IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 17-1683

FREEDOM FROM RELIGION FOUNDATION, et al.,

Plaintiffs-Appellees,

v.

CONCORD COMMUNITY SCHOOLS

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Cause No. 3:15-CV-00463-JD-CAN

The Honorable Jon E. DeGuilio, Judge

BRIEF OF DEFENDANT-APPELLANT

Anthony W. Overholt, 16481-49
FROST BROWN TOOD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
Telephone: (317) 237-3800
Facsimile: (317) 237-3900
Email: Aoverholt@fbtlaw.com

Attorneys for Defendant-Appellant, Concord Community Schools

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Appellate Court No: 17-1683

Short Caption: Freedom From Religion Foundation, Incorporated v. Concord Community Schools

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Attorney's Printed Name: Anthony W. Overholt

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Address: 201 North Illinois Street, Suite 1900

Indianapolis, IN 46204

Phone Number: (317) 237-3800 Fax Number: (317) 237-3900

E-Mail Address: aoverholt@fbtlaw.com

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Jurisdictional Statement

In October 2015, the Freedom from Religion Foundation, a student, and one of the student's parents file filed a complaint against the Defendant, the Concord Community Schools, alleging that the School's planned 2015 performance of its annual "Christmas Spectacular" program would violate the First Amendment's Establishment Clause. Plaintiffs sought declaratory and injunctive relief as well as nominal damages. The district court had subject-matter jurisdiction over the cause of action pursuant to 28 U.S.C. § 1331 as this First Amendment case was brought pursuant to 42 U.S.C. § 1983. (App. 13, Dkt. No. 1.)[1] On December 2, 2015, the district court granted Plaintiffs' request for a preliminary injunction that enjoined the School from performing a certain aspect of the Christmas Spectacular that year. (App. 547, Dkt. No. 40.)

On February 7, 2016, Plaintiffs filed an amended complaint. All parties moved for summary judgment. On March 6, 2017, the district court issued a ruling on the summary judgment motions, and a final judgment was entered the following day, March 7, 2017. No post judgment tolling motions were filed. Therefore, this case was appealable under 28 U.S.C. § 1291. This appeal is taken from the Opinion and Order entered on September 14, 2016 (Short App. 1, Dkt. No. 62) and the Judgment in a Civil Action entered on March 7, 2017 (Short App. 58, Dkt. 71).

Plaintiffs timely filed a notice of appeal on March 21, 2017. The School timely filed its notice of cross-appeal on March 31, 2017.

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[1] Citations to the district court's docket are indicated by "Dkt. No." The district court's March 6, 2017, entry on summary judgment, Dkt. 70, and the Judgment in a Civil Action, Dkt. 71, have been included in the Short Appendix at the end of this brief. The Short Appendix is cited as "Short App." References to the separately bound Joint Appendix filed herewith are cited as "App."

Statement of Issues

1. The School abandoned the challenged portion of its planned 2015 Christmas program, complied with the district court's injunction, and provided a sworn affidavit from its Superintendent explaining that it was making the program changes permanent for future years. Further, the School never sought in this case to defend the Christmas Spectacular as it was performed in 2014 and previous years and is not challenging in this appeal the removal of the live nativity scene from future programs. Given these facts, did the district court err in rejecting the School's argument that Plaintiffs' claims were moot based upon the School's voluntary cessation?

2. Because Plaintiffs' claims were moot, did the district court have jurisdiction to award Plaintiffs any nominal damages?

Statement of the Case

A. Procedural History

A student at Concord High School, along with his father, and the Freedom from Religion Foundation, initiated this action against the School under 42 U.S.C. § 1983. The complaint alleged that the School would violate the First Amendment if it performed the annual Christmas Spectacular in a manner consistent with performances in previous years. Specifically, Plaintiffs objected to the portion of the program that contained scenes from the nativity, recounted parts of the story of Jesus' birth, and had choirs perform some traditional Christmas carols and other holiday music associated with the Christmas season. (App. 2.) Plaintiffs sought a preliminary injunction.

The district court granted a preliminary injunction limited to a single point. The School was enjoined from "any portrayal of a nativity scene that is composed of live performers as part of its 2015 Christmas Spectacular shows." (App. 569, Dkt. # 40 at 23.)

Two new anonymous plaintiffs joined the action, each of whom are family members of students at the School who participate in the Christmas Spectacular. Plaintiffs filed an amended complaint on February 7, 2016, in response to changes made by the School to the Christmas Spectacular.

The parties moved for summary judgment, and the district court issued its first order on September 14, 2016. (Short App. 1, Dkt. 62.) That order addressed several issues, but requested supplemental briefing from the parties on the School's mootness defense. After that additional briefing was completed, the district court entered its summary judgment order on all issues, (Short App., 38, Dkt. 70.), and final judgment was entered on March 7, 2017. That order upheld the constitutionality of the School's modified Christmas Spectacular, but rejected the School's mootness argument and its related assertion that the district court lacked jurisdiction to award nominal damages of one dollar for each Plaintiff. Both Plaintiffs and the Defendant filed an appeal to this Court.

B. Statement of Facts

1. The Plaintiffs and the School's response to their challenges to the Christmas Spectacular

The Freedom From Religion Foundation ("FFRF") is an association "devoted to … separation of church and state." (App. 14; Dkt. No. 1, ¶ 6). This FFRF devotion includes challenging all aspects of what it believes are almost any sort of government entanglement with religion. The scope of these challenges and the arguments made in furtherance of them demonstrate that the FFRF sees no room for religion of any kind in government or public schools. *See e.g. Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010) (unsuccessful Establishment Clause challenge to the recitation of the Pledge of Allegiance based on the inclusion

of the words "Under God") and *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011) (unsuccessful Establishment Clause challenge to the statute creating the "National Day of Prayer"). The anonymous Plaintiffs generally share FFRF's goals and support its position in this lawsuit.

Plaintiffs originally challenged the Defendant's "Christmas Spectacular" on First Amendment grounds by complaining about the fact that faculty members read to the audience certain biblical passages during the performance and the fact the program contained a nativity scene using student actors. They raised this challenge even though the nativity scene was only a small portion of the entire 90 minute program.

In response to that challenge, the School modified the program in several ways. First, it eliminated biblical readings from the program entirely. (Short App. 1, Dkt. No. 62, p. 1.) Second, it added songs and readings to the program addressing other faith traditions, and made other modifications as well. In response to these changes, Plaintiffs pressed forward with their challenge to the program's living nativity scene.

The district court issued a preliminary injunction as to the 2015 modified program. Specifically, the district court prohibited the brief appearance of a nativity scene that contained student performers in the 2015 Christmas Spectacular performance. (App. 547, Dkt. No. 40.) Explaining its decision to eliminate the live nativity, the district court wrote:

> [A] reasonable observer would interpret the message being conveyed by the nativity scene in light of its connection to the educational purposes it may appear to serve. *Bauchman*, 132 F.3d at 555; *see generally Allegheny*, 492 U.S. at 635 (noting that viewers' understanding of the purpose of the display may affect whether they perceive a message of endorsement). In that respect, while other performances include visual effects such as choreography or dancing, which have a clear connection to the performance aspect of the show, the nativity scene primarily features students standing still on stage. The students portraying the nativity scene

> are not singing, playing instruments, dancing, or otherwise practicing the skills that are typically thought of as part of a performing arts department. While there is still some performance aspect to the nativity scene, a reasonable observer could perceive that the nativity scene is actually on stage for the religious message it conveys instead of as an outlet for the performing talents of the students or for the pedagogical value of its performance. Moreover, the use of student performers to depict this distinctly religious scene further increases the likelihood that it will be seen as an endorsement of religion. *Brown*, 27 F.3d at 1380 (noting that "active participation in 'ritual' poses a greater risk of violating the Establishment Clause than does merely reading, discussing or thinking about religious texts"); *see also Elmbrook*, 687 F.3d at 851 (noting that "the case law has evinced special concern with the receptivity of schoolchildren to endorsed religious messages"). While that factor is not dispositive, as discussed above, it still informs the context and circumstances of the display from which an observer would interpret its meaning.

(*Id.*, Dkt. 40, pp. 15-16.) Consistent with this Order, the School eliminated the living nativity scene from the upcoming 2015 program. Instead, the 2015 program, as performed, simply used mannequins instead of live performers in order to reduce any unintended effect of religious endorsement by the School.

Despite all of these changes, Plaintiffs were still unsatisfied. Plaintiffs argued before the district court that this static depiction of a nativity scene, even without student performers, still violated the Establishment Clause.

The district court rejected Plaintiffs' remaining claim and found that the 2015 program, as performed, was permissible under the First Amendment. That is, the district court concluded that the many changes to the program, combined with the elimination of a nativity scene with live student performers, was sufficient to make the 2015 program consistent with established First Amendment principles. (Short App., 1, Dkt. No. 62.)

In reaching this conclusion, however, the district court sought additional briefing from the parties as to the School's argument that Plaintiffs' claims were moot and that the district court lacked jurisdiction to enter any award of nominal damages against the School. The district court,

in its final summary judgment decision, rejected those supplemental arguments offered by the School and awarded nominal damages as well as issuing a declaratory judgment that the 2014 show and 2015 show, as proposed, violated the Establishment Clause.

2. The Christmas Spectacular is one part of an expansive, vibrant performing arts program at Concord Schools.

Unlike many schools that focus on extracurricular athletics, Concord historically has had a very strong performing arts program. As noted in the Complaint, "the Performing Arts Department 'involves approximately half of the School's 1,500 students at the high school. Students are involved in marching band, 3 concert bands, 2 jazz bands, pep band, string orchestra, symphony orchestra, 6 choirs, piano, and dance.'" (App. 15, Dkt. No. 1, ¶ 12; *quoting* http://www.concordmusic.info; App. 206; Dkt. 27, Spradling Aff'd., ¶ 4). The Performing Arts Department includes other performance based courses, including classes or programs in dance, theater, and stagecraft. (App. 214; Dkt. 27, Spradling Aff'd., ¶ 4; Exhibit "B"). As part of its educational program, the Concord High School Performing Arts Department presents a variety of programs throughout the school year that allow high school students to experience performing in front of live audiences. (App. 206, 219-233; Dkt. 27, ¶ 5; Exhibits "C-1" through "C-6").

As part of the School's renowned performing arts program, the Christmas Spectacular has three key educational purposes:

- To act as the culmination of the fall semester's music instruction by presenting a multi-pronged musical performance incorporating all aspects of the High School's music offerings, including band, orchestra, and choral components as well as to incorporate other aspects of the Performing Arts Department such as dance, theatre, and stagecraft;

- To provide music students with challenging and instructive live music performance opportunities in front of a large audience; and

- To provide educational instruction to both music students, the general student population, and the general population as a whole regarding the traditional underpinnings of the holidays (such as Chanukah, Kwanza, and Christmas) celebrated during the season.

Despite the changes to the program as required by the district court, student participation in the Spectacular is still paramount as the program's purpose is educational. Ensembles that typically perform include two string orchestras, a symphony orchestra, a concert band, two jazz bands, five choirs, and small chamber groups. It also includes various dance teams, students from the drama program, and stage technicians. The Performing Arts Department presents five sold-out holiday concerts which involve over 600 students as either performers or technical support. (App. 108, Dkt. 27, ¶ 8).

Because of the size and complexity of the program, planning for the Spectacular usually begins in August. Rehearsals historically begin in October with more intensive preparation developing in late October largely depending on when the Marching Band season concludes. Because of the success of the Marching Band, selection of the music and program design have been pushed back into early November. *Id.*, ¶ 10.

Preparation for the event includes selecting music that will challenge and educate the students in music performance and pedagogy. The music selections help students learn about holiday music through historical and cultural context. The performance of the music is also intended to provide an enjoyable listening experience. (*Id.*, ¶ 11).

In addition to the music portion of the program, it is also important for the Christmas Spectacular to highlight other aspects of the Performing Arts Department's program, including dance and theatre. Artistic vision is a high priority in developing the program so that the students and the audience can experience a holiday event that is aesthetically invigorating. (*Id.*, ¶ 12). As a

part of the program students learn to create costumes, stage props, and stage lighting. They also build or procure large Christmas trees, giant reindeer, thirty (30) to forty (40) pre-lit Christmas trees, plastic snow, snow machines and set construction are all designed and assembled. The front of the stage and the balcony are adorned by these students with garland, lights, and ornaments. (*Id.*, ¶ 13).[2]

3. Alterations to the 2015 Christmas Spectacular Program.

Keeping in mind both the educational purpose and Plaintiffs' concerns about the program, the 2015 Christmas Spectacular contained a wider variety of song selections and included songs commemorating Hanukah and Kwanzaa. The majority of the remaining songs were primarily secular and celebrated the holiday season. (App. 210, 234-235, Dkt. 27, ¶ 16; Exhibit "D"). The

[2]The School's policies and procedures may be viewed at http://www.neola.com/concord-in. (Spradling Aff'd., ¶ 3). One of the policies enacted by the School Board is Board Policy 2240, entitled "Controversial Issues". This policy contains an "opt-out" provision that allows parents who object to a portion of the educational curriculum to opt their students out of that portion of a class without penalty:

> The Board recognizes that a course of study or certain instructional materials may contain content and/or activities that some parents find objectionable. If after careful, personal review of the program lessons and/or materials, a parent files a complaint in accordance with Board Policy 9130 regarding either the content or activities that conflict with his/her religious beliefs or value system, the school will honor a written request for his/her child to be excused from a particular class for specified reasons. The student, however, will not be excused from participating in the course and will be provided alternate learning activities during times of such parent-requested absences.

(App. 205, Dkt. 27, ¶ 3, Exhibit A). Thus, students who had concerns about participation the Christmas Spectacular could have chosen other avenues for their artistic endeavors.

songs (both vocal and instrumental) are chosen to challenge choir and instrumental students and provide opportunities for special solos, small group performances, and performance pieces.[3]

The 2015 Christmas Spectacular ran about ninety (90) minutes with a fifteen (15) minute intermission. The first portion of the program, titled "The Magic of the Season" lasted approximately sixty (60) minutes. The post-intermission portion of the program entitled the "Spirit of the Season" lasted approximately thirty (30) minutes and included a brief historical narration and music from each of the three major holidays celebrated during the season, Chanukah, Kwanza, and Christmas. (*Id.*, ¶ 18; Exhibit "D").

