IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Nos. 17-1591 and 17-1683

FREEDOM FROM RELIGION FOUNDATION, *et al.*,	)	
Plaintiffs/Appellees and Cross-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana
v.	)	Cause No. 3:15-cv-00463-JD-CAN
CONCORD COMMUNITY SCHOOLS,	)	The Honorable Jon E. DeGuilio, Judge
Defendant/Appellant and Cross-Appellee.	)	

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Cause No: Nos. 17-1591 and 17-1683

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Freedom From Religion Foundation – none; all others – N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Freedom From Religion Foundation – none; all others – N/A

Attorney's Signature: /s/ Gavin M. Rose Date: June 29, 2017

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Attorney's Printed Name: **Ryan Jayne**

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Attorney's Printed Name: **Heather L. Weaver**

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Attorney's Signature: /s/ Daniel Mach Date: June 29, 2017

Attorney's Printed Name: **Daniel Mach**

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction of this case pursuant to 28 U.S.C. § 1331. Federal-question jurisdiction was premised on an alleged violation of the First Amendment of the United States Constitution.

The Court of Appeals has jurisdiction of these consolidated appeals pursuant to 28 U.S.C. § 1291. The final judgment from which these appeals are taken was issued on March 7, 2017, and followed the entry of partial summary judgment in favor of the defendant on September 14, 2016 and partial summary judgment in favor of the plaintiffs on March 6, 2017. No motion for a new trial or alteration of the judgment or any other motion that would have tolled the time to appeal was filed. The plaintiffs' notice of appeal was filed on March 21, 2017, and the defendant's notice of cross-appeal (treated here as the principal appeal) was filed on March 31, 2017. These are not appeals from the decision of a magistrate judge.

STATEMENT OF THE ISSUES

This case concerns three versions of a religious performance staged annually by Concord High School ("the School") as a part of its "Christmas Spectacular." In the first version, a twenty-minute performance staged for 45 years before the initiation of this lawsuit, a faculty member recited the story of the birth of Jesus as it appears in the New Testament while students portrayed the biblical figures present at the Nativity and musical groups performed religious hymns. After the plaintiffs sought preliminary

relief, the School modified this version by (a) omitting the lengthy scriptural reading and (b) including two brief songs that it believed (erroneously in the first case) pertinent to other winter holidays—Hanukkah and Kwanzaa—although the twenty-minute musical telling of the story of the birth of Jesus, complete with a "living nativity," would remain otherwise unaltered. The district court held that each of these versions violates the Establishment Clause of the First Amendment to the United States Constitution, and the School does not challenge this holding on appeal.

In response to the preliminary injunction, the School created the current version of this religious event. Like the second version, this version includes two brief songs pertinent to other holidays, and it also includes a short narrative prefacing the performance of each song. Additionally, the nativity scene no longer relies on student actors (instead employing mannequins) and is on stage for less than three minutes. But the grand finale of the Christmas Spectacular remains a 24-minute-long musical telling of the story of the birth of Jesus, replete with religious symbolism, that—unlike any other performance during the show—is staged by multiple musical groups filling the auditorium.

The questions presented are as follows:

1. Whether the district court erred in concluding that the current version of the Christmas Spectacular's religious performance does not violate the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether the district court correctly held that the plaintiffs' challenges to the first two versions of the religious performance were not moot, given that the School offered only "water cooler" conversations in its effort to meet the "rigorous" standard for demonstrating that a claim has been rendered moot through voluntary cessation of unconstitutional conduct.

3. If the plaintiffs' challenges to the first two versions of the religious performance *are* moot, whether the district court nonetheless has jurisdiction to award the plaintiffs nominal damages for their past exposure to these events.

STATEMENT OF THE CASE

I. Background to the "Christmas Spectacular" and the versions of the event that resulted in the preliminary injunction

A. Background to the Christmas Spectacular

Concord Community Schools operates several public schools, including Concord High School ("the School"), in and around Elkhart, Indiana. (ECF No. 35-1 at 3).[1] For nearly half a century, toward the beginning of each winter trimester the School's

[1] ECF No. 35-1 is the transcript of the deposition of Scott Spradling, who was deposed as the designate of the defendant pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. As set forth below, Mr. Spradling described at length the musical performances at the heart of this case. These performances are also described, in similar terms, by the plaintiffs who have attended or participated in them. (*See* ECF No. 13-2 [Aff. of John Doe]; ECF No. 13-3 [Aff. of Jack Doe]; ECF No. 52-2 [Supp. Aff. of John Doe]; ECF No. 52-3 [Supp. Aff. of Jack Doe]; ECF No. 52-4 [Supp. Aff. of John Roe]; ECF No. 52-5 [Supp. Aff. of John Noe]). For ease of presentation, and for the sake of avoiding duplication, except where necessary citations to the record are only made to Mr. Spradling's deposition.

