer, “State Legislature Foots the Bill for ACLU Victory; Group Fought Lawmaker’s Plan for Monument,” *Lexington Herald Leader* (July 8, 2003) at B1.
- The ACLU received \$38,000 in legal fees in a case against Hamilton County, Tennessee, to remove the Ten Commandments from a court building. *See* Chris Joyner and Kimberly Greuter, “Judge Awards Attorneys’ Fees in Postings Case,” *Chattanooga Times Free Press* (June 19, 2002) at B1.
- The ACLU and two other groups received nearly \$550,000 in an Alabama case to remove the Ten Commandments from a courthouse. *See* Kyle Wingfield, “Legal Battle over Ten Commandments Monument Will Cost Alabama Taxpayers More Than \$500,000,” Associated Press (April 14, 2004).
- The ACLU received nearly \$75,000 from Habersham County, Georgia, in a case involving two Ten Commandments displays, one at the county courthouse and one in the county swimming pool building. *See* <http://www.acluga.org/docket.html>.

### Examples of cities that capitulated rather than go up against the ACLU:

- “County Officials in Iowa Agree to Remove Ten Commandments from Courthouse Grounds” (March 15, 2001) (“Ben Stone, Executive Director of the Iowa Civil Liberties Union [said] ‘[w]e ... wanted to spare the community a divisive and costly lawsuit.’”) (emphasis added);
- “ACLU of Montana Settles Lawsuit Over Ten Commandments, Nativity Scene Placed on County Property” (October 12, 2000) (“The ACLU said the lawsuit was a ‘last attempt’ to nudge Custer County into addressing the *possible* unconstitutionality of the displays.”) (emphasis added);
- “ACLU Action Prompts [Val Verde, California] School Board to Abandon Posting of Ten Commandments” (November 24, 1999) (“*The school board’s decision came in the wake of the filing of a lawsuit last week by the ACLU ...*”) (emphasis added);
- “ACLU of Illinois Lauds Officials’ Decision to Remove Religious Postings in Harrisburg Schools” (December 7, 1999) (The “Director of Communications for the ACLU [said] ‘*This action means the people of Harrisburg can focus all their energies, resources, and attention on the needs of their students, rather than worrying about a lengthy, expensive and disruptive court battle.*’”) (emphasis added);
- “Commandments Come Down in West Virginia School” (August 27, 1999) (“School board attorney Brian Abraham recommended at a Thursday night meeting that the signs be taken down *to avoid possible lawsuits.*”) (emphasis added).

*This material was prepared by the office of Congressman John Hostettler (R-IN) and was publicly distributed. From the distributed material a PDF version was produced by the Religious Freedom Coalition to be posted as a public Internet document. This document may be printed in its entirety. For additional information on PERA please contact the office of Congressman Hostettler.*

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