The Christmas portion of the "Spirit of the Season" lasted approximately nineteen (19) minutes and contained a medley of traditional Christmas Carols. Consistent with this Court's order, no drama student actors participated in the last twelve (12) minutes of the program. Instead, the nativity scene was portrayed using mannequins. (*Id.*, ¶ 19; Exhibit "D"). Thus the challenged portion of the program makes up only about 13% of the overall Christmas Spectacular program.[4]

Outside of a brief historical perspective of the holiday told in narrative form by a student before each of the three holiday performances, Chanukah, Kwanza, and Christmas, there is no

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[3]Several of the pieces incorporate musical numbers with performances by other elements of the Performing Arts Program. For example, the dance program is incorporated in the "Santa's Workshop" piece which is performed by the Concord Dance Team, and the "Parade of Wooden Soldiers" incorporates the entire dance team. The stage design, the lighting, and the costume manufacture are all designed to incorporate the theatre and stagecraft programs with students creating the costumes, the sets, and the lighting as well as actually portraying various characters. (App. 210, 234, Dkt. 27, ¶ 17; Exhibit "D").

[4] Moreover, when the other five ninety-minute music/theatre performances throughout the remainder of the year are included, the challenged portion of the School's overall performing arts program totals only 2%, effectively "*de minimis* religious references." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015).

further oral reading, and specifically no reading from any religious texts of any kind. (*Id.*, ¶ 20). Specifically, the district court, in rejecting Plaintiffs' First Amendment challenge to the 2015 program as performed, explained that the nativity scene not only contained no live actors, but was on stage for less than two minutes while a single ensemble performed a single song. (Short App. 23, Dkt. 62, p. 23.)

Summary of Argument

The School abandoned the challenged portion of its planned 2015 Christmas program, complied with the district court's injunction, and provided a sworn affidavit from its Superintendent and sworn testimony from the School's Music Director explaining that it was making the program changes permanent for future years. Consistent with this position, the School never sought in this case to defend the Christmas Spectacular as it was performed in 2014 and previous years. In rejecting the School's mootness argument, the district court, in part, relied upon unscientific "public opinion polls" that addressed alleged continued opposition to the School's decision to change its program. The district court's error on these points requires reversal of the decision that the School did not meet its burden in establishing its mootness defense.

Because the Plaintiffs' claims were rendered moot by the School's voluntary cessation, the district court should not have awarded nominal damages. That is because a claim for nominal damages, standing alone, is insufficient to create a justiciable controversy under Article III.

Argument

A. The district court erred by holding that the challenges to the 2014 program and the planned 2015 program were not mooted by the School's stated commitment to permanently change its program.

1. The standards governing the School's claim of mootness.

This Court reviews *de novo* the legal question of mootness. *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 928–29 (7th Cir. 2003). Factual determinations by the district court surrounding the mootness issues are reviewed for clear error. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004).

2. The evidence reveals that the School satisfied its burden to demonstrate that Plaintiffs' challenges to the previous program are moot.

In support of its mootness defense, the School produced a sworn declaration of Superintendent John Trout. (App. 822, Dkt. 63, Attachment 1.) This declaration states that "[f]ollowing the very successful conclusion of the 2015 Christmas Spectacular, given the controversy, the community, the School Board, administrators, teachers, parents, and students engaged in a variety of informal discussions regarding the program on a going forward basis" which "resulted in what appeared to be a consensus that the program was a success and that the changes should be made permanent." (App. 823, Dkt. 63, Attachment 1, ¶ 5). As a consequence, Superintendent Trout and the School Board made a determination that the changes should be made "permanent and the School would not return to performing the program as it had been done in 2014 and the years preceding that time." *Id.*, ¶ 6. This testimony from Superintendent Trout is also consistent with the deposition testimony from Scott Spradling, the School's music director, who testified before the preliminary injunction issued that the changes to the 2015 program were "permanent." (App. 289, Dkt. No. 35-1, p. 48.)

This decision to voluntarily and permanently cease the challenged aspects of the 2014 and the proposed-2015 shows was communicated to the FFRF in a Rule 68 Offer of Judgment presented on December 21, 2015, that provided, in part, as follows:

- To agree to an Order making the Preliminary Injunction entered on December 2, 2015, permanent enjoining the School "from organizing, rehearsing, presenting, or intentionally allowing to be presented, any portrayal of a nativity scene that is composed of live performers as part of its 2015 Christmas Spectacular shows." (D. # 40, Order, p. 23).

- To agree to a permanent injunction enjoining the School from organizing, rehearsing, presenting, or intentionally allowing to be presented, any portrayal of a nativity scene that is composed of live performers as part of its Christmas Spectacular shows after 2015.

- To agree to a permanent injunction enjoining the School from organizing, rehearsing, presenting, or intentionally allowing to be presented, a reading of "the story of the birth of Jesus, [by] a faculty-member (acting as a narrator) recite[ing] the story as it appears in the Christian Bible (Luke 2:6-14 and Matthew 2:1-11)."

(App. 823, 828, Dkt. 63, Attachment 1, ¶ 7; Exhibit "A").

Although the offer was ultimately rejected by the FFRF, the School decided to make the changes permanent, especially with this Court's September 14, 2016 Order giving final approval to the program as performed. As explained in Superintendent Trout's Affidavit, the School has committed to ceasing the above noted challenged portions of the program, and performing the version approved by this Court on a going forward basis.

The express commitments and policy decisions noted above and in Superintendent Trout's Affidavit place this case squarely within *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485 (7th Cir. 2004) and outside the holding in *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 720 (7th Cir.

2011).[5] In the *Elmbrook* case the school "District has informed us that its official position is not to rule out using the Church in the future should the need arise" and it very specifically declined to "disavow" its prior policy. *Id.*, 658 F.3d at 720. As a consequence, this Court concluded that "[n]othing in official policy would prevent or even obstruct the District from changing its mind and immediately returning to the Church." *Id.*

In the present case not only has the School made repeated and firm policy commitments not to return to the pre-2015 program, indeed it specifically offered to formalize those commitments in the form of a permanent injunction, an offer rejected by the FFRF.[6]

As explained by the court in a very similar situation involving an FFRF challenge to the placement of a Nativity scene by Franklin County, Indiana, which the county later voluntarily removed:

> "If the plaintiff's only claims seek to require government officials to cease allegedly wrongful conduct, and those officials offer to cease that conduct, then the claims should be dismissed as moot, absent some evidence that the offer is disingenuous."

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[5] While the panel opinion was vacated and later overturned, the en banc decision affirmed and adopted the Panel's justiciability analysis: 'The panel first concluded that the Does' case is justiciable, despite the District's cessation of holding high school ceremonies at the Church. Next, the panel determined that the district court did not err in allowing the Does to proceed anonymously. Finally, a majority decided that the District's use of the Church did not violate the Establishment Clause. We adopt the panel's original analysis on the issues of justiciability and anonymity and confine our discussion to whether the District's actions were constitutional under the First Amendment's Establishment Clause. Our conclusion is that the public school graduation ceremonies at issue, which took place in the sanctuary of a non-denominational Christian church, violated the Constitution." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 842–43 (7th Cir. 2012).

[6]The district court concluded that the offer of judgment was not persuasive evidence of the School's intent to make the program changes permanent because the offer expired once the Plaintiffs chose not to accept it. (Short App., 47, Dkt. 70, p. 8.) The court's conclusion, however, ignores the fact that the School's offer is consistent with the testimony from the Superintendent and the Music Director that the changes to the 2015 program were permanent.

> *Fedn. of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003). There must exist a reasonable expectation that the expressed intent is not genuine in order for the court to refuse to hold a case moot. *See e.g. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Freedom From Religion Found., Inc. v. Franklin Cty., Ind., 133 F. Supp. 3d 1154, 1159 (S.D. Ind. 2015)(finding the FFRF's case was moot due to voluntary cessation).

The evidence of the School's position, after the production of Superintendent Trout's declaration, leads to only one conclusion: the School has ceased the challenged activities and has committed to following the structure and content of the 2015 program into the future.

The district court's rejection of the School's position was error because it suggested that only by taking some additional actions could the School meet its mootness burden, similar to the government's position in *Franklin Cty., Ind.*.

Obviously, the School cannot pass an ordinance, but no such action is required to meet the School's burden. Contrary to the legal conclusion drawn by the district court, the Superintendent's action in formally stating the School's position in this litigation and making the commitment that the program will not return to its previous form must be sufficient. As the district court noted, Superintendent Trout met with the School Board in late December 2015 to discuss options in the case and that a "consensus was reached that the changes should be made permanent and that the School would not return to performing the program as it has been done in 2014 and the years preceding that time." (App. 823, Dkt. 63, Attachment 1, ¶ 6.)

The district court also relied upon improper evidence in reaching its conclusion. In support of its decision to reject the School's argument that its position was sufficiently definite to moot Plaintiffs' claims, the district court went to some length discussing "public opinion" and "public opposition" to changes to the Christmas Spectacular, going so far as cite to an online poll

conducted by a local paper indicating that a majority of voters did not want changes to the program. This evidence about public opinion, the court held, undercut the Superintendent's official position as a representative of the School Board, that the changes were permanent. (Short App. 915-916, Dkt. 70, pp. 11-12.)

That reliance by the district court on "public opinion" was error. To decide that unscientific evidence of public opinion can undercut the stated motivations of governmental decisionmakers is contrary to decisions such as *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389 (2003). In that case, the Supreme Court rejected an argument that discriminatory animus by members of the public attending a public meeting should be imputed from those private actors involved in a petition drive to the government itself. The same is true here. The School's stated commitment to make the changes to the program permanent, testimony both from the music director and the Superintendent after consultation with the Board is what controls here. The district court's reliance on public opinion was clear error.

Because the School provided a clear evidentiary basis for its repeated statements that it has voluntarily ceased the above noted challenged conduct, and that it "has made it clear that it will not return to the pre-2015 program," the voluntary line of cessation/self-correction cases noted in this Court's Order and in the School's prior briefing apply and the remaining issues, the 2014 and the proposed-2015 shows, are moot by voluntary cessation.

B. Because Plaintiffs' challenges to the 2014 program and the planned 2015 program are moot, the district court lacked jurisdiction to award nominal damages.

As addressed in the previous section, Plaintiffs' claims are moot. Because those claims are moot, Plaintiffs' claims for nominal damages should have been dismissed for lack of jurisdiction. Before the district court, the FFRF argued in a footnote that even if its declaratory and injunctive

relief claims were moot, it nevertheless had a "live" claim for $1.00 in nominal damages relating to the performance of the 2014 show, and the district court directed the parties to brief that issue. (App. 792, Dkt. No. 62, p. 16).

In the *Franklin County*, the district court addressed this argument in a virtually identical context:

> FFRF argues that a favorable judgment—even for nominal damages—will serve the purposes underlying the civil rights statutes: in that it will most certainly "contribute[ ] significantly to the deterrence of civil rights violations in the future." *City of Riverside*, 477 U.S. at 575. FFRF's argument is compelling, however the Court is not persuaded. Nominal damages of which $1.00 is the norm, are an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury. *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F.Supp.2d 1019, 1029–1030 (E.D. Wis. 2008). Under Seventh Circuit case law, nominal damages are more akin to declaratory relief, and should be subject to the same justiciability principles. *Id.* (*citing Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (10th Cir. 2004)). Neither nominal damages nor declaratory judgments intend to confer jurisdiction that does not otherwise exist. *Id.* By seeking only nominal damages, plaintiffs concede at the outset (or with amending the complaint) that they suffered no actual injury, or at least that the injury they claim cannot be redressed by an award of actual damages; thus appearing to have no standing. *City of Green Bay*, 581 F.Supp.2d at 1030. "[N]ominal damages are symbolic only, do not compensate for past wrongs, and were traditionally appropriate 'when an authoritative legal determination of a dispute is all that the parties require: neither damages nor injunctive relief are necessary.'" *Id.* The Supreme Court has never held that a claim for nominal damages is sufficient to maintain the justiciability of a case that otherwise would be moot. *Id.* at 1031 (*citing Salt Lake City Corp.*, 371 F.3d at 1266). The Sixth Circuit has also recently held that a case is moot when the only relief sought by the plaintiff was an award of nominal damages. *Id.* (*citing Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008)). The Seventh Circuit holds that, at a minimum, a plaintiff who [first] proves a constitutional violation is entitled to nominal damages. *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003). Franklin County is correct that there is no Seventh Circuit precedent which supports FFRF's efforts to expand the Supreme Court precedent that limits nominal damage claims for violations of due process cases.

Franklin County, 133 F.Supp.3d at 1158–59. The district court also noted that "there is no Seventh Circuit precedent which supports FFRF's efforts to expand the Supreme Court precedent that limits nominal damage claims."

While it is true that other circuits are split on the issue of nominal damages as this Court notes in its Order (*compare Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, No. 15-3083, 2016 WL 4191499, at *15 (3d Cir. Aug. 9, 2016) with *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004)) the majority follow the rule described in *Franklin County*.

The only other decision on the issue in the 7th Circuit, *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp.2d 1019, 1029–33 (E.D.Wis. 2008) holds to the majority rule: "Because an award of nominal damages is virtually indistinguishable from a declaratory judgment which, like Plaintiffs' claim for injunctive relief, I have already found nonjusticiable, I conclude that the Plaintiffs' nominal damages request does not prevent dismissal."

The School believes that the two cases from districts in the 7th Circuit which deal with essentially identical fact patterns and which both find that a claim for nominal damages alone is insufficient to maintain justiciability are correctly decided and respectfully requests that this Court should follow that logic and similarly "conclude that the Plaintiffs' nominal damages request does not prevent dismissal."

Conclusion

The Plaintiffs' claims are moot, and the district court's holding to the contrary was error. As a result, the district court also lacked the authority to enter an award of nominal damages.

FROST BROWN TODD LLC

By: */s/Anthony W. Overholt*

Anthony W. Overholt, #16481-49
FROST BROWN TODD LLC
201 N. Illinois St., Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900

Attorney for Defendant-Appellee,
Concord Community Schools

Certificate of Compliance with F.R.A.P. Rule 32(a)(7)

The undersigned counsel certifies pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) of the Rules of the United States Court of Appeals for the Seventh Circuit, that the Brief of Defendant-Appellee complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B). Specifically, based upon the word count of our word processing program, Microsoft Word 2016, I certify that the Brief of Defendant-Appellee contains 5470 words, exclusive of the items listed in F.R.A.P. 32 (a)(7)(B)(iii).

FROST BROWN TODD LLC

By: /s/Anthony W. Overholt
Anthony W. Overholt, 16481-49

Attorneys for Defendants-Appellees, Concord Community Schools

Dated: June 1, 2017

Certificate of Service

I hereby certify that on June 1, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Anthony W. Overholt
Anthony W. Overholt

FROST BROWN TODD LLC
201 N. Illinois St., Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
aoverholt@fbtlaw.com

Circuit Rule 30(d) Statement

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

FROST BROWN TODD LLC

By: /s/Anthony W. Overholt
Anthony W. Overholt, 16481-49

Attorneys for Defendants-Appellees, Concord Community Schools

Dated: June 1, 2017

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 17-1591

FREEDOM FROM RELIGION FOUNDATION, et al.,

Plaintiffs-Appellants,

v.

