IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FREEDOM FROM RELIGION FOUNDATION, STEVE KRISTOFF, and RENANA GROSS,	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-02047-TWP-DML
FRANKLIN COUNTY, INDIANA,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Each year, a large nativity scene is erected on the lawn of the Franklin County Courthouse in Brookville, Indiana. The display consists of several life-size figures surrounding the Baby Jesus, and no other displays on the lawn diminish the religious impact of the nativity scene. It is currently on display, and will remain on display until early to mid January of 2015. The plaintiffs—a membership organization promoting the separation of church and state and two (2) individuals who come into contact with the scene during the course of their lives as residents of Franklin County—all object to the display of the nativity scene on government property. The display represents an endorsement of religion and has the principal purpose and effect of advancing religion, and it therefore runs afoul of the Establishment Clause of the First Amendment to the United States Constitution. A preliminary injunction should issue requiring the defendant to immediately remove the nativity scene from the lawn of the Franklin County Courthouse.

STATEMENT OF FACTS

It is anticipated that the below-described facts will be adduced at the preliminary injunction hearing in this case. Given that the plaintiffs have not yet engaged in discovery, they reserve their right to supplement these facts as appropriate.

I. The Franklin County Courthouse and the Display of the Nativity Scene

The Franklin County Courthouse ("the Courthouse") is located in downtown Brookville, Indiana, which is the county seat of Franklin County ("the County"). The entrance to the Courthouse abuts U.S. Highway 52 (also known in places as Brookville Road), a busy two-lane highway that runs from North Dakota to South Carolina.

For approximately the past fifty (50) years, the County has erected a large nativity scene on the lawn—owned and operated by the County—directly outside the Courthouse. The nativity scene consists of a depiction of the birth of Jesus Christ, and includes life-size figurines of the Baby Jesus, Mary and Joseph, the Three Wise Men, at least one angel, and several animals appropriate to the story of the Birth of Jesus. It is a well-recognized symbol of the Christian faith. Viewed from the other side of U.S. Highway 52, the nativity scene and the Courthouse lawn appear as follows:

The Courthouse is directly to the left of the above image. The nativity scene itself appears as follows (the visible building is the Courthouse):

The main entrance to the Courthouse is accessed from U.S. Highway 52, and the nativity scene is thus visible to every person who enters or exits the Courthouse. The display is typically erected from shortly after Thanksgiving until early-to-mid January of each year.

The nativity scene is lighted after dark, so that it stands out in downtown Brookville. On information and belief, the electricity used to light the nativity scene is provided and paid for by the County. On the same lawn as the nativity scene, but separated by a large evergreen, the County has also displayed a series of plastic reindeer. The reindeer are not part of the same display. These reindeer are lighted after dark but when they are not lighted during the day they are scarcely visible to passersby. The lawn of the Courthouse has virtually no history of displays

similar to the nativity scene, and it contains only two other items of note: several large evergreen trees that are on the lawn year-round; and a veteran's memorial containing Biblical verses.

In 2010, the nativity scene was erected at the foot of a flag pole on the Courthouse lawn, and an angel immediately above the nativity scene (and overlooking the scene) was affixed to the flag pole itself. That year, after being contacted by a member of the organization who resides in or around Brookville and who objected to the display of the nativity scene, Freedom From Religion Foundation ("FFRF") contacted the County, via letter, to express its concerns with respect to the nativity scene. FFRF did not receive a direct response to its letter, although, after this letter, the County strung some lights around one of the large evergreen trees on the Courthouse lawn. The following year, in 2011, the nativity scene was moved from the base of the flag pole on the Courthouse lawn to a location closer to the Courthouse itself. It has been erected in this location—which, again, is a short distance away from the Courthouse entrance, directly adjacent to U.S. Highway 52, and visible to any person entering or exiting the Courthouse—each year since 2011. No other images are contained within the display that might detract from its religious meaning.