All record citations are made to the page numbers assigned by the district court's electronic filing system, rather than to any internal pagination.

Performing Arts Department has produced a so-called "Christmas Spectacular." (*Id.* at 5). The Christmas Spectacular is staged by the Performing Arts Department and features performances both by students enrolled in elective, for-credit performing arts classes that meet during the school day (co-curricular groups) and those who participate in groups that meet after school hours (extra-curricular groups). (*Id.* at 4). Co-curricular groups include several bands and choirs, a dance team, and the School's orchestra; extra-curricular groups include a small chamber ensemble and, in the past, have included a second dance team. (*Id.*). Approximately 600 of the School's 1,700 students participate in the Performing Arts Department each year, and every group within the Performing Arts Department performs during the Christmas Spectacular. (*Id.*).

In planning for the Christmas Spectacular, faculty members within the Performing Arts Department meet in or around August of each year to establish a theme for that year's show. (*Id.* at 8). Past themes have included, for instance, "Joy to the World" (2014) (ECF No. 35-7 at 1), "It's a Wonderful Life" (2011) (ECF No. 35-4 at 1), and "Believe" (2010) (ECF No. 35-3 at 1). Most of the pieces to be performed are selected by the faculty members that lead each group, based "loosely" on the established theme for that year. (ECF No. 35-1 at 7-8; ECF No. 13-2 at 3; *see also* ECF Nos. 35-3 through 35-7 & 36-3 through 36-7 [programs]). For instance, the following songs (among others) were presented during the 2014 Christmas Spectacular: "Here

Comes Santa Claus"; "Last Christmas"; "Christmas Time is Here"; a mash-up of "Walking in a Winter Wonderland" and "Don't Worry, Be Happy"; and "Let It Snow." (ECF No. 35-7 at 20; *see also* 2014 Video [ECF No. 14]).[2] During the 2015 Christmas Spectacular, the following songs (among others) were presented: "Almost Christmas"; "Text Me Merry Christmas"; "Jingle, Jangle Bells"; and "Parade of the Wooden Soldiers." (ECF No. 35-8 at 1; *see also* 2015 Video [ECF No. 53]).

Since the inception of the Christmas Spectacular, however, the grand finale of the show has always been overtly religious in nature, although the 2015 and 2016 versions of this religious performance were modified slightly from previous years. (ECF No. 35-1 at 5, 9). Unlike the non-religious aspects of the show, in which the pieces to be performed are selected by individual faculty members, the pieces to be performed during this finale—discussed at length below—are not selected by individual faculty members but by the Director of Music for Concord Community Schools. (*Id.* at 7). These songs have remained largely consistent over the years, although occasionally one or two songs might be rotated in or out of the program. (*Id.*).

Rehearsals for the Christmas Spectacular begin in October or November

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[2] Video recordings of both the 2014 Christmas Spectacular and the 2015 Christmas Spectacular were manually filed with the district court and are in the record. (ECF Nos. 14 & 53). For ease of presentation, these recordings are referenced throughout this brief simply as the "2014 Video" and the "2015 Video." Where specific segments of these videos are relied upon, they are cited by the time-stamp on the video where they appear. In order to view the video of the 2015 event, on the opening screen it is necessary to click either on "The Magic of the Season" (for the show before intermission) or "The Spirit of the Season" (for the religious performance after intermission).

(depending on the group) (*id.* at 8-9; ECF No. 13-3 at 3), and largely occur at the School during the period when each group normally meets, including during co-curricular periods that are a part of the school day (ECF No. 35-1 at 14-15). In addition to these rehearsals, "run throughs"—in which the entire Christmas Spectacular is rehearsed from beginning to end—occur after school. (ECF No. 35-1 at 15). All rehearsals are led by various faculty members in the Performing Arts Department. (ECF No. 13-3 at 3). The actual performances of the Christmas Spectacular take place in the School's auditorium. (ECF No. 35-1 at 13). Each year, five performances are staged: four public performances over the course of one weekend (two on Saturday and two on Sunday), and one school-day performance on the preceding Friday. (*Id.* at 13-14). The school-day performance is attended by elementary-school students from other schools operated by Concord Community Schools, who are bussed to the School to attend the event. (*Id.* at 14). The public performances, as opposed to the school-day performance, are open to students, faculty, family members, and members of the community at large, and are typically attended by thousands of people each year. (*Id.*; ECF No. 13-2 at 3).