CONCORD COMMUNITY SCHOOLS

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Cause No. 3:15-CV-00463-JD-CAN

The Honorable Jon E. DeGuilio, Judge

DEFENDANTS-APPELLEES REQUIRED SHORT APPENDIX

Anthony W. Overholt, 16481-49
FROST BROWN TOOD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
Telephone: (317) 237-3800
Facsimile: (317) 237-3900
Email: Aoverholt@fbtlaw.com

Attorneys for Defendant-Appellee, Concord Community Schools

SHORT APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FREEDOM FROM RELIGION FOUNDATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 3:15-CV-463 JD
CONCORD COMMUNITY SCHOOLS,	)	
Defendant.	)	

OPINION AND ORDER

This began as a case about a living nativity scene. For the finale of its annual holiday show, called the Christmas Spectacular, Concord High School would present a living nativity scene during which students in costumes portrayed various nativity figures, while multiple ensembles from a cross-section of the performing arts department played a number of religious songs and a faculty member read excerpts from the Bible telling the story of Jesus' birth. This practice continued for many years. In 2015, however, a student and his father, along with the Freedom From Religion Foundation, filed suit, asserting that the religious content of the Christmas Spectacular violated the Establishment Clause. In response, the School made some changes to that portion of the show, proposing to omit the Bible readings and to add songs celebrating other winter holidays. The Court found, though, that even with those changes, the proposed show was still likely to violate the Establishment Clause, so the Court granted the Plaintiffs' request to enjoin the presentation of a living nativity scene as part of the 2015 shows.

The show that was actually performed in 2015 thus bore little resemblance to the religious presentations of previous years. It did not include any Bible readings or a living nativity scene—the two subjects of the Plaintiffs' motion for a preliminary injunction. And while the

show did include a brief display of a nativity scene (composed of mannequins), that scene was on stage for less than two minutes as the visual complement to a single song performed by a single ensemble. The presentation of the nativity scene was thus not differentiated from the rest of the show, which featured a wide and engaging variety of visuals to augment the respective musical performances, including images and videos projected onto screens, dancing, choreography, costumes, and lighting displays.

After the 2015 show, the Plaintiffs amended their complaint to assert Establishment Clause challenges against each of those three versions of the show—the show as it was performed in 2014 (and previous years); as it was proposed in 2015, prior to the preliminary injunction; and as it was actually performed in 2015. The parties have now filed cross-motions for summary judgment. For the reasons that follow, the Court finds that the show that was actually performed in 2015 did not violate the Establishment Clause. As to the first two shows, the Court orders supplemental briefing as to whether those claims remain live, and as to what remedy may be appropriate.

I. FACTUAL BACKGROUND

Concord Community Schools is a public school corporation located in Elkhart County, Indiana. It serves approximately 5,300 students from four elementary schools, one intermediate school, one junior high school, and one high school—Concord High School, which has an enrollment of about 1,700 students. Concord High School has a performing arts department that involves approximately half of the students at the school. The department includes a marching band, three different concert bands, two jazz bands, a pep band, a string orchestra, a symphony orchestra, and six different performance and show choirs. The department also offers other artistic outlets, with programs in dance, theatre, and stagecraft.

The performing arts department presents a number of programs throughout the school year that allow the students to experience performing in front of live audiences. Those include an annual musical, a variety show, a band festival, a choral pops concert, a jazz café, and a Christmas show, which is at issue here. The Christmas show originated in 1970 after the marching band attended the Radio City Christmas Spectacular during a trip to New York City. Every year since then, the School has presented the Christmas Spectacular, modeled after the Radio City version, as its holiday show. The Christmas Spectacular typically includes performances from two string orchestras, a symphony orchestra, a concert band, two jazz bands, five choirs, and small chamber groups. It also includes dance teams, students from the drama program, and stage technicians, and involves over 600 students in total. The Christmas Spectacular is performed five times each year, including four public performances over a weekend, and a school-day performance for younger students in the district on a Friday.

The Christmas Spectacular traditionally runs about ninety minutes long, plus a fifteen minute intermission. The first portion of the show runs for about sixty minutes, and includes about twenty songs performed by the various ensembles. In the 2014 show, each of the songs for this portion of the show were listed on one page of the program under the heading “The Magic of Christmas.” This portion of the show was made up of secular songs relating to the Christmas season, like Jingle Bells, Deck the Halls, Carol of the Bells, Let it Snow, and White Christmas. Each song was generally performed by a different ensemble than the last, and the performances included a variety of visual complements to the musical performances, including images projected onto screens next to the stage, dancing, choreography, and lighting displays. Some performances also included costumes, props, and backdrops, and the auditorium was decorated in a holiday theme, with Christmas trees, lights, and garland.

Each of the songs following the intermission in the 2014 show were listed on the next page of the program under the heading "The Spirit of Christmas." This portion of the show began with three songs related to the religious Christmas holiday. The rest of the songs, which lasted about twenty minutes, were listed in the program under the subheading "The Story of Christmas," and one of the ensembles performing during this portion was listed as the "Nativity Orchestra." This segment of the show had been performed in nearly the same manner since the Christmas Spectacular was first presented. It began with an announcement by a faculty member, stating: "Ladies and gentlemen: As we now present the Story of Christmas, we ask that you please hold your applause until the conclusion." [DE 36-1]. Thereafter, the faculty narrator, reading from a script, told the story of the birth of Jesus, reciting portions of the story as it appears in the Bible, as the various ensembles played a medley of ten songs, including Angels We Have Heard On High, Away in a Manger, We Three Kings, and Hark, the Herald Angels Sing. Parts of the narration were read over the musical performances, while other portions were read in between. During the third song, O Little Town of Bethlehem, a backdrop depicting a landscape scene appeared in front of the orchestra on stage, and students dressed in costumes as Mary and Joseph slowly walked across the front of the stage, as if walking to Bethlehem.

After a choir sang another song, the curtain raised to reveal a nativity scene on stage. The students dressed as Mary and Joseph stood over a manger inside a set depicting a stable. On each side of Mary and Joseph inside the stable stood three students dressed in white robes, portraying angels. More students dressed as shepherds stood on the sides of the stage outside of the stable. All of the students stood still in their places for the final twelve minutes of the show, while six songs were played. During the third-to-last song, We Three Kings, three more students dressed as the three wise men slowly walked on stage, one at a time, and took their place in front of the

nativity scene, as if presenting their gifts to Jesus. Once the performers concluded the final song, a recorded version of Joy to the World began playing, and the nativity scene remained on stage for about another forty-five seconds as the audience applauded, until the curtain dropped.

After the performance of the 2014 show, the Freedom From Religion Foundation sent a letter to the School, objecting to the presentation of the Christmas Spectacular as a violation of the Establishment Clause. The Freedom From Religion Foundation is a not-for-profit organization that advocates for the separation of church and state, and it wrote the letter on behalf of one of its members, John Doe,[1] a parent of a student who had performed in the 2014 show. After receiving the letter, the School's superintendent read a statement at a school board meeting on September 8, 2015, during which he defended the Christmas Spectacular and indicated that the School would not comply with the Freedom From Religion Foundation's request to remove the religious aspects of the show.

Accordingly, on October 7, 2015, the Freedom From Religion Foundation filed suit, along with John Doe and his son, Jack Doe. They then moved for a preliminary injunction, asking the Court to prohibit the School from including the live nativity scene and the Bible readings portraying the story of the birth of Jesus as part of the Christmas Spectacular. [DE 13]. After the motion was filed, the School indicated that it intended to make two changes to the show as compared to previous shows. First, it decided to omit the narration that included the Bible readings. Second, it added songs pertaining to Chanukah and Kwanzaa in the second half of the show. The School planned to have the show resume after the intermission with one of the string ensembles playing "Ani Ma'Amin," in reference to Chanukah, after which one of the choirs

[1] The magistrate judge granted motions for each of the individual plaintiffs to proceed anonymously in this action. [DE 37, 49].

would sing "Harambee," in reference to Kwanzaa. During each of those performances, images reflecting those holidays would be projected onto screens next to the stage, such as a menorah or a dreidel for Chanukah, and candles or a mat for Kwanzaa. After those songs, the Christmas segment would then be performed the same as in the past, except for the narration. In addition, each of the three holidays would be introduced by a student reading a short script noting the cultural significance of the respective holiday. The Chanukah and Kwanzaa segments were expected to last three or four minutes each, while the Christmas segment, as before, would last about twenty minutes, with the nativity scene on stage for the final twelve minutes. Ultimately, the Court found that the show as proposed by the School was still likely to violate the Establishment Clause as an endorsement of religion, so it granted the Plaintiffs' motion for a preliminary injunction. The School had already agreed to omit the narration from the Bible about Jesus' birth, but the Court granted the Plaintiffs' remaining request and enjoined the School from presenting a nativity scene composed of live performers as part of the 2015 Christmas Spectacular shows.

As in past years, the Christmas Spectacular that the School presented for its performances in December 2015 began with about twenty individual performances by many of the School's bands, orchestras, and choirs, as well as several solos and small-group performances.[2] These performances were almost entirely secular in nature, and were not affected by the injunction. As in the past, they also included a wide range of visual complements to the musical performances. For example, two string ensembles played songs by the Trans-Siberian Orchestra, during which they stood towards the front of the stage with the lights dimmed, while stage lights overhead

[2] This description of the show is based on a video recording of the live performance, which has been filed as an exhibit. [DE 53].

presented a light show in synch with the music. The dance team performed for two songs in which they presented choreographed dance routines using costumes and props, one of which was accompanied by the combined bands. Many of the choir pieces included choreography, dancing, and movement about the stage. During other songs, images were projected onto screens to the sides of the stage, or videos were projected onto a screen over the center of the stage. Still others included backdrops, stage decorations, or costumes. This portion of the show lasted about seventy-three minutes, concluding with the intermission.

After the intermission, the show resumed with a student reading the following introduction: "Welcome to the Spirit of the Season, where we observe the many cultural celebrations during this holiday season." She then continued with an introduction of Chanukah:

> Our first holiday we will celebrate tonight is Chanukah, also known as the Festival of Lights. Chanukah is a Jewish holiday commemorating the rededication of the Holy Temple, also known as the Second Temple, in Jerusalem. Chanukah is observed for eight days and nights, by the lighting of a candle held in a unique candelabrum, called a menorah, each night of the holiday. "I Believe" is the English translation for the title of our first selection that is performed during Chanukah. Performing Ani Ma'Amin, here are the Concord Chamber Strings.

The string ensemble then played Ani Ma'Amin, which lasted about four minutes, as images reflecting Chanukah and the Jewish faith were projected onto the screen to the side of the stage. After that performance concluded, the student then read the following introduction of Kwanzaa:

> Kwanzaa is a week-long celebration held in the United States and in other nations where Western African population centers exist. The celebration honors African heritage in African-American culture, and is observed the last week of the year, culminating on January 1st with a feast and gift-giving. Kwanzaa possess seven core principles represented by seven candles. Harambee is chanted after the 6th day of celebration dedicated to creativity. Please enjoy the Symphonic Choir as we celebrate Kwanzaa with Harambee!

The choir then sang Harambee, as images associated with Kwanzaa were projected onto the screens. This performance also lasted about four minutes.

The remaining songs during the show were each associated with the Christian Christmas holiday. These performances, including the spoken introduction, lasted about twenty-two minutes. After a choir sang a song entitled One Amazing Night, the student read the following introduction for the Christmas holiday:

> Our country's Christmas season originated and is based on the Christian celebration of the birth of Jesus Christ. The Bible tells the story that Jesus was born to poor parents in a small town; angels announced his birth and he received many visitors, from shepherds to kings, in the manger where he was born. He worked as a carpenter and for three years as a traveling preacher. He had no family and never traveled far from his birthplace. The Bible recites that in his early 30s, Jesus was tried and executed. His life, particularly his birth and death, now serve as the basis of the celebration of two major holidays widely recognized by many throughout the United States and the world.

Various ensembles then performed the final eight pieces of the show. As compared to the proposed version of the show, two of the proposed songs during this sequence were removed, while one, a piano solo, was added. As before, the image of an angel was projected on the side screen as a choir sang Angels We Have Heard on High. However, no student actors walked across stage during the performance of O Little Town of Bethlehem, as they had in the past.

After the piano solo, the main curtain lifted to reveal a nativity scene on stage. Given the injunction, the scene did not include any student performers. Instead, five mannequins, depicting Mary, Joseph, and the three wise men, were situated inside the stable set. Unlike previous years, no angels were inside the stable and no shepherds were outside of it. The choir then sang O Holy Night, after which the lights dimmed and the nativity scene was not seen again. In total, the nativity scene was on stage for less than two minutes. The show then concluded with two songs jointly performed by the choirs and orchestra, after which a recording of Joy to the World played while the audience filed out of the auditorium.

After the performances of this show, the Plaintiffs filed an amended complaint. In addition to challenging the show that the School presented in 2014, the amended complaint

added claims challenging the versions of the show that the School proposed to present in 2015, prior to the issuance of the preliminary injunction, and the show that the School actually presented in 2015. As to each of those three versions of the show, the Plaintiffs seek a declaratory judgment that the show was unlawful and a permanent injunction against presenting those versions of the show in the future. They also seek nominal damages and attorneys' fees. Finally, the amended complaint added two additional plaintiffs, both of whom are individuals with family members who have performed in the Christmas Spectacular. After a brief period for discovery, the parties have both moved for summary judgment, and those motions have been fully briefed.

II. STANDARD OF REVIEW

On summary judgment, the moving party bears the burden of demonstrating that there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material" fact is one identified by the substantive law as affecting the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists with respect to any material fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Where a factual record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 289 (1968)). In determining whether a genuine issue of material fact exists, this Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir. 2008); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 890 (7th Cir. 1999). However, the non-moving party cannot simply rest on the allegations contained in its pleadings, but must

present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000).

III. DISCUSSION

The Plaintiffs assert that three different versions of the Christmas Spectacular violated the Establishment Clause: (1) the version presented in 2014; (2) the version the School proposed to present in 2015 prior to the issuance of the preliminary injunction; and (3) the version the School actually presented in 2015. The Court addresses the first two versions together, as they share common questions as to the Court's continuing jurisdiction and as to what remedies may be appropriate should the Court adjudicate those claims in the Plaintiffs' favor. The Court then addresses the 2015 show that was actually performed.