II. The Plaintiffs

FFRF is a nationwide not-for-profit membership organization with its primary place of business in Madison, Wisconsin. The organization is devoted to protecting the constitutional principle of the separation of church and state and to educating the public about the views of non-theists. FFRF has 21,500 members in the United States and 349 members in Indiana. FFRF received complaints from one or more members who reside in or around Brookville and who object to the display of the nativity scene each year since 2010, with the exception of 2012. FFRF therefore has current members who object to the display of the nativity scene and who will

come into contact with the display. As a result of the display of the nativity scene, FFRF has been forced to expend resources in order to investigate the County's actions and to advocate on behalf of its mission and on behalf of its members. The resources that FFRF has expended and will continue to expend concerning the nativity scene have necessarily been diverted from other projects about which FFRF is concerned.

Steve Kristoff and Renana Gross are adult residents of the County who regularly pass by the nativity scene when it is displayed each year, and who object to its display. They also pay taxes to the County and object to the use of their taxes for purposes of the display. Both Mr. Kristoff and Ms. Gross are members of FFRF.

PRELIMINARY INJUNCTION STANDARD

The standard in the Seventh Circuit for the granting of a preliminary injunction is clear. In order to determine whether a preliminary injunction should be granted, the Court weighs several factors:

> (1) whether the plaintiffs have established a prima facie case, thus demonstrating at least a reasonable likelihood of success at trial;
>
> (2) whether the plaintiffs' remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue;
>
> (3) whether the threatened injury to the plaintiffs outweighs the threatened harm the grant of the injunction may inflict on the defendant; and
>
> (4) whether, by the grant of the preliminary injunction, the public interest would be disserved.

See, e.g., *Baja Contractor, Inc. v. City of Chicago*, 830 F.2d 667, 675 (7th Cir. 1987). The heart of this test, however, is "a comparison of the likelihood, and the gravity of two types of error: erroneously granting a preliminary injunction, and erroneously denying it." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 590 (7th Cir. 1984).

ARGUMENT

All factors for the issuance of a preliminary injunction are met in this case, and an injunction should issue immediately prohibiting the County from displaying the nativity scene on the Courthouse lawn.

The Plaintiffs are Likely to Prevail on the Merits of Their Claim

I. The plaintiffs have standing

The County has, of course, not yet challenged the plaintiffs' standing to pursue their legal claim in this cause. Nonetheless, given that standing issues often arise in Establishment Clause challenges and given the time constraints associated with the plaintiffs' preliminary injunction request, standing should be addressed at the outset. In order to possess standing to sue, a plaintiff must have (a) suffered an injury in fact (b) that is causally connected to the defendant's conduct and (c) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). All plaintiffs possess standing.

A. The individual plaintiffs

Steve Kristoff and Renana Gross possess standing for two (2) reasons: as residents of Franklin County they are forced to come into contact with a religious display to which they object; and as municipal taxpayers they object to the use of their tax monies on the nativity scene.

1. Observer standing

As noted, both Mr. Kristoff and Ms. Gross are residents of Franklin County who have, and will continue to, come into regular contact with the challenged display. "[D]irect and unwelcome exposure to a religious message cannot be distinguished from the 'injuries' of other plaintiffs who have had standing to bring claims under the Establishment Clause." *Doe v.*

County of Montgomery, 41 F.3d 1156, 1159 (7th Cir. 1994). *See also, e.g.*, *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011) ("In suits brought under the Establishment Clause, 'direct and unwelcome' contact with the contested object demonstrates psychological injury in fact sufficient to confer standing.") (citation omitted); *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("The injury that gives standing to plaintiffs . . . is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state."). The individual plaintiffs clearly have standing for this reason alone.

2. Taxpayer standing

It is the plaintiffs' understanding, which they anticipate discovery will confirm, that (at the very least) the County expends taxpayer funds to light the nativity scene each evening. At present, the plaintiffs are unaware as to whether any additional taxpayer funds are expended on the display. While this expenditure of tax dollars for the nativity scene is no doubt modest in terms of dollars and cents, it is sufficient to bestow taxpayer standing on the individual plaintiffs. After all, both Mr. Kristoff and Ms. Gross pay taxes to the County that have then been used to provide electricity to the display. While the scope of taxpayer injury recognized under the doctrine of *federal* taxpayer standing is relatively narrow, *see, e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007), the scope of taxpayer injury recognized under the doctrine of *municipal* taxpayer standing is broad, *see, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

The U.S. Supreme Court has articulated the "very different" interest possessed by federal and municipal taxpayers in this manner:

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of

> the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923); *see also Hinrichs v. Speaker*, 506 F.3d 584, 591-92 (7th Cir. 2007). While a "federal taxpayer's 'interest in the moneys of the treasury . . . is comparatively minute and indeterminable,'" *Flast v. Cohen*, 392 U.S. 83, 92-93 (1968) (quoting *Frothingham*, 262 U.S. at 486-87), the same is not true of a municipal taxpayer's interest.

Accordingly, when it comes to municipal taxpayer standing, courts are in agreement that when a "municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement [for standing] is satisfied." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988); *accord Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1416 (7th Cir. 1993) (noting that, to establish standing, municipal taxpayers need only challenge "tax dollar expenditures that allegedly contribute to Establishment Clause violations"). The injury in such cases is simply the "misuse of public funds," which includes transfers or leases of governmental property for less than fair market value. *Common Cause*, 4 F.3d at 5, 7 (citing *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir. 1985), *Annunziato v. New Haven Bd. of Aldermen*, 555 F.Supp. 427, 431 (D. Conn. 1982), and *Ridgefield Women's Political Caucus, Inc. v. Fossi*, 458 F.Supp. 117, 120 n.3 (D. Conn. 1978)). *See also, e.g.*, *Wirtz v. City of South Bend*, 813 F. Supp. 2d 1051, 1056 (N.D. Ind. 2011) (noting that "[m]unicipal taxpayer plaintiffs must show that (1) they are actually municipal taxpayers, and (2) tax money was used to fund the contested project," and concluding that taxpayer plaintiffs had standing to challenge the donation of publicly owned property to a religious organization) (citation omitted), *appeal dismissed*, 669 F.3d 860 (7th Cir. 2012).

The individual plaintiffs in this case clearly satisfy this test: they pay taxes to the County and the County expends funds for purposes of lighting the display. Taxpayer standing exists.

B. The Freedom From Religion Foundation

Like the individual plaintiffs, the Freedom From Religion Foundation possesses standing for two (2) independent reasons: as a membership organization it has associational standing to represent the interests of its affected members; and insofar as it has expended and will expend limited resources to address the unconstitutional actions of the County, it has standing to represent its own interests under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

1. Associational standing

As indicated, FFRF has members in and around the County who come into unwelcome contact with the challenged display each year (and who pay taxes to support the display). In order to obtain associational standing to raise a claim on behalf of its members, an organization must meet the three-prong test set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. Clearly this test is met here: FFRF has members in and around the County who come into contact with the display; FFRF's interests in preventing the County from engaging in religious endorsement are certainly germane to its purpose; and there is no need for the participation of individual members in this challenge to the display (although individual members are present).

Indeed, courts have on multiple occasions held that FFRF itself possesses associational standing under *Hunt* to raise Establishment Clause claims similar to that raised in this case. *See, e.g.*, *Doe v. Porter*, 370 F.3d 558, 561-62 (6th Cir. 2004) (challenge to school board's practice of permitting the teaching of the Christian Bible as religious truth in public schools); *Freedom From Religion Found. v. Weber*, 951 F. Supp. 2d 1123, 1130-31 (D. Mont. 2013) (challenge to renewal of Catholic organization's special use permit to maintain a privately owned religious statue on federal land); *Moss v. Spartanburg County Sch. Dist. No. 7*, 676 F. Supp. 2d 452, 457-58 (D.S.C. 2009) (challenge to religious release-time program in a public school district). Associational standing exists.