A. Christmas Spectaculars as Performed in 2014 and Proposed in 2015

The Plaintiffs argue that the versions of the Christmas Spectacular that the School performed in 2014 and that it proposed to perform in 2015 prior to the issuance of the preliminary injunction each violated the Establishment Clause. In issuing the preliminary injunction, the Court found that the Plaintiffs had shown a likelihood of success of proving that the proposed 2015 show would violate the Establishment Clause. The Plaintiffs argue for those same reasons that they are now entitled to judgment as a matter of law that the proposed 2015 show would in fact have violated the Establishment Clause. They further argue that the 2014 version, which placed even greater emphasis on religion and Christianity, violated the Establishment Clause as well.

In response, the School does not present any argument in defense of the constitutionality of those versions of the show. The Court does not adjudicate the merits of these claims at this time, however, because there are two other questions that need further consideration, one of

which goes to the Court's jurisdiction to decide these issues: first, whether the Plaintiffs' challenges to these shows have become moot, such that the Court lacks the power to adjudicate them; and second, what remedy may be appropriate should the Court reach the merits and resolve these claims in the Plaintiffs' favor.

1. Mootness

The School argues that the Plaintiffs' challenges to the 2014 show and the proposed 2015 show are moot. It argues that it has made changes since those versions of the show and does not intend to present those versions in the future, so there is no longer a live controversy as to whether those shows complied with the Establishment Clause. The School did not raise the issue until its surreply,[3] though, and it failed to cite any facts in the record in support of its argument. The Plaintiffs' previous briefs also made only passing references to mootness. Thus, the Court finds that the existing filings are inadequate to resolve this issue, so it will require supplemental filings with legal and factual support for the parties' positions in light of the discussion below.

Article III of the Constitution states that the power of the federal courts extends to "cases" and "controversies." U.S. Const. art. III, § 2. Thus, "[u]nder Article III, 'cases that do not involve actual, ongoing controversies are moot and must be dismissed for lack of jurisdiction.'" *Wisc. Right to Life, Inc. v. Schober*, 366 F.3d 485, 490–91 (7th Cir. 2004) (quoting *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 929 (7th Cir. 2003)). Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68

[3] The filing is titled as the School's reply in support of its cross-motion for summary judgment, but given the sequence of the briefing on the motions for summary judgment, the filing is functionally the School's surreply.

n.2 (1997). That description is imprecise, though, as there are some notable differences between the two. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189–90 (2000) (noting that this description of mootness "is not comprehensive"). Unlike standing, on which a plaintiff bears the burden of proof, the burden of proving that a controversy is moot lies with the party asserting mootness, which is usually the defendant. *Laidlaw*, 528 U.S. at 190; *Schober*, 366 F.3d at 491. The Supreme Court has also acknowledged that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190.

A case can become moot if the conduct a plaintiff seeks to stop comes to an end on its own, in which case the result a plaintiff is seeking has already occurred. However, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1983)); *see also Chi. United Indus., Ltd. v. City of Chi.*, 445 F.3d 940, 947 (7th Cir. 2006) ("It is true that the mere cessation of the conduct sought to be enjoined does not moot a suit to enjoin the conduct, lest dismissal of the suit leave the defendant free to resume the conduct the next day."). Only when "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" will a case become moot by voluntary cessation. *Laidlaw*, 528 U.S. at 189; *accord Doe ex rel. Doe v. Elmbrook Sch. Dist.* (*Elmbrook I*), 658 F.3d 710, 719 (7th Cir. 2011), *adopted in pertinent part en banc*, 687 F.3d 840, 842–43 (7th Cir. 2012). The Supreme Court has described this burden of proof as "stringent," "heavy," and "formidable." *Laidlaw*, 528 U.S. at 189–90. When the defendants are public officials, though, courts "place greater stock in their acts of self-correction, so long as they appear genuine." *Schober*, 366 F.3d at 492.

The Seventh Circuit addressed a mootness-by-voluntary-cessation argument in a context similar to this case in *Elmbrook I*, 658 F.3d at 718–21.[4] There, the plaintiffs challenged a public high school's practice of holding graduation ceremonies in a church. After the suit was filed, the school moved its ceremonies back to school property, and at the time the case reached the court of appeals, the school had no intention of holding any future ceremonies at the church. The court thus observed that "the likelihood that the District will again use the Church for a graduation ceremony . . . certainly has decreased" since the litigation began. *Id.* at 719. The court nonetheless held that the claim for prospective relief was not moot. Unlike cases where a defendant moots a case by repealing a challenged statute or ordinance, or expressly disavowing a challenged policy, the school presented "no evidence of a formal or even an informal policy change regarding graduation ceremonies," and the school did not officially rule out using the church in the future. *Id.* at 720. And though the school asserted that it had no present intent of using a church again, no official policy would have prevented or even obstructed the school from returning the ceremonies to the church should its inclination change, so the Seventh Circuit found that the request for prospective relief remained live.

Here, the School declares in its surreply that it "has made it clear that it will not return to the pre-2015 program," [DE 60 p. 5], but it fails to cite even a single piece of evidence to support that assertion. The evidence that is actually in the record is not so conclusive, either. Following the 2015 show, the School's superintendent stated in response to an interrogatory that "[a]t this time, [the School] does not anticipate making significant changes to the program in future years."

[4] The *en banc* Seventh Circuit reversed this opinion as to the merits of the underlying claim, but adopted the opinion's analysis as to mootness. *Doe ex rel. Doe v. Elmbrook Sch. Dist.* (*Elmbrook II*), 687 F.3d 840, 842–43 (7th Cir. 2012) ("We adopt the panel's original analysis on the issue[] of justiciability . . . .").

[DE 52-7]. That statement is plainly insufficient in a number of respects to establish mootness. First, it does not reflect a commitment *not* to present the previous versions of the show, it merely indicates that "[a]t this time," the School "does not anticipate" doing so. As the Seventh Circuit held in *Elmbrook*, the lack of a present intent to resume the challenged conduct is not equivalent to a commitment not to resume that conduct. 658 F.3d at 720. Second, by qualifying this statement as representing the School's intent "[a]t this time," the School does not make clear what, if anything, might affect that intent. Perhaps the School does not intend to change the show at this time, during the pendency of litigation, but may wish to present the previous versions of the show should it prevail in this litigation.[5] And third, this statement is vague, as it does not indicate what "significant changes" would entail; the School may or may not characterize the proposed 2015 show as representing a "significant change" from the actual 2015 show, for example.

The School also asserts (again, without citing any evidence) that "the evidence is undisputed that [the School] had already made significant changes even before this suit was filed." [DE 60 p. 5]. That argument directly contradicts the School's argument at the preliminary injunction stage, though, which was that this case was not ripe because the School had not yet decided the content of the upcoming show. [DE 26 p. 10–11]. Nor is the School's presentation of a modified show in 2015 enough on its own to moot the Plaintiffs' challenge to the previous versions. In *Elmbrook*, the school had not held its most recent graduation ceremonies at the church, yet that did not moot the case. 658 F.3d at 719–20. In fact, even when a defendant repeals a challenged ordinance and replaces it with a different ordinance, a challenge to the

[5] In addition, the interrogatory that this statement responded to asked about the School's intentions should the preliminary injunction become permanent, so this statement does not give assurance that the School will not resume this conduct should these claims be dismissed.

repealed ordinance will not be moot if it is "sufficiently similar" to the new ordinance. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662, n.3 (1993); *Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 287–88 (7th Cir. 2014).

Finally, in a footnote, the Plaintiffs acknowledge testimony by the School's music director from a deposition taken before the preliminary injunction issued, in which he stated that the changes incorporated into the proposed 2015 show were "permanent." [DE 33-2 p. 48]. That testimony makes a stronger case for mootness as to the 2014 show (but at the same time would undermine a case for mootness as to the proposed 2015 show). The director also acknowledged, though, that this was not any official or unofficial policy or position of the School, but only a decision he had made as the director. It is also unclear whether that testimony reflected a commitment not to return to the previous version, or merely a lack of a present intent to do so, and neither party has provided any explanation or analysis on those points.

For those reasons, the Court cannot conclude at this time that the School has met its heavy burden of establishing that the claims for prospective relief as to the 2014 and proposed-2015 shows are moot due to voluntary cessation. However, mootness affects a court's subject matter jurisdiction to decide a claim, so a court has a duty to inquire further when the prospect of mootness is present. *Elmbrook I*, 658 F.3d at 718–19 (noting that the court raised the issue of mootness *sua sponte* and ordered supplemental briefing to confirm its jurisdiction). And given the limited briefing and support that has been presented thus far, requiring additional briefing is the appropriate course. Accordingly, the Court directs the parties to submit supplemental briefs as to whether the Plaintiffs' claims for prospective relief as to the 2014 and proposed-2015 shows are moot. The parties should also submit any additional evidence pertinent to that issue.

There is another aspect of mootness that bears further exploration, too. The Plaintiffs state in a footnote that, even if their request for prospective relief (a declaratory judgment and a permanent injunction) as to these shows is moot, their claim as to the 2014 show is still live and justiciable as to their request for nominal damages.[6] While that proposition has been accepted by some courts, it has been rejected by multiple district courts in this circuit, and has received criticism elsewhere.[7] Neither party cited any authority or attempted to present any analysis on this issue, though. Accordingly, the parties should also address in their supplemental filings whether the Plaintiffs' claim for nominal damages as to the 2014 show can alone keep that claim live should their request for prospective relief as to that claim be deemed moot.

[6] Since the proposed 2015 show was never performed, the Plaintiffs have no basis to request nominal damages as to that show. In addition, the Plaintiffs do not seek any actual damages as to any show.

[7] *Compare Freedom From Religion Found., Inc. v. Franklin Cty., Ind.*, 133 F. Supp. 3d 1154, 1158–60 (S.D. Ind. 2015) ("By allowing FFRF to proceed to determine the constitutionality of a policy that has been voluntarily amended to cease illegal conduct, in hope of receiving $1.00, vindicates no rights and is not a task of the federal courts."), *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029–33 (E.D. Wis. 2008) ("Because an award of nominal damages is virtually indistinguishable from a declaratory judgment which, like Plaintiffs' claim for injunctive relief, I have already found nonjusticiable, I conclude that the Plaintiffs' nominal damages request does not prevent dismissal."), *and Freedom From Religion Found., Inc. v. Orange Cty. Sch. Bd.*, 610 F. App'x 844, 848 n.3 (11th Cir. 2015) (holding that a claim for nominal damages does not save an otherwise-moot claim), *with Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257–58 (10th Cir. 2004) ("It may seem odd that a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held."); *see also Freedom From Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, No. 15-3083, 2016 WL 4191499, at *9 (3d Cir. Aug. 9, 2016) (Smith, J., concurring) (writing separately to express "skepticism that a claim for nominal damages alone would suffice to create standing or save a case from mootness"); *Utah Animal Rights Coal.*, 371 F.3d at 1262 (McConnell, J., concurring) ("[T]he proposition that a claim for nominal damages automatically precludes mootness is inconsistent with fundamental principles of justiciability.).

2. Remedy

The second question as to the 2014 and proposed-2015 shows that requires additional briefing is what remedy should be awarded if those claims are resolved on their merits in the Plaintiffs' favor. The Plaintiffs seek a permanent injunction, a declaratory judgment, and nominal damages. While they spend considerable time arguing in support of their request for $1 per performance in nominal damages, the entirety of their argument for a permanent injunction is that they "are . . . entitled to injunctive relief enjoining the School Corporation from staging the challenged program in any of its three forms." [DE 54 p. 30]. A permanent injunction does not inevitably follow from any finding that a right has been violated, though. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010). Rather, a party seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (holding that the court had a duty to consider the appropriateness of a permanent injunction even when the defendant was in default and did not respond to the request). The Plaintiffs have made no attempt to do so here. In addition, even if any changes to the show do not result in these claims being moot, those changes may still affect whether a permanent injunction is an appropriate remedy. *Laidlaw*, 528 U.S. at 193 (citing *City of Mesquite*, 455 U.S. at 289 for the proposition that "Although the defendant's voluntary cessation of the challenged practice does not moot the case, '[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice'" (alteration in original)).

A related issue that needs to be addressed is the scope and construction of any permanent injunction. Rule 65(d) requires every injunction to "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). "[A] court has an independent duty to assure that the injunctions it issues comply with" these requirements. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631–32 (7th Cir. 2003) (internal citation omitted). The Plaintiffs' request for "an injunction prohibiting the presentation of any of the three versions of the event at issue in this litigation" fails to comply with those requirements, as it is neither specific nor self-contained. [DE 54 p. 33]. In addition, as the Court noted at the preliminary injunction stage, the fact-intensive nature of these claims makes crafting an appropriate injunction particularly challenging. *Books v. City of Elkhart, Ind.* (*Books I*), 235 F.3d 292, 307 (7th Cir. 2000) ("In crafting equitable relief to comply with our judgment today, the district court must ensure that, although the condition that offends the Constitution is eliminated, Elkhart retains the authority to make decisions regarding the placement of the monument."). That is also a factor to consider in deciding whether an injunction is justified. *Badger Catholic*, 620 F.3d at 782 ("As for the choice between declaratory judgment and an injunction: that's a matter left to the district judge's discretion . . . . The problem with issuing an injunction straight off is that the details required by Fed.R.Civ.P. 65(d)(1)(C) would be considerably more elaborate than the terms of a declaratory judgment. The district judge was not looking for an opportunity to take over management of the University's activity-fee program. If the entry of a regulatory injunction can be avoided by a simpler declaratory judgment, everyone comes out ahead.").

Accordingly, the Court directs the parties to submit supplemental briefs addressing whether a permanent injunction is warranted if Plaintiffs prevail on these claims on their merits,

and, if so, what specific injunction should issue. In particular, the Plaintiffs' filing must include a proposed injunction and explain both why that particular injunction is warranted and how it complies with Rule 65(d).

B. Christmas Spectacular as Performed in 2015

The Plaintiffs also challenge the version of the Christmas Spectacular that was actually presented in 2015. The Court can proceed to the merits of this claim, as there is no question that it presents a live and justiciable controversy. The School has given no indication that this claim may be moot, and in fact has stated that it does not anticipate making significant changes to the program in future years. The Plaintiffs also have standing to challenge this show. The individual plaintiffs have come, or will come, into direct and unwelcome contact with the display to which they object—Jack Doe as a student performer in the show, and the remaining individual plaintiffs as attendees with children or family members in the show. Under the existing law of the Seventh Circuit, that gives these plaintiffs the requisite interest to have standing. *Books v. Elkhart Cty., Ind.* (*Books II*), 401 F.3d 857, 861 (7th Cir. 2005) (holding that a party has standing to raise an Establishment Clause challenge if they "must come into direct and unwelcome contact with the religious display to participate fully as a citizen and to fulfill legal obligations"); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010) (holding that a student at a public school who was exposed to a practice that allegedly violated the Establishment Clause had standing to challenge that practice); *Croft v. Governor of Tex.*, 562 F.3d 735, 746 (5th Cir. 2009) (likewise as to parents). The Freedom From Religion Foundation also has associational standing since one of its members has standing, the interests it seeks to protect are germane to its organizational purpose, and neither the claim asserted nor the relief requested requires the participation of individual members, as it is not seeking compensatory damages. *Hunt v. Wash.*

State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011).

The Court therefore considers whether the 2015 show complied with the Establishment Clause. The First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend I, cl. 1. Though this provision specifically refers to Congress, courts have held that the Fourteenth Amendment made this provision equally applicable to state and municipal governments. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947); *Elmbrook II*, 687 F.3d at 849. In *Lemon v. Kurtzman*, the Supreme Court articulated a three-pronged test to identify violations of the Establishment Clause: Under the *Lemon* test, a governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion. 403 U.S. 602, 612–13 (1971). The Seventh Circuit recognizes that this test "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Elmbrook II*, 687 F.3d at 849 (quoting *Books I*, 235 F.3d at 301).

The Supreme Court has also articulated two other approaches by which an Establishment Clause violation can be detected. *Id.* First, a governmental practice violates the Establishment Clause if it has "'the effect of communicating a message of government endorsement or disapproval of religion.'" *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)); *see also Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–93 (1989). Under that test, a court must "'assess the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion.'" *Elmbrook II*, 687 F.3d at 850 (quoting *Books I*, 235 F.3d at 304). The Seventh circuit has "viewed the endorsement test as a legitimate part of

Lemon's second prong," *id.*, so the Court uses this test to apply *Lemon's* primary-effect prong. *See Sherman*, 623 F.3d at 517 (articulating *Lemon's* primary-effect prong as asking, "irrespective of government's actual purpose, whether the practice under review in fact conveys a message or endorsement or disapproval"). Second, the government violates the Establishment Clause if it "applie[s] coercive pressure on an individual to support or participate in religion." *Elmbrook II*, 687 F.3d at 850; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992). Though it is not clear whether or where this test belongs in the *Lemon* test, "it is evident that if the state 'coerce[s] anyone to support or participate in religion or its exercise,' an Establishment Clause violation has occurred." *Elmbrook II*, 687 F.3d at 850 (quoting *Lee*, 505 U.S. at 587) (alteration in original).

Here, the parties focus most heavily on the endorsement test, so the Court considers that test first. The Court then considers whether the show was religiously coercive, and whether it had a legitimate secular purpose.

1. Endorsement

"[T]he prohibition against governmental endorsement of religion 'precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)) (alteration and emphasis omitted). The endorsement test "'asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" *Books II*, 401 F.3d at 867 (quoting *Freedom From Religion Found., Inc. v. City of Marshfield, Wisc.*, 203 F.3d 487, 493 (7th Cir. 2000)). In applying this test, courts "evaluate the effect of the challenged government action by 'assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion.'" *Id.* (quoting

Books I, 235 F.3d at 304). More specifically, courts ask "whether an objective, reasonable observer, 'aware of the history and context of the community and forum in which the religious display appears,' would fairly understand the display to be a government endorsement of religion." *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)).

In addition, "the case law has evinced special concern with the receptivity of schoolchildren to endorsed religious messages," and has "long guarded against government conduct that has the effect of promoting religious teachings in school setting." *Elmbrook II*, 687 F.3d at 851. As the Seventh Circuit discussed in *Elmbrook II*, "[d]isplaying religious iconography and distributing religious literature in a classroom setting raises constitutional objections because the practice may do more than provide public school students with *knowledge* of Christian tenets, an obviously permissible aim of a broader curriculum." 687 F.3d at 851. "The concern is that religious displays in the classroom tend to promote religious beliefs, and students might feel pressure to adopt them." *Id.*

That does not mean, though, that any content or imagery that carries an inherently religious meaning must be purged from the school setting. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Rather, context and circumstances remain key; as the Supreme Court noted in *Lynch*, to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Applying this fact-specific analysis, courts have held that school choirs can perform sacred music, *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) ("Any choral curriculum designed to expose students to the full array of vocal music culture . . . can be expected to reflect a significant number of religious

songs."); that Christmas carols can be sung at school assemblies, *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1315 (8th Cir. 1980); that students can reenact religious rituals as part of a secular curriculum, *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 n.6 (9th Cir. 1994); and even that students can present a living nativity scene as a part of a holiday program, *Doe v. Wilson Cty. Sch. Sys.*, 564 F. Supp. 2d 766, 800 (M.D. Tenn. 2008). None of those cases establishes bright-line rules, but each illustrates how in appropriate circumstances, religious content can permissibly intersect with a secular education. Conversely, the Court found on the preliminary injunction in this case that the living nativity scene the School proposed to present in 2015 was improper—not because living nativity scenes are categorically impermissible, but because the context and extent of that particular presentation would convey an endorsement of religion, which justified the injunction the Plaintiffs requested against performing a living nativity scene in that particular show.

Here, in arguing that the 2015 show endorsed religion, the Plaintiffs largely argue that the Court found that the proposed 2015 show endorsed religion, and that the only change to that version was replacing the student actors with mannequins. That is simply not true, though. Not only did the nativity scene in the actual 2015 show not include live actors, it was only on stage for under two minutes, while a single ensemble performed a single song.[8] Those changes fundamentally altered the nativity scene's role in the show as compared to previous versions. Prior shows emphasized the nativity and set it apart from any other aspect of the show in multiple respects: it was on stage for over twelve minutes while six different songs were

[8] The Plaintiffs fail to even acknowledge that fact in their briefing, instead repeatedly asserting that the only change was to replace students with mannequins in the nativity. Because the video conclusively refutes those assertions, they do not create genuine disputes of fact. *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

performed by multiple ensembles representing a cross-section of the entire performing arts department. And even before the living nativity itself appeared on stage, student actors walked across stage in front of a backdrop, as if walking to Bethlehem, and a narrator told the story of Jesus' birth, making the nativity performance in effect the visual centerpiece of a twenty-minute portion of the show. By comparison, the rest of the show featured a series of independent performances of two to four minutes each, making the nativity by far the most prominent aspect of the show.

The portrayal of the nativity scene in the 2015 show was very different. As just noted, the nativity scene was on stage for less than two minutes. It did not span multiple performances, either, as it was only on stage while a choir sang a short version of O Holy Night,[9] and it was not on stage for the conclusion of the show. The scene was also less elaborate than in previous years. Previous shows included almost twenty student actors as part the living nativity scene. Mary and Joseph stood inside the stable behind a manger, with three students on each side dressed in white robes, depicting angels. Students dressed as the three wise men would then walk onto the stage and take their place in front of the nativity scene. In addition, multiple students were spread to the sides of the stage dressed as shepherds. The nativity scene that was actually presented in 2015, though, included only Mary, Joseph, and three wise men, each situated inside the stable set and depicted by mannequins instead of students.

When presented in that limited manner, the nativity scene did not stand out from any other portion of the show, during which almost every performance was accompanied by some

[9] A song that, while distinctly religious in nature, has been widely covered by popular musicians, including Nat King Cole, Bing Crosby, Liberace, Cher, Neil Diamond, Celine Dion, Mariah Carey, Destiny's Child, Christina Aguilera, Josh Groban, and Carrie Underwood. *See* http://www.allmusic.com/search/all/o%20holy%20night.

sort of visual complement in order to make the show visually as well as musically pleasing and engaging. For example, during a number of performances, images were projected onto the screens on each side of the stage. Many of the choir performances included dancing or choreography. Some of the performances by the string ensembles were accompanied by lighting shows. For one performance, the bands played a song called Secret Agent Santa, while actors on stage and in a recorded video projected over center stage showed Santa Claus apprehending present-thieves. In another, a percussion ensemble played a song called the 12 Drum Fills of Christmas, while the screen over center stage showed slides corresponding with the twelve days of Christmas as each day would have been mentioned in the song. The dance team also performed in multiple numbers, including one in which about twenty students dressed in costumes as wooden soldiers and other characters presented a choreographed routine while the bands played the Parade of the Wooden Soldiers. Other songs included decorations, costumes, props, and choreography, too.

Set against that context, nothing about the presentation of the nativity scene, which likewise provided the visual complement for a single song, drew additional emphasis to or suggested a preference for the nativity. To the contrary, it was presented on par with each of the other performances. Under those circumstances, even though the nativity scene is undoubtedly religious in nature, a reasonable observer would not perceive the show as expressing a preference for the nativity scene or endorsing its religious message. *Compare Books II*, 401 F.3d at 868 (holding that where the Ten Commandments were presented in a manner similar to the other, secular components of the display, the context did not suggest that they were included for their religious message), *with Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (finding that a monument of the Ten Commandments conveyed a message of endorsement

in part because it was "a display distinct both in its placement by other statues and monuments and in its content"); *see also Wilson Cty.*, 564 F. Supp. 2d at 799–801. Moreover, given the varied assortment of visuals throughout the show, the reasonable observer would not perceive an endorsement of Christianity over Chanukah or Kwanzaa simply because a Christmas song briefly included a stationary display on stage while the Chanukah and Kwanzaa songs featured images projected onto screens—neither stood out in the show as a whole.

The nativity scene also differed from previous years in that it did not portray a narrative of the story of Jesus' birth, thus further reducing its likelihood of conveying a religious message. In previous years, a narrator read passages from the Bible of the story of Jesus' birth during this portion of the show. As noted above, this segment also began with students walking across stage prior to the appearance of the nativity, as if walking to Bethlehem, after which the nativity scene appeared on stage, and the three wise men would then walk up to and take their place in front of the nativity, as if presenting their gifts to Jesus. The sequence of songs also roughly correlated with the nativity story, further reinforcing that narrative. As presented in that manner, the nativity was not just a pleasing aesthetic complement to the performance of Christmas songs, but conveyed a deeply religious message.

Those elements were each absent from the 2015 show, except that it included a similar sequence of songs. It would be asking far too much of the reasonable observer, though, to presume that they would perceive those songs (only some of which include words) as constituting a narrative of Jesus' birth. Rather, without those other cues, the observer would merely perceive them as a number of mostly-familiar songs that relate to Christmas, some of which include corresponding visuals. Thus, even though this portion of the show still includes

religious songs and some religious imagery, it does not embody nearly the same religious content.

In addition, the show's inclusion of Chanukah and Kwanzaa, and its spoken introductions of each of the holidays, further served to place those performances in a secular context.[10] After the intermission, the show resumed with a student reading the following introduction: "Welcome to the Spirit of the Season,[11] where we observe the many cultural celebrations during this holiday season." Then, along with each of the three holidays, the student read a brief introduction describing the holiday and its celebration. The Plaintiffs argue that the wording of the introductions expressed a preference for Christianity, but the Court disagrees. The introductions were each about the same length and included details about the background and celebration of the respective holidays, and adequately conveyed their educational messages.

Courts have found those sorts of explanations meaningful in deciding whether a display containing religious components sends a message of endorsement. For example, in *Books II*, the Seventh Circuit approved of a display containing the Ten Commandments in part because it contained a written explanation of the significance of each of the documents in the display. 401 F.3d at 868. Similarly, Justice O'Connor emphasized in *Allegheny* that a display containing a

[10] The Court found at the preliminary injunction stage that the inclusion of these holidays did not attenuate the message of endorsement, largely because the show still placed a disproportionate emphasis on the Christmas holiday, "and in particular the religious aspect of that holiday through the live depiction of the nativity scene." [DE 40 p. 18]. For the reasons just discussed, the show that the School actually presented did not place a similar emphasis on the religious aspect of the Christmas holiday through the nativity scene, thus negating that distinction. And as discussed below, the remaining distinction—more Christmas songs than Chanukah or Kwanzaa songs—is readily explained by secular factors when those songs are not used to amplify the religious message conveyed by other aspects of the show.

[11] The program listed each of the songs following the intermission under the heading "The Spirit of the Season." [DE 27-9].

Christmas tree and a menorah also included a sign stating that the city saluted liberty and freedom, so the display as a whole conveyed a message of pluralism and freedom of belief, not a message of endorsement of any of its religious components. 492 U.S. at 635 (O'Connor, J., concurring). Conversely, the Seventh Circuit in *O'Bannon* found that a display containing the Ten Commandments endorsed religion in part because it lacked "any marker explaining why these particular texts have been combined." 259 F.3d at 773. Here, the student-read introductions underscored that the performances during this portion of the show were meant to observe holidays celebrated by different cultures and religions, and thus conveyed a message of inclusion and education rather than endorsing the religious or cultural content of any of the performances. *See Books II*, 401 F.3d at 868 ("In a pluralistic society, reasonable people can usually tell the difference between preaching religion and teaching about the role of religion in our history.").

Granted, the show still included more Christmas songs than Chanukah[12] or Kwanzaa songs, perhaps emphasizing the Christmas holiday somewhat more than the other holidays. But the show also included many more secular songs, so the show as a whole did not present a disproportionate number of Christmas songs. In addition, the greater number of Christmas songs as compared to the other holidays would easily be perceived by a reasonable observer as reflecting the greater extent to which those songs have permeated into the secular culture. The hypothetical observer could likely hum along with any number of religious Christmas songs, like Angels We Have Heard on High; Hark, The Herald Angels Sing; or Joy to the World, while such an observer might be hard pressed to even recognize songs devoted to Chanukah or Kwanzaa.

[12] The Plaintiffs also argue that while the song Ani Ma'Amin represents the Jewish faith, it is not actually associated with Chanukah. Even assuming they are correct, though, no reasonable observer of the show would be aware of that distinction, so it is immaterial in this context.

That simply reflects the different extent to which those holidays have become a part of the secular culture, not an endorsement of one of the holidays over the others.[13]

Finally, a reasonable observer is also presumed to be aware of the history of an event. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) ("[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" (quoting *Santa Fe*, 530 U.S. at 315)); *Books II*, 401 F.3d at 867 (noting that the reasonable observer is "aware of the history and context of the community and forum in which the religious display appears"). The Plaintiffs argue that this factor cuts in their favor, as the observer would believe that the School made only superficial changes from the version at issue in the preliminary injunction, which the Court found was likely to violate the Establishment Clause. To begin with, the proper point of comparison would not be the version the School proposed to perform in 2015—given the injunction, the School never presented and no observer saw that version—but the version that had actually been presented in 2014 and in previous years. And the Court believes that an observer viewing the 2015 show would perceive substantial changes in comparison to those shows; changes that fundamentally altered the character of the show and the message it conveys. The overtly religious aspects of the previous shows were either omitted entirely (the Biblical

[13] *See Florey*, 619 F.2d at 1317 n.5 ("The singing of 'Christmas carols' appears to be a primary focal point of appellants' objections . . . . Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants and retail stores in every city and village. . . . Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same objection but because they feel it enhances religion. We take no part in this argument, it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.").

narration) or altered and minimized (the nativity scene, which was on stage for only one song for under two minutes, was not composed of student performers, and was less elaborate than in previous years). The 2015 show also celebrated other religious and cultural holidays, with each introduced by a student (not a faculty member) reading a brief introduction of the holiday. The second act of the show also began with an explanation that it was observing the various cultural celebrations of the holiday season, which placed the performance of Christmas songs in a different light. In short, the Court believes that a reasonable observer would perceive the 2015 show as a genuine departure from the previous versions.