2. Standing under Havens

In *Havens*, the U.S. Supreme Court addressed the showing necessary for an advocacy organization dedicated "to mak[ing] equal opportunity in housing a reality," 445 U.S. at 368, to possess standing to maintain an action under the Fair Housing Act. The Seventh Circuit has summarized the holding in *Havens Realty* and its progeny succinctly:

> [T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination. These are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination.

Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). Here, FFRF has diverted resources from other projects in order to combat the allegedly unconstitutional actions by the County here. That is all that *Havens* requires, and standing exists for this reason as well.

II. The display of the nativity scene violates the Establishment Clause[1]

[1] Of course, the Establishment Clause prohibits only religious displays that may fairly be attributed to the government, and does not generally forbid private religious speech. One of the County's commissioners was recently quoted in the press as indicating that "it is an open forum

A. Background to Establishment Clause analysis

The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. This provision, among other things, "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established a three-part test to determine whether governmental action runs afoul of the Establishment Clause: in order to pass constitutional muster, (a) the action must have a secular purpose, (b) the action must have a principal or primary effect that neither advances nor inhibits religion, and (c) the action must not foster excessive governmental entanglement with religion. *Id.* at 612–13; *see also, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997).

The so-called *Lemon* test has been subjected to much criticism by Members of the Court and, as this internal criticism has mounted, a number of cases have redefined the first two (2)

---

outside the courthouse and anybody can add a display of a different religion, like a Jewish Star of David." *'Look the Other Way': Town Fights Atheist Group on 50-Year-Old Nativity Scene*, Fox New Insider, Dec. 11, 2014, at http://insider.foxnews.com/2014/12/11/look-other-way-indiana-town-fights-atheist-group-50-year-old-nativity-scene (last visited Dec. 15, 2014). Whether or not that is true, the nativity scene is erected by the government and is therefore subject to scrutiny under the Establishment Clause; the government may not immunize its own speech from constitutional purview simply by indicating that others may have the right to engage in similar speech. Indeed, even were the nativity scene erected by a private entity, it would still be subject to scrutiny under the Establishment Clause. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 774-78 (1995) (O'Connor, J., joint controlling opinion); *id.* at 785-86 (Souter, J., joint controlling opinion). *See also, e.g.*, *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018, 1027-28 (S.D. Ind. 2013) (applying the Establishment Clause to the display by a private organization of a series of Latin crosses in a public form), *appeal dismissed*, 759 F.3d 639 (7th Cir. 2014).

prongs under a so-called "endorsement" test. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *County of Allegheny*, *supra*; *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993). Thus, in *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), the Seventh Circuit noted as follows:

> Following the Court's formal acceptance in *County of Allegheny*, the effect prong of th[e *Lemon*] test has been analyzed under the "perception of endorsement" test developed in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Under this test, the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. When [a court] find[s] that a reasonable person could perceive that a government action conveys the message that religion or a particular religious belief is *favored* or *preferred*, the Establishment Clause has been violated.

Id. at 493 (selected quotations and citations omitted). The endorsement test "dispenses with *Lemon*'s 'entanglement' prong and, combining with an objective version of *Lemon*'s 'purpose' prong with its 'effect' prong, asks whether a reasonable observer familiar with the history and contact of a religious display would perceive it as a government endorsement of religion." *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 608–09 (3d Cir. 2009).

Thus, while the Supreme Court has continued to hold that *Lemon* remains alive and viable, *see, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010), it has been largely supplanted by the endorsement test in challenges to religious displays on public property, *see, e.g.*, *Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004) ("[T]he endorsement test modifies *Lemon* in cases involving religious displays on public property."). Under this rubric, the religious display at issue in this case is plainly unconstitutional. And, even if the traditional *Lemon* test is applied, the display is still unconstitutional.