The same would be true even when comparing the actual 2015 show to the proposed show. Though the changes from that version were small in number, they were large in effect, and the presentation of the passive nativity scene for such a brief time was simply not comparable to the elaborate, live, extended nativity scene the School had proposed to present. If the reasonable observer was actually oriented to that proposed version of the show, they would understand that the School did not merely swap out students for mannequins, but also substantially changed the role the nativity scene played in the latter portion of the show. If anything, a reasonable observer would likely perceive the brief inclusion of a nativity scene as a nod to the show's tradition, not an effort to retain the religious message conveyed by prior shows. Thus, the history of the show would not cause the reasonable observer to believe that the show that was actually presented in 2015 endorsed religion, either.

At bottom, the endorsement test involves a holistic, qualitative assessment of the totality of the circumstances of a given display. Here, based on the circumstances and presentation of the show as a whole, and the way in which an objective, reasonable observer would likely perceive it, the Court finds that the Christmas Spectacular that was actually performed in 2015 did not

convey a message of endorsement of religion. Like the display containing the Ten Commandments in *Books II*, as to which the Seventh Circuit concluded that a reasonable observer would "think history, not religion," 401 F.3d at 869, the Court finds that a reasonable observer of the Christmas Spectacular would think music and performance, not religion. Accordingly, the show did not constitute an unlawful establishment of religion under the endorsement test.

2. Coercion

Having found that the Christmas Spectacular did not convey a message of endorsement, the Court must also consider the Plaintiffs' argument that the Christmas Spectacular was unlawful because it was impermissibly coercive. In *Lee*, the Supreme Court stated that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so.'" 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678) (internal alteration omitted). Though the show here did not involve any exercise of religion, like prayer, the Seventh Circuit has held that this principle extends beyond the coercion of religious activity itself. *Elmbrook II*, 687 F.3d at 885. In *Elmbrook II*, the court explained that endorsement of religion and coercion of religion are "two sides of the same coin," as a government endorsement of religion will apply "'indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion.'" *Id.* (quoting *Wallace*, 472 U.S. at 60 n.51). Here, for the reasons just discussed, the Court does not find that the Christmas Spectacular as performed in 2015 endorsed religion, so the performers and audience members would not have been subjected to any indirect coercive pressure to conform to Christianity under that theory.

The Seventh Circuit also held in *Elmbrook II* that coercion will be present "when the government directs students to attend a pervasively Christian, proselytizing environment." 687

F.3d at 855. There, the school held its graduation ceremony in a church that was full of religious imagery. The lobby of the church also had posters and banners directing religious messages to students; pamphlets that advertised the church's ministries for students and that called on the students "to live and love like Jesus"; and staff members ready to discuss the church's religious offerings. *Id.* at 852. The court described this environment as "obviously aimed at nurturing Christian beliefs and gaining new adherents among those who set foot inside the church." *Id.* at 853. The court found that this environment was coercive since it would "create subtle pressure" to conform to those beliefs, particularly if some attendees began partaking of the church's offerings, in which case the "law of imitation" would operate. *Id.* at 855.

Those same concerns are not present here. First, unlike the church in *Elmbrook*, there were no proselytizing materials that might have called students to partake in religious offerings or activities. And though the show included some religious songs and briefly displayed some religious imagery, it was not pervasively Christian. To the contrary, the show was pervasively secular, as the majority of the show was devoted to purely secular themes, and even the religious songs were mostly familiar songs that have become part of the secular culture. Further, because the manner in which the nativity scene was presented in this show did not convey a message of endorsement, the performers who were singing while the nativity scene was on stage would not have reasonably felt as if they were being coerced to celebrate a religious message through their performance.

Nor was there any opportunity for students or audience members to engage in any religious activity or observance such that the law of imitation would have exerted influence on other individuals. As for the audience members, their role was to passively observe the show while the nativity was on stage just the same as they passively observed the rest of the show.

Perhaps the presence of the nativity prompted some audience members to pray or meditate, but an audience member's internal, subjective response would not apply any coercive pressure to any other audience member.[14] The student performers likewise performed their respective parts the same with the nativity scene on stage as they would have without, and there was no opportunity for them to engage in any manifestation of religious observance. Again, perhaps some of the performers derived additional meaning from the presence of the nativity during their performance because of their own religious background, but those internal feelings would not have applied coercive force on their classmates. That distinguishes this case from *Elmbrook II*, 687 F.3d at 855, where the court was concerned that attendees would see other students taking pictures in front of the religious symbols or speaking with the church's staff members about its religious offerings, which could subtly influence them to do the same. Because those circumstances are not present here, the law of imitation would not have applied any coercive force on the performers or attendees. Therefore, the Court finds that the show did not violate the Establishment Clause under the coercion test.

3. Purpose

The Plaintiffs finally argue that the Christmas Spectacular was unlawful because its religious components lacked a legitimate secular purpose. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary*, 545 U.S. at 860. This prong of the *Lemon* test "asks whether the government's actual purpose is to endorse or disapprove of religion." *Books II*,

[14] The audience applauded when the nativity scene appeared on stage, but that reaction was not prompted in any way by the show itself (the choir began singing even before the applause concluded), and was quite clearly in response to the pending litigation, as the previous shows did not involve similar applause when the nativity appeared.

401 F.3d at 863. "[A] secular purpose need not be the exclusive one," though; "it is sufficient if the government has '*a* secular purpose.'" *Sherman*, 623 F.3d at 507 (quoting *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 800 (7th Cir. 1999)) (internal alteration omitted). Courts also generally give deference to a government's stated purposes, but the stated secular purpose "has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. Accordingly, courts evaluate a display's purpose in light of its particular presentation and circumstances, again through the eyes of an objective observer. *Id.* at 862.

Here, the School has articulated a number a secular purposes that guide the production and performance of the Christmas Spectacular. The show as a whole is intended to provide students with experience performing in front of live audiences. The School thus integrates as many aspects of the Performing Arts Department as possible into the show, including its bands, orchestras, choirs, and jazz bands, in addition to its dance teams, drama students, and stage technicians. The show is designed so as "to provide intense challenges to each performer through the planning and programming of this event." [DE 27 ¶ 8]. In addition, "[a]rtistic vision is a high priority in developing the program so that the students and audience can experience a holiday event that is aesthetically invigorating." [*Id.* ¶ 12]. In selecting the music to be performed, the directors strive to select "music that will challenge and educate the students in music performance and pedagogy. The music selections help students learn about holiday music through historical and cultural context. The performance of the music is also intended to provide an enjoyable auditory experience." [*Id.* ¶ 11; *see also* DE 33-2 p. 64]. Students are also encouraged to audition for special solos or small groups "to further enhance the educational challenge presented" by the program. [DE 27¶ 13]. Students also contribute to the visual aspects of the show, including by creating costumes, stage props and sets, and stage lighting, and

decorating the auditorium with garland, lights, and ornaments. Finally, as to the latter portion of the 2015 show in particular, the School sought to include historical and educational components reflecting the major December holidays.

The Court finds that the Christmas Spectacular that was performed, including its religious aspects, was fully consistent with those secular purposes. As to the nativity scene itself, it provided a visual complement to one of the musical performances, and thus served the goal of making the show both musically and visually pleasing and engaging. It also presumably involved a degree of stagecraft and lighting design, thus providing outlets for students in those areas, too. The manner in which the nativity scene was presented did not belie its secular purposes, either. As discussed above, the nativity was presented on par with each of the other performances during the show, which featured a wide array of visual displays, ranging from backdrops and stage decorations to acting, dancing, and choreography, to projections of videos and still images onto screens, all of which served to make the show "aesthetically invigorating."

As to the selection of music, all of the pieces, whether religious or secular, appeared to satisfy the goals of being challenging and educational, while also aesthetically pleasing and suited to be performed at a high level. And there is no outward indication that any of the religious songs were performed to promote their religious content instead of for those secular purposes. The number of Christmas songs performed was largely commensurate with the degree to which those songs are widely familiar and have become part of the secular culture. *See Florey*, 619 F.2d at 1317 n.5. The music director also explained that a reason why fewer Chanukah and Kwanzaa songs were included in the show was that there are comparatively fewer quality arrangements available at appropriate levels of difficulty for songs celebrating those holidays. That is a plausible and reasonable explanation, and the Plaintiffs do not suggest otherwise. In

addition, the performance of songs celebrating the holidays of Chanukah, Kwanzaa, and Christmas, along with the spoken introductions for each of the holidays, served to expose the performers and audience to and educate them about those holidays.[15]

Nor does the show's history undermine these secular purposes. To the contrary, as discussed above, a reasonable observer would perceive substantial changes to the 2015 show that fundamentally changed the message it conveyed. Since the show that was actually presented was plainly consistent with the School's secular purposes, the distinct shows that were presented in the past would not change that fact. Moreover, despite the religious content of the previous shows, that history does not necessarily reflect the absence of a secular purpose. The School modeled the show after the Radio City Christmas Spectacular, which the marching band attended while on a trip to New York City. Emulating such a successful and longstanding theatrical production is a reasonable way to increase interest in the show, for both the performers and audience members, and to ensure that the show was presenting an "invigorating" and high-quality performance. [DE 27 ¶ 12 (noting that "[a]rtistic vision is a high priority in developing the program so that the students and audience can experience a holiday event that is aesthetically invigorating")]. That doing so also meant incorporating religious content does not mean that the

[15] The Plaintiffs argue that the Chanukah and Kwanzaa songs could not have served those purposes, as they did not include lyrics in English. Music is not only culturally or educationally significant when it contains words the listener will understand, though; music is significant in its own right, and these songs served to expose the performers and audience to the music of those traditions. Moreover, the Plaintiffs' argument that Ani Ma'Amin only represents Judaism in general, not Chanukah in particular, and their criticisms about the depth of the music director's knowledge of Chanukah and Kwanzaa, fail to show that these secular purposes are actually shams. *See Books II*, 401 F.3d at 866 ("The purpose prong of the *Lemon* test does not require us to evaluate the quality or sufficiency of the historical analysis embodied in the County's display."); *see also McCreary*, 545 U.S. at 872 (criticizing the content of a display where, unlike here, the content wholly failed to bear out the stated purpose and also artificially inflated the role of religion).

show lacked a secular purpose (nor does it mean that the show would pass muster under the other Establishment Clause tests, either).

Therefore, the Court finds that the Christmas Spectacular that was actually presented in 2015 had secular purposes, and thus satisfied *Lemon's* purpose prong, too. Accordingly, having found that the Christmas Spectacular satisfied each of the Establishment Clause tests at issue, the Court concludes that the show did not violate the Establishment Clause.

IV. CONCLUSION

The Court takes both parties' motions for summary judgment under advisement as to the 2014 and proposed-2015 shows. The School's supplemental brief as to mootness is due by October 5, 2016, with any response from the Plaintiffs due by October 26, 2016. The Plaintiffs' supplemental brief as to the appropriate remedy, if any, for those shows is due by October 5, 2016, with any response from the School due by October 26, 2016. Finally, the Court grants the School's motion for summary judgment as to the 2015 show, finding that it did not violate the Establishment Clause. The Court denies the Plaintiffs' motion for summary judgment to the same extent.

SO ORDERED.

ENTERED: September 14, 2016

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FREEDOM FROM RELIGION FOUNDATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 3:15-CV-463 JD
CONCORD COMMUNITY SCHOOLS,	)	
Defendant.	)	

OPINION AND ORDER

This matter is again before the Court on the parties' cross-motions for summary judgment. The Plaintiffs contend that a living nativity scene that Concord High School has long presented as the finale to its annual Christmas Spectacular violates the Establishment Clause. After the Plaintiffs filed this suit, the School proposed some changes for its upcoming shows in December 2015, but the Court found that even with those changes, the proposed show was still likely to violate the Establishment Clause, so the Court entered a preliminary injunction against performing a live nativity scene as part of the 2015 Christmas Spectacular. The School complied with that injunction, and the Court previously found that the show the School actually presented in 2015 did not violate the Establishment Clause. What remains of this case is the Plaintiffs' challenge to the version of the Christmas Spectacular that the School performed in 2014, and to the modified version of the show that the School proposed to present in 2015, prior to the issuance of the injunction. For the reasons that follow, the Court finds that the Plaintiffs' challenge to those shows is not moot; finds that those two versions of the Christmas Spectacular violated the Establishment Clause; and awards the Plaintiffs nominal damages and a declaratory judgment.

I. FACTUAL BACKGROUND

In its previous orders, the Court has described at length each of the versions of the Christmas Spectacular at issue in this case. *Freedom From Religion Found. v. Concord Cmty. Schs.*, No. 3:15-cv-463, 2016 WL 4798964 (N.D. Ind. Sept. 14, 2016); *Freedom From Religion Found. v. Concord Cmty. Schs.*, 148 F. Supp. 3d 727 (N.D. Ind. 2015). [DE 40 p. 2–6; DE 62 p. 2–8]. Those facts are undisputed, and the Court will not repeat them here. The parties have filed cross-motions for summary judgment. In its previous order on those motions, the Court held that the version of the Christmas Spectacular that the School actually presented in 2015 did not violate the Establishment Clause. The Court did not reach the merits of the Plaintiffs' challenge to the 2014 show or the proposed-2015 show, though, because the School asserted for the first time in its surreply that the Plaintiffs' challenge to those shows was moot. Specifically, the School argued that it had decided not to present those versions of the show again, so the Plaintiffs' requests for a declaratory judgment and a permanent injunction were mooted by its voluntary cessation of the challenged conduct. The School cited no evidence in support of its assertion, though, so the Court directed it to file a supplemental brief with any evidence and argument in support of its position on this issue. In that same order, the Court also directed the Plaintiffs to file a supplemental brief that identified and justified the specific injunction they sought. The parties have now submitted and responded to those respective supplements, so the motions for summary judgment are again ripe for ruling.

II. STANDARD OF REVIEW

On summary judgment, the moving party bears the burden of demonstrating that there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material" fact is one identified by the substantive law as affecting the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A

"genuine issue" exists with respect to any material fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Where a factual record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 289 (1968)). In determining whether a genuine issue of material fact exists, this Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir. 2008); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 890 (7th Cir. 1999). However, the non-moving party cannot simply rest on the allegations contained in its pleadings, but must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000).

III. DISCUSSION

The Plaintiffs assert that the Christmas Spectacular that the School presented in 2014, and the show that it intended to present in 2015 prior to the preliminary injunction, violated the Establishment Clause. In its present filings, the School does not defend either of these shows on the merits, but instead raises a threshold argument that the Plaintiffs' challenges to those shows are now moot. The Court addresses the mootness argument first. Finding that these claims are not moot, the Court then considers these claims on their merits and then decides what remedies are appropriate.

A. Mootness

The School argues that the Court lacks jurisdiction to resolve the Plaintiffs' challenges to the 2014 and proposed-2015 shows because those claims are now moot. It argues that it has

decided not to present those versions of the show in the future, so there is no longer a case or controversy that could justify awarding forward-looking relief (a declaratory judgment and a permanent injunction). The School does not suggest that it has enacted any formal policy or taken any official action that would preclude presenting those shows in the future. However, in its supplemental filing, it has submitted an affidavit by its superintendent, John Trout, in which he describes a decision the School has made not to present those versions of the show. Mr. Trout notes that following the 2015 shows, "the community, the School Board, administrators, teachers, parents, and students engaged in a variety of informal discussions regarding the program on a going forward basis." [DE 63-1 ¶ 5]. Mr. Trout describes these conversations as taking place "at the local park, over the water cooler, and across the fence," and he asserts that they "resulted in what appeared to be a consensus that the program [as actually presented in 2015] was a success and that the changes should be made permanent." *Id.*

Mr. Trout further states that, in late December 2015, he met with the school board to discuss their options relative to the litigation and the future of the Christmas Spectacular. At that time, a "consensus was reached that the changes should be made permanent and that the School would not return to performing the program as it had been done in 2014 and the years preceding that time." *Id.* ¶ 6. Mr. Trout states that, as a result of this decision, the School decided to make a Rule 68 offer of judgment, part of which included a proposed injunction against presenting a living nativity scene or having a faculty member recite the story of Jesus' birth as it appears in the Bible. However, the Plaintiffs did not accept the offer of judgment, so by its own terms, and pursuant to Rule 68, the offer was withdrawn. Mr. Trout states, though, that notwithstanding the withdrawal of this offer, the School "made the decision to permanently alter the program . . . and

to perform the program on an ongoing basis in a fashion largely similar to the program performed in 2015 . . . ." *Id.* ¶ 9.

The School argues that, in light of this decision not to present the 2014 and proposed-2015 versions of the show in the future, the Plaintiffs' challenges to those shows are now moot. Article III of the Constitution states that the power of the federal courts extends to "cases" and "controversies." U.S. Const. art. III, § 2. Thus, "[u]nder Article III, 'cases that do not involve actual, ongoing controversies are moot and must be dismissed for lack of jurisdiction.'" *Wisc. Right to Life, Inc. v. Schober*, 366 F.3d 485, 490–91 (7th Cir. 2004) (quoting *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 929 (7th Cir. 2003)). Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.2 (1997). That description is imprecise, though, as there are some notable differences between the two. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189–90 (2000) (noting that this description of mootness "is not comprehensive"). Unlike standing, on which a plaintiff bears the burden of proof, the burden of proving that a controversy is moot lies with the party asserting mootness, which is usually the defendant. *Laidlaw*, 528 U.S. at 190; *Schober*, 366 F.3d at 491. The Supreme Court has also acknowledged that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190.

Generally speaking, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1983)); *see also*

Chi. United Indus., Ltd. v. City of Chi., 445 F.3d 940, 947 (7th Cir. 2006) ("It is true that the mere cessation of the conduct sought to be enjoined does not moot a suit to enjoin the conduct, lest dismissal of the suit leave the defendant free to resume the conduct the next day."). Only when "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" will a case become moot by voluntary cessation. *Laidlaw*, 528 U.S. at 189; *accord Doe ex rel. Doe v. Elmbrook Sch. Dist.* (*Elmbrook I*), 658 F.3d 710, 719 (7th Cir. 2011), *adopted in pertinent part but overruled on other grounds en banc*, 687 F.3d 840, 842–43 (7th Cir. 2012). The Supreme Court has described this burden of proof as "stringent," "heavy," and "formidable." *Laidlaw*, 528 U.S. at 189–90. When the defendants are public officials, though, courts "place greater stock in their acts of self-correction, so long as they appear genuine." *Schober*, 366 F.3d at 492.

To begin with, there is no dispute that the Plaintiffs' challenges to these shows were live and justiciable at the time they were filed. The School had presented roughly the same living nativity scene as the conclusion of the Christmas Spectacular for the last forty-five years. Prior to filing suit, the Freedom From Religion Foundation also sent a letter to the School, objecting that the show violated the Establishment Clause, and the School responded with a defiant statement that refused to accede to the Plaintiffs' demands. Thus, at the time the Plaintiffs filed suit, a controversy existed that gave the Plaintiffs standing to assert their challenge to the show that was presented in 2014 and likely would have been presented into the future if not for this litigation.

The challenge to the proposed-2015 show was also live when it was filed. The show that the School actually presented in 2015 differed from the version it proposed, but only because the Court entered a preliminary injunction that compelled the School to make those changes. The School's music director also said prior to the preliminary injunction that he intended for these

changes to be permanent. In light of that, and because the School changed that show only because it was ordered by the Court to do so, a live controversy existed as to the legality of the proposed-2015 show at the time the Plaintiffs filed their amended complaint shortly thereafter, as there was a sufficient likelihood that the School would present that version of the show in the future if permitted to do so.

Thus, the question is whether, in light of subsequent events, those controversies are no longer live—whether the School has met its "stringent" and "formidable" burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. Generally, when evaluating whether a defendant's voluntary conduct moots a case, courts look at what actions the defendant took to ensure that the challenged practice would not recur, and also consider the reasons the defendant offers for taking those actions. First, as to a defendant's actions, the clearest case for mootness comes when a defendant formally rescinds a challenged ordinance or policy or enacts a new ordinance or policy that cures the alleged defect. *E.g.*, *Wernsing v. Thompson*, 423 F.3d 732, 744–45 (7th Cir. 2005); *Fed'n of Advert. Indus. Representatives*, 326 F.3d at 930 (noting the general rule "that repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief"); *see Elmbrook I*, 658 F.3d at 720 ("[W]e have accepted the repeal of a challenged ordinance or an express disavowal of official policy as sufficient to moot a case . . . ."). Less conclusive measures can suffice, too, though. For example, in *Schober*, the state never repealed the statute at issue, but it took a number of actions that, in combination, clearly established that it would not enforce the statute. Prior to the suit, the state had openly conceded that the statute was unconstitutional, and in another proceeding, it declined to appeal from a district court's order that held the statute was void in its entirety. After

the suit was filed, the state also sent a letter to the plaintiff assuring them that it would not enforce the statute, and it posted a public disclaimer on its website indicating that it would not enforce the statute. Also, the state had never enforced the statute against anyone. The Seventh Circuit thus held that there was "no real prospect that the [state] will ever enforce this statute," so it found the case to be moot.

Here, the School does not suggest that it has enacted any formal policy or resolution that would preclude the versions of the show in question. It has offered only an affidavit from its superintendent that a consensus was reached that the changes should be made permanent, and that the School has decided to permanently remove the objected-to aspects of the shows. The School does not indicate that it has documented this decision in any manner, or that it has taken any steps to implement this decision. The minutes of the school board meetings during the period this decision occurred do not reflect any discussion or announcement on this topic, either. In fact, there is no indication that the School has ever expressed this commitment except in its filings in this litigation, through Mr. Trout's affidavit. Granted, those filings are public records, but Mr. Trout's affidavit was not filed until nearly a year after the decision was made, and the School's failure to take action outside the confines of this litigation undermines its argument that this conduct cannot reasonably be expected to recur even if this case was dismissed. The School also tries to portray its Rule 68 offer of judgment as communicating its commitment not to present these shows in the future, as it offered to agree to an injunction against these versions of the shows. However, an offer of judgment is no such commitment; it is a litigation tactic that, by its own terms, is withdrawn if not accepted.

The School has not identified any case where an informal assurance of this sort supported a finding of mootness by voluntary cessation. The School cites to *Freedom From Religion*

Found., Inc. v. Franklin Cty., Ind., 133 F. Supp. 3d 1154, 1159 (S.D. Ind. 2015), but there the county formally enacted an ordinance that cured the plaintiffs' concerns. The School also cites to *Schober*, where the agency's actions were less formal than in *Franklin County*, but those actions still went far beyond the circumstances present here. As just discussed, the state in *Schober* sent a letter to the plaintiff clearly indicating that it would not enforce the statute, and it posted a disclaimer on its website clarifying that it was not attempting to enforce, adopt, or apply the statute. Thus, the state had made both "private and public assurances . . . that the statute will not be enforced in the future." 366 F.3d 485. Prior to the suit, it had also admitted that the statute was unconstitutional; it declined to appeal a judgment declaring the statute void in its entirety; and it had never enforced the statute in the first place. None of those factors are present here. Rather, the School's actions are more similar to *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975), where the defendant sent an internal memorandum instructing its employees to discontinue the challenged practice, or to *Elmbrook I*, 658 F.3d at 720, where the defendant discontinued its challenged practice and had no intent to resume it, but "presented no evidence of a formal or even an informal policy change" that would have prevented it from doing so. In both cases, the courts found that the claims were not moot.

Courts also consider the reasons a defendant provides for voluntarily modifying its conduct, as those reasons can provide insight into whether the defendant's voluntary actions are likely to endure. *Schober*, 366 F.3d at 491 ("We believe that the defendants' now public policy of non-enforcement of the statute and regulations, *particularly in view of the reasons therefor*, . . . moots any challenge to that requirement." (emphasis added) (internal quotation and alteration omitted)). For example, claims are likely to be moot when a governmental entity states that it will not enforce a statute or policy because it is admittedly unconstitutional, as government

actors are unlikely to engage in conduct that they have already admitted would be unlawful. *E.g.*, *Schober*, 366 F.3d at 492 ("[A] case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the failure of the legislature to remove the statute from the books."); *Ragsdale*, 841 F.2d at 1365–65.

Other objective rationales can also suffice. In *Federation of Advertising Industry Representatives*, the defendant did not admit that the policy in question was unconstitutional, but the court found that the case was moot where the defendant's voluntary cessation was supported by a cost-benefit analysis as to the likelihood of success in litigation, and its "desire to avoid substantial litigation costs by removing a potentially unconstitutional law from the books." 326 F.3d at 931. And in *EEOC v. Flambeau*, the Seventh Circuit credited the defendant's assertion of voluntary cessation where the defendant changed its policy after determining, based on two years of experience, that the costs of the challenged program outweighed its benefits. 846 F.3d 941, 949 (7th Cir. 2017). Absent a reason to believe the defendant would re-impose a policy it had already determined to be uneconomical, the Seventh Circuit held that the challenge to that policy was moot. *Id.* The court added, though, that a "decision supported by less evidence or less thought might more reasonably be expected to recur," and it emphasized that no evidence contradicted the cost-benefit analysis upon which the defendant based its decision. *Id.*

By contrast, in *Concentrated Phosphate*, the defendants offered only their "own statement that it would be uneconomical for them to engage in any further" challenged conduct. 393 U.S. at 203. The Supreme Court found that the case was not moot, as "[s]uch a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those" who seek to establish mootness by voluntary cessation. *Id.*; *see also Flambeau*, 846 F.3d at 949 (distinguishing *Concentrated Phosphate* on the additional basis that there was reason

to doubt the veracity of those defendants' economic claims). In addition, in *Elmbrook*, the court noted that the school began holding its ceremonies in a church in the first place because that was cheaper than its other options. Because that remained true even after the school ceased holding its ceremonies at the church, the court found that "it is not difficult to imagine that such a [cost] disparity would lead District schools back to the Church in the future," so the case was not moot. *Elmbrook I*, 658 F.3d at 720.

Here, the justification the School offers for its decision undermines rather than reinforces its case for mootness. Mr. Trout indicates that the decision was based on "what appeared to be a consensus" that was reached after "a variety of informal discussions" were held "at the local park, over the water cooler, and across the fence." [DE 63-1 ¶ 5]. That explanation is problematic in many respects. First, public opinion is inherently subject to change, and basing a decision on a perceived public consensus offers little assurance that the decision will not change in the future. *See Flambeau*, 846 F.3d at 949 (finding mootness where the "reasons for the [defendant's] change were not speculation or opinion"). Second, Mr. Trout offers no basis for his assertion that the informal discussions "resulted in what appeared to be a consensus" that the changes should be made permanent. Given his description of these discussions as occurring at the water cooler and across the fence, Mr. Trout appears to be speaking purely metaphorically, and the School offers no objective support for his broad assertion.

Third, the record offers reason to doubt the accuracy of this perceived consensus. In the individual plaintiffs' affidavits in support of their motions for leave to proceed anonymously, they describe a great deal of public opposition to any changes in the Christmas Spectacular. For example, Jack and John Doe explained in their affidavit:

> Elkhart is a very religious area, and countless members of the community have rallied around the portion of the Christmas Spectacular to which we have objected.

> Many of these persons have been extremely vocal in their support: during a meeting of the school board at which this issue was discussed, hundreds of persons attended in pre-printed t-shirts advocating in favor of the portion of the Christmas Spectacular to which we object; yard signs expressing support for the objectionable portion of the Christmas Spectacular have also been displayed throughout our community; and a petition in support of this portion of the event has been circulated.

[DE 4-1 ¶ 7]. Jack Doe further stated that he "is aware that the vast majority of the High School—including faculty members that oversee his classes and that are responsible for the Christmas Spectacular—feel very passionately about the Christmas Spectacular and about keeping the live Nativity Scene." *Id.* ¶ 16.[1] The affidavits submitted by the new plaintiffs following the 2015 show reflect a similar sentiment:

> [C]ountless members of the community have rallied around the portion of the Christmas Spectacular to which we have objected. Many of these persons have been extremely vocal in their support, and I have witnessed the vitriol that resulted from the initial filing of the complaint in this case as well as from subsequent steps in the litigation.