B. <u>The religious display here constitutes an impermissible endorsement of religion</u>

The "endorsement" test focuses not on the actual benefit bestowed to a religious institution, but on how that benefit is *perceived*. "Every government practice must be judged in its unique circumstances to determine" if there has been an endorsement. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). The issue, therefore, is whether a reasonable observer would deem the transaction to constitute an endorsement of religion. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) (controlling opinion).[2] As the inquiry focuses on whether a person would believe an endorsement has occurred, the analysis is "fluid, and varies from case to case." *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993) (citation omitted). Consequently, the inquiry "necessarily calls for line-drawing; no fixed *per se* rule can be framed.'" *Id.* (same). When it comes to the display on public property of a nativity scene, however, these lines have already been drawn, for that is precisely the issue that the Court faced in *Lynch* and *County of Allegheny*.

> In *Lynch*, the Court upheld a display on public property that consisted of
>
> > many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. . . .

---

[2] The lead opinion in *Pinette* was a four-justice plurality opinion. Both Justice O'Connor and Justice Souter wrote separate concurrences (joined both by each other and by Justice Breyer). As the narrowest opinions necessary to the Court's judgment, these separate concurrences—which largely mirror one another—are therefore jointly the controlling opinions. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Grosjean v. Bommarito*, 302 Fed. App'x 430, 436 n.1 (6th Cir. 2008) ("Under the *Marks* doctrine, it appears that the concurring opinions of Justice Souter and Justice O'Connor were the more narrow, and therefore controlling, grounds for judgment in" *Pinette*.) (internal citation omitted); *Cabral*, 958 F. Supp. 2d at 1027 n.10 ("As the narrowest opinions necessary to the Court's judgment, [Justice O'Connor's and Justice Souter's concurrences] become the controlling opinions [in *Pinette*].").

> The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'.

465 U.S. at 671 (plurality opinion); *see also id.* at 691-94 (O'Connor, J., concurring). Notwithstanding "the religious and indeed sectarian significance of the crèche," its presence in a holiday display did not run afoul of the Establishment Clause insofar as "the overall . . . setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring).

By contrast, the Court in *County of Allegheny* held unconstitutional the display of a crèche by a private organization inside a county courthouse even though the display also contained "red and white poinsettia plants," "a small evergreen tree, decorated with a red bow," and a sign indicating that the display had been donated by the private organization. 492 U.S. at 580. Under these circumstances, the Court concluded that,

> unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display composed a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display in the Grand Staircase.

Id. at 598. While "*Lynch* teaches that government may celebrate Christmas in some manner in form, but not in a way that endorses Christian doctrine," the display in *County of Allegheny* "transgressed the line": the county had "chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message," and "nothing more is required to demonstrate a violation of the Establishment Clause." *Id.* at 601-02.

The only issue in this case, therefore, is whether the nativity scene on the Courthouse lawn is more akin to the display at issue in *Lynch* or that in *County of Allegheny*. That is not a difficult question. Unlike in *Lynch*, the nativity scene here simply is not part of a larger holiday display. To the contrary, it stands by itself directly adjacent to the Courthouse and abutting a busy thoroughfare. Although in recent years a lighted tree and a few reindeer have also appeared on the Courthouse lawn, those are remotely located and have moved around the lawn independent of the nativity. These non-religious elements are not associated with the nativity scene. And, even were that not so, these few non-religious elements "cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display." *Id.* at 599. The display represents the unconstitutional endorsement of religion.

C. The display has a religious purpose and its principal effect is religious

As noted, even if the traditional *Lemon* test is applied, the County's display of the nativity scene violates the first two (2) prongs of the traditional *Lemon* test.

1. The religious display has no secular purpose

First, the display of a religious crèche on public property, without the presence of any notable secular symbols, has no secular purpose. *Lemon*, 402 U.S. at 612-13. Under this prong of the *Lemon* test, government action will be deemed unconstitutional "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *see also, e.g.*, *Cammack v. Waihee*, 932 F.2d 765, 774 (9th Cir. 1991).

> The general rule when attempting to determine the purpose behind a government action is to consult and to defer to the stated purpose of the action. While the secular purpose need not be the exclusive purpose for taking the action, it must be sincere and not a sham to avoid a potential Establishment Clause violation. Since the avowed purpose may not be a 'sham,' courts have looked at both the context of the display as well as the content of the display to determine if the purpose is in fact secular.

Indiana Civil Liberties Union Inc. v. O'Bannon, 110 F. Supp. 2d 842, 849 (S.D. Ind. 2000) (internal citations omitted), *aff'd*, 259 F.3d 766 (7th Cir. 2001). While this is certainly a demanding standard, it is one that is met in this case: after all, given the nature of the religious symbol, the motivation underlying its display seems self-evident. Moreover, when governmental action is religious on its face, the burden of demonstrating a secular purpose rests on the government. *See Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995). And carrying this burden requires more than "the mere existence of some secular purpose": "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). The County cannot carry its burden.

In media reports dating back to as early as 2010, one of the County's commissioners was quoted as insisting that FFRF's intervention demonstrated that the organization was "serious about limiting our Christian values that we have." *Group Demands County Remove Nativity – Or Add Santa*, WLWT5, Dec. 11, 2010, *at* http://www.wlwt.com/Group-Demands-County-Remove-Nativity-Or-Add-Santa/10451938 (last visited Dec. 15, 2014). That same year, the commissioner was quoted as indicating that the nativity scene "reflects the beliefs of the largely Christian community." *Commissioner says Brookville nativity scene staying put*, Fox 19, Dec. 20, 2010, *at* http://www.fox19.com/Global/story.asp?S=13712688 (last visited Dec. 15, 2014). And this year, the same commissioner was quoted as follows in remarks given at a rally concerning the display of the nativity scene:

> If we don't start standing up for our rights, we're going to lose them. The atheists and the liberals are taking over our country. They are the ones demonstrating and doing everything, and we're the ones sitting back and doing nothing.
>
> Pretty soon, one morning we're going to wake up and our freedoms are going to be gone. We'll have a socialist government or a dictator telling us what to do.

We'll lose our right to believe in God and our right to go to worship everyday.

John Estridge, *God is with us, those at rally told*, Dec. 10, 2014, *at* http://www.whitewaterpub.com/AAAissues/brookville/2014/50/story01.php (last visited Dec. 15, 2014).

No person who comes into contact with the crèche will be under the misconception that it is a secular symbol, and the County cannot argue to the contrary. *Cf. O'Bannon*, 110 F. Supp. 2d at 850–51 (citing several cases for the proposition that the display of the Ten Commandments has no valid secular purpose and, in so doing, relying on the fact "that the Ten Commandments is undeniably a sacred text"). Its display is plainly religious, and it violates the first prong of *Lemon*. *Cf., e.g.*, *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 495 (2d Cir. 2009) (concluding that religious brochures on the counter of a post office "fail spectacularly under the first inquiry of *Lemon*").

2. The principal effect of the religious display is religious in nature

Under the second prong of the *Lemon* test, courts ask, "irrespective of the . . . stated purpose, whether accepting th[e] monument for display . . . has the primary effect of conveying a message that the [government] is advancing or inhibiting religion." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 772 (7th Cir. 2001). The Seventh Circuit has made clear, however, that at least in the context of religious displays this inquiry merges with the endorsement inquiry detailed above. *See id.* ("The question [under the 'effects' prong] is: would a reasonable person believe that the display amounts to an endorsement of religion?"). Unlike in *O'Bannon*, however—or in other cases concerning the display of religious monuments in the context of a larger display including secular texts or historic perspective, *see O'Bannon*, 110 F. Supp. 2d at 854–56 (describing a series of such cases)—the County here cannot argue that other factors "help neutralize any religious message emanating from the [monument]." 259 F.3d at

772. The bottom line is that, when viewing a nativity scene immediately adjacent to a County Courthouse, "[a] reasonable person will think religion" and "[n]othing in the context of the monument itself or the surrounding grounds mitigates the religious message conveyed." *Id.* at 773.