[DE 47-2 ¶ 6; 47-3 ¶ 6]. The Plaintiffs' supplemental brief also cites to a recent online opinion poll in the Goshen News, in which 68% of the voters voted to resume the previous version of the nativity scene. Of course, none of that is scientific, but neither is Mr. Trout's assertion that the water cooler conversations held throughout the community resulted in a consensus that the changes should be made permanent. This illustrates the subjective and transitory nature of public opinion, which undermines the School's assertion that these versions of the show cannot reasonably be expected to recur. *Compare Concentrated Phosphate*, 393 U.S. at 203 (finding that the case was not moot where the defendants offered only their "own statement that it would

[1] *See also* DE 4-1 ¶ 8, 10 ("Additionally, a Facebook 'group' called 'Save Concord's Christmas Spec's Nativity Scene has been created. . . . [N]early 6,400 persons have 'liked' that group, which is about four times as many persons as attend the High School altogether. . . . Hundreds of persons have used either the 'online comments' section of media reports or the 'comments' function in the aforementioned Facebook 'group' to aggressively express their opposition to our position.").

be uneconomical for them to engage in any further" challenged conduct), *with Flambeau*, 846 F.3d at 949–50 (finding that the case was moot where the defendant offered undisputed proof that the costs of the challenged policy exceeded its benefits).

On the whole, the Court cannot conclude that the School has met its "stringent" burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. As in *Elmbrook*, the likelihood that the School will present the challenged versions of the Christmas Spectacular in the future "certainly has decreased" since this litigation began, but not to the extent that the Court now lacks jurisdiction to decide these claims. The case for mootness here is marginally stronger than in *Elmbrook*, since the School has stated that it will not present the challenged shows in the future, whereas the school in *Elmbrook* said only that it had no intent to resume the challenged conduct. But like in *Elmbrook*, the School "has presented no evidence of a formal or even an informal policy change," and "[n]othing in official policy would prevent or even obstruct [the School] from changing its mind" and resuming the challenged versions of the show. *Elmbrook I*, 658 F.3d at 720. Nor have the individuals who have decided to make the change indicated how they would implement the decision, as they are not the ones who typically set the content of the shows. And like the cost incentive that could have caused the school in *Elmbrook* to resume its challenged conduct, public sentiment could do likewise as to the Christmas Spectacular if the School's decision was in fact informed by its perception of the public consensus, as it indicates.

It is also worth noting that the practice the Plaintiffs challenge is long-standing. The School had presented roughly the same version of the living nativity scene for the last forty-five years, so it should not be taken lightly that the School will be able to leave behind such a practice that has spanned generations and enjoyed a great deal of support within the community. Against

that tide of tradition, the School cannot carry its burden of establishing mootness by voluntary cessation with only an affidavit attesting to an informal and undocumented decision made by the superintendent and school board out of the public eye. Therefore, the Court finds that the Plaintiffs' challenges to these shows are not moot due to the School's voluntary cessation of the challenged conduct, so the Court retains jurisdiction to resolve the Plaintiffs' claims.[2]

B. Merits

Because these claims are not moot, the Court turns to the merits. The Plaintiffs contend that the 2014 and proposed-2015 versions of the Christmas Spectacular violated the Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend I, cl. 1. The Fourteenth Amendment made this provision equally applicable to state and municipal governments, such as the School. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947); *Doe ex rel. Doe v. Elmbrook Sch. Dist.* (*Elmbrook II*), 687 F.3d 840, 849 (7th Cir. 2012) (en banc). Under *Lemon v. Kurtzman*, a governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion. 403 U.S. 602, 612–13 (1971). The second of those elements has also been framed as asking "'whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval'" of religion or of a particular religious belief. *Books v. Elkhart Cty., Ind.*, 401 F.3d 857, 867 (7th Cir. 2005) (quoting *Freedom From Religion Found., Inc. v. City of Marshfield, Wisc.*, 203 F.3d 487, 493 (7th Cir. 2000)); *see*

[2] Given this finding, the Court need not reach the Plaintiffs' alternative argument that their request for nominal damages would present a justiciable controversy even if all of their other requests for relief were moot.

also Elmbrook II, 687 F.3d at 850 ("[W]e have viewed the endorsement test as a legitimate part of *Lemon's* second prong . . . .").

In granting a preliminary injunction as to the proposed-2015 show, the Court found that the Plaintiffs were likely to succeed on the merits of their claim that that show violated the Establishment Clause. Specifically, the Court held that "a reasonable observer would fairly believe that the portrayal of the living nativity scene, when viewed in the particular context, circumstances, and history of the Christmas Spectacular, conveys a message of endorsement of religion, or that a particular religious belief is favored or preferred." [DE 40 p. 19]. As the Court has previously emphasized, the portrayal of a living nativity scene in and of itself did not render the performance unconstitutional. But the manner in which the living nativity scene was presented and its context within the show combined to create an impermissible message of endorsement. Though the standard of review at this stage is different, no new evidence has been submitted, and the School's present filings offer no argument in defense of the constitutionality of this version of the show. Accordingly, for the reasons explained in the prior order, [DE 40 p. 9–19], the Court now finds that the proposed-2015 version of the Christmas Spectacular would have violated the Establishment Clause by conveying a message of endorsement.

The 2014 version of the Christmas Spectacular presents an even clearer case. Not only did this version of the show include the same extended living nativity scene as the proposed-2015 show, in which the nativity scene was emphasized unlike any other aspect of the show,[3] it included a narration consisting of Bible passages read by a faculty member, telling the story of

[3] As discussed in the Court's last order, this presentation differed substantially from the show that was actually presented in 2015, during which a nativity scene was on stage for less than two minutes of the 107-minute show, as the visual complement to a single song performed by a single ensemble, and included no student actors. [DE 62 p. 24–26].

Jesus' birth. It also lacked any context suggesting an educational or cultural purpose for this presentation, and instead focused solely on the Christmas holiday, and in particular, the religious content of that holiday. The message of endorsement conveyed by this version of the show was unmistakable. Indeed, at no point in this litigation has the School presented any argument in defense of this version of the show. Accordingly, the Court also finds that the 2014 version of the Christmas Spectacular violated the Establishment Clause by conveying a message of endorsement. Thus, the Court grants the Plaintiffs' motion for summary judgment as to the merits of these claims.

C. Remedies

Finally, the Court must address what remedies are warranted given those findings. First, the Plaintiffs seek nominal damages for their exposure to the 2014 show. The School has not responded to this request or otherwise disputed the Plaintiffs' entitlement to nominal damages if this case is not moot.[4] Thus, the Court finds that the Plaintiffs are entitled to nominal damages in the amounts they request, which equal one dollar for each exposure to the 2014 show. Accordingly, the Court awards nominal damages in the amounts of $7.00 to Jack Doe; $1.00 to John Doe; $1.00 to John Roe; and $1.00 to the Freedom From Religion Foundation. Next, the Court also grants the Plaintiffs' request for declaratory judgment, having found that the 2014 and proposed-2015 versions of the Christmas Spectacular violated the Establishment Clause. The Court will therefore enter declaratory judgment that those versions of the show were unlawful.

Last, the Plaintiffs request that, in addition to a declaratory judgment, the Court enter a permanent injunction against presenting those versions of the show in the future. In contrast to

[4] The School argues in its supplemental briefs that a claim for nominal damages cannot on its own maintain a live controversy if the Plaintiffs' other requests for relief are all moot, but the School does not contest the Plaintiffs' request for nominal damages in the absence of mootness.

their extended arguments in support of their request for nominal damages, though, the Plaintiffs offer no argument for why a permanent injunction is warranted here. They simply assert that because these shows were unlawful, they are "entitled" to a permanent injunction against presenting these shows in the future. The Court raised this omission in its previous order, noting that a "permanent injunction does not inevitably follow from any finding that a right has been violated . . . ." [DE 62 p. 17 (citing *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007))]. That decision is committed to a district court's discretion, which is guided by a number of factors. *eBay*, 547 U.S. at 391 ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . ."); *Badger Catholic*, 620 F.3d at 782 ("As for the choice between declaratory judgment and an injunction: that's a matter left to the district court's discretion . . . . A declaratory judgment cannot be enforced by contempt proceedings, but it has the same effect as an injunction in fixing the parties' legal entitlements."). The Court thus directed the Plaintiffs to submit a supplemental brief explaining why a permanent injunction is warranted under the present circumstances of this case.

In their supplemental filing, the Plaintiffs again fail to engage on this issue. They argue only that the case is not moot, so they are entitled to a permanent injunction. The Supreme Court has rejected that premise on multiple occasions, though, as the Court further noted in its previous order. [DE 62 p. 17 ("Even if any changes to the show do not result in these claims being moot, those changes may still affect whether a permanent injunction is an appropriate remedy.")]. In *Laidlaw*, for example, the Supreme Court noted that "although the defendant's voluntary cessation of the challenged practice does not moot the case, 'such abandonment is an important

factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice.'" 528 U.S. at 193 (quoting *City of Mesquite*, 455 U.S. at 289) (internal alteration omitted); *see also City of Mesquite*, 455 U.S. at 289 n.10 (stating that while the case was not moot by voluntary cessation, "'[o]f course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary'" (quoting *Concentrated Phosphate*, 393 U.S. at 203–04)). By relying only on a categorical argument that they are entitled to a permanent injunction because the case is not moot, the Plaintiffs have failed to offer any argument for why, under the circumstances of this case as it now stands, the Court should exercise its discretion to enter a permanent injunction.

The Court finds that a permanent injunction is not warranted here, as a declaratory judgment affords the Plaintiffs the relief they seek, without needing to resort to an overbroad and likely unnecessary use of coercion through an injunction. Though the School has not met its stringent burden of establishing that its voluntary cessation of the challenged conduct deprives the Court of jurisdiction to resolve the Plaintiffs' claims, that factor certainly bears on whether an injunction is appropriate. The School's superintendent has stated under oath that the School will not present these versions of the Christmas Spectacular in the future, and the Court has no reason to doubt that statement's sincerity, even if it lacks the sort of certainty and justification that would give rise to mootness. It also appears that the School followed through with this commitment as to the 2016 shows, as the Plaintiffs did not seek an injunction as to those shows, and have not otherwise challenged them. In addition, should the School's position change in the future, a declaratory judgment gives the Plaintiffs the tools they need to address that situation. Under 28 U.S.C. § 2202, "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose

rights have been determined by such judgment." Thus, if the School suggests in the future that it may present either of these versions of the show, the Plaintiffs can swiftly return to court and seek appropriate relief, which could include an injunction.

The permanent injunction the Plaintiffs seek is also overbroad, which further weighs against awarding an injunction under these circumstances. The Plaintiffs seek an injunction that bars the School "from organizing, rehearsing, presenting, or intentionally allowing to be presented, any portrayal of a nativity scene that is composed of live performers." [DE 65 p. 2–3]. The Court has not held in this case, though, that any portrayal of a living nativity scene violates the Establishment Clause. [DE 40 p. 12–14; DE 62 p. 22–23]. The Court has held only that these particular performances of the living nativity scenes, in light of all the pertinent context and circumstances of these particular shows, conveyed a message of endorsement and violated the Establishment Clause. A broader holding is not possible given the fact-intensive inquiry in Establishment Clause cases, and the injunction the Plaintiffs seek extends beyond the scope of that holding.[5] Conversely, tailoring a permanent injunction to all of the circumstances of these shows that made them unlawful, with enough specificity to apprise the School of what conduct is prohibited, *see* Fed. R. Civ. P. 65(d)(1) ("Every order granting an injunction . . . must . . . state its terms specifically; and describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."), would be unduly complicated.

If it were more likely that the School would present these versions of the show in the future, some sort of injunction might be warranted despite these obstacles. But as it stands, the

[5] The Plaintiffs take their proposed language from the preliminary injunction the Court issued as to the proposed-2015 show. However, that injunction applied only to the 2015 shows, and the School had suggested no alternative, so the Court found that any overbreadth was acceptable under the circumstances. [DE 40 p. 21–22]. The injunction the Plaintiffs now seek would extend into perpetuity, and thus deserves closer scrutiny.

Court need not choose between a permanent injunction that is simple but overbroad and one that is narrow but minutely detailed. The declaratory judgment itself establishes the parties' rights, and if the School acts in the future in ways that would be inconsistent with that judgment, the Court can grant further relief to protect and enforce the Plaintiffs' rights. *Badger Catholic*, 620 F.3d at 782 ("The problem with issuing an injunction straight off is that the details required by Fed. R. Civ. P. 65(d)(1)(C) would be considerably more elaborate than the terms of a declaratory judgment. . . . If [the plaintiff's] fears come to pass, then more relief lies in store. For now, however, a declaratory judgment suffices."). At this time, however, the Plaintiffs have not shown that a permanent injunction is warranted, so the Court denies that request.

IV. CONCLUSION

The Court GRANTS the Plaintiffs' motion for summary judgment [DE 52] in part, as to the 2014 and proposed-2015 shows, and DENIES the School's motion for summary judgment [DE 55] to the same extent. The Court AWARDS nominal damages to the plaintiffs in the amounts of $7.00 to Jack Doe; $1.00 to John Doe; $1.00 to John Roe; and $1.00 to the Freedom From Religion Foundation. The Court GRANTS the Plaintiffs' request for a declaratory judgment that the 2014 and proposed-2015 shows violated the Establishment Clause, but DENIES the Plaintiffs' request for a permanent injunction at this time. Because the Court previously granted summary judgment in favor of the School as to the show that was actually performed in 2015, [DE 62], all claims in this action have now been resolved, so the Clerk is DIRECTED to enter a final judgment in accordance with these orders.

SO ORDERED.

ENTERED: March 6, 2017

/s/ JON E. DEGUILIO
Judge
United States District Court

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the
Northern District of Indiana

FREEDOM FROM RELIGION FOUNDATION; JOHN DOE; JACK DOE; JOHN ROE; and JOHN NOE,

Plaintiffs

v. **Civil Action No. 3:15-CV-463 JD**

CONCORD COMMUNITY SCHOOLS,

Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

___ the plaintiff _____ recover from the defendant _____ the amount of _____ _____ dollars $_____, which includes prejudgment interest at the rate of _____% plus post-judgment interest at the rate of _____ % along with costs.

___ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

__*X*__ Other: Judgment is entered in favor of Defendant Concord Community Schools and against Plaintiffs Freedom From Religion Foundation, John Doe, Jack Doe, John Roe and John Noe in that Defendant did not violate the Establishment Clause as to the 2015 show. Judgment entered in favor of Plaintiffs Freedom From Religion Foundation, John Doe, Jack Doe, John Roe and John Noe and against Defendant Concord Community Schools in that Defendant violated the Establishment Clause as to the 2014 and proposed 2015 shows. Nominal damages are AWARDED in the amounts of Seven Dollars ($7.00) to Plaintiff Jack Doe; One Dollar ($1.00) to Plaintiff John Doe; One Dollar ($1.00) to Plaintiff John Roe; and One Dollar ($1.00) to Plaintiff Freedom From Religion Foundation.

This action was (*check one):*

__ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

__ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Jon E. DeGuilio on Motions for Summary Judgment.

DATE: March 7, 2017

ROBERT N. TRGOVICH, CLERK OF COURT

By s/C. Reed
Signature of Clerk or Deputy Clerk