As described in greater detail above, the display has the principal effect of advancing religion.[3]

The Remaining Factors for the Entry of a Preliminary Injunction are Met

I. Absent immediate relief, the plaintiffs will suffer irreparable harm for which there is no adequate remedy at law

Absent a preliminary injunction the plaintiffs will suffer irreparable harm for which there is no adequate remedy at law. Of course, at this point it is well-established that the denial of constitutional rights is irreparable harm in and of itself. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *see also, e.g.*, *Cohen v. Coahoma County, Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). Indeed, in the First Amendment context, the Supreme Court has noted specifically that the

[3] The third and final prong of the *Lemon* test asks whether a religious display constitutes an excessive entanglement between the government and religion. In order to determine whether a display satisfies this prong, courts generally look to a variety of factors. These include (a) "evidence of contact with church authorities concerning the content or design of the exhibit"; (b) whether "expenditures for maintenance of the [exhibit] have been necessary"; and (c) the extent of the "tangible material" that the government contributes to the display. *See Lynch*, 465 U.S. at 684. Given that this prong of the *Lemon* test typically requires "comprehensive, discriminating, and continuing [governmental] surveillance" or "enduring entanglement," *Lemon*, 403 U.S. at 619–22; *see also Lynch*, 465 U.S. at 684, this prong is rarely met. Nonetheless, the plaintiffs reserve their right to argue that information adduced during discovery reveals unconstitutional entanglement as well.

violation of the First Amendment, for even "minimal periods of time," is "unquestionably . . . irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *See also, e.g.*, *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (applying same principle to Establishment Clause context); *Tanford v. Brand*, 883 F. Supp. 1231, 1237 (S.D. Ind. 1995) (same).

There is no adequate remedy at law that can address this irreparable harm. *See, e.g.*, *Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) (holding that "money damages are [an] inadequate" remedy for the loss of First Amendment freedoms). Absent an immediate injunction, the plaintiffs will be forced to endure the continuing violation of their constitutional rights. Nothing more need be demonstrated.

II. The balance of harms and the public interest favor an injunction

As with the irreparable harm requirement, courts apply a *per se* rule as to the remaining preliminary injunction factors once a plaintiff demonstrates a likelihood of success on the merits: "[v]indication of constitutional freedoms is in the public interest." *See, e.g.*, *McIntire v. Bethel Sch.*, 804 F.Supp. 1415, 1429 (W.D. Okla. 1992). The public has a significant interest in ensuring that local governmental bodies comply with the First Amendment. Moreover, the County may not contend that requiring it to comply with constitutional norms is harmful.

The Injunction Should Be Issued Without Bond

The issuance of a preliminary injunction will not impose any monetary injuries on the County. In the absence of such injuries, no bond should be required. *E.g.*, *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). To require a bond in the present case would be to condition the exercise of the plaintiffs' constitutional rights on their ability to pay. No bond should be required.

CONCLUSION

For the foregoing reasons, the County should be enjoined to immediately remove the challenged display from public property.

/s/ Gavin M. Rose
Gavin M. Rose,
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
fax: 317/635-4105
grose@aclu-in.org

Rebecca S. Markert
Motion for admission pro hac vice to be filed
Sam Grover
Motion for admission pro hac vice to be filed
Freedom from Religion Foundation
P.O. Box 750
Madison, WI 53701
608/256-8900
fax: 608/204-0422
rmarkert@ffrf.org
sgrover@ffrf.org

Attorneys for the plaintiffs

CERTIFICATE OF SERVICE

I hereby certified that a true copy of the foregoing was filed electronically on this 16th day of December, 2014. Parties may access this filing through the Court's electronic system. I further certify that a true copy of the foregoing was sent to the following parties by first-class U.S. mail, postage pre-paid, on this 16th day of December, 2014.

Franklin County, Indiana
c/o County Commissioners
Franklin County Government Center
1010 Franklin Ave.
Brookville, IN 47012

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law