B. The religiously charged Christmas Spectacular performances before the preliminary injunction, and the district court's injunction

1. The performance before the initiation of this lawsuit

For forty-five years, prior to 2015, *every* performance of the Christmas Spectacular ended with an approximately twenty-minute recitation of the biblical story of the birth of Jesus Christ, including a living nativity scene and a scriptural reading

from the New Testament. (ECF No. 35-1 at 5-6; ECF No. 13-2 at 4). During this segment, students at the School portrayed the Virgin Mary, Joseph, the Three Wise Men, shepherds, and angels, and a doll was used to portray the Baby Jesus. (ECF No. 35-1 at 5). Portraying these biblical figures, the students gathered on stage with a stable set piece, which included a manger and the Star of Bethlehem:

(ECF No. 13-2 at 4; *see also* ECF No. 13-2 at 9-14 [photographs available through the webpage of Concord Community Schools]).

While students portrayed the various characters present in the story of the birth of Jesus, a faculty member (acting as narrator) recited the story verbatim as it appears in the New Testament (reading Luke 2:6-14 and Matthew 2:1-11). (ECF No. 35-1 at 6; ECF No. 13-2 at 4; *see also* ECF No. 36-1 [Pre-2015 Script]). At the same time, other students

performed various religious hymns—either singing or instrumentally—that specifically relate to the biblical story, such as "Christ in the Manger," "Silent Night," and "Hark! The Herald Angels Sing." (ECF No. 35-1 at 6-7; ECF No. 13-2 at 4). These hymns were performed by the School's various musical groups, which were placed throughout the auditorium, including to the side of the stage and in the aisles of the auditorium:

(ECF No. 13-2 at 4; *see also* ECF No. 13-2 at 10-13 [photographs]). All of the School's choirs, as well as one of its concert bands and one of its string orchestras, performed during the living nativity. (ECF No. 35-1 at 7; ECF No. 35-7 at 20).

Until 2015, the "living nativity" appeared fundamentally the same each year, although the specific religious hymns performed during the nativity changed slightly

over the years as the School identified religious music or arrangements that it preferred. (ECF No. 35-1 at 5-6). And, for forty-five years a faculty member recited the story of the birth of Jesus as it appears in the New Testament. (*Id.* at 6). In fact, each written program described this portion of the Christmas Spectacular under the heading "The Story of Christmas." (*E.g.*, ECF No. 35-3 at 19; ECF No. 35-4 at 18; ECF No. 35-5 at 8).

2. The changes to the performance following the initiation of this lawsuit and the issuance of the preliminary injunction

After receiving a complaint about the Christmas Spectacular from one of its members, in August 2015 the Freedom From Religion Foundation ("FFRF") sent a letter to the Superintendent of Concord Community Schools expressing FFRF's concern about the constitutionality of school officials incorporating the nativity scene and the story of the birth of Jesus into the Christmas Spectacular. (ECF No. 13-4 at 2-3, 6-7). In response, the Superintendent defended the practice, refusing to bring it to an end. (ECF No. 13-2 at 5-6, 13). Thus, on October 7, 2015, FFRF—along with one of its members (John Doe) and his son, a student at the School who participated in one of the musical groups performing during the grand finale of the Christmas Spectacular (Jack Doe)—filed their Complaint for Declaratory and Injunctive Relief and Nominal Damages (ECF No. 1). Their Motion for Preliminary Injunction was filed on October 22, 2015 (ECF No. 13).

Following the filing of the preliminary-injunction motion but before the issuance of a preliminary injunction, the School initially made only two small changes to the

religious programming to be presented during the 2015 Christmas Spectacular. (ECF No. 35-1 at 9). The *only* change initially made to the "living nativity" itself was that no one would recite from the New Testament. (*Id.*). However, as with past performances, the School still intended to rely on students to portray biblical figures; the "living nativity" would still be the only performance staged by numerous groups within the Performing Arts Department; and the "living nativity" would still be the centerpiece of the 20-minute-long grand finale of the show. (*Id.*). On top of this, the School added two short performances to its program: one instrumental piece ("Ani Ma'amin") intended to represent Hanukkah; and one foreign-language song ("Harambee") intended to represent Kwanzaa. (*Id.* at 9-10; ECF No. 35-8 at 2).

"Ani Ma'amin" is, as indicated, a strictly instrumental piece and would be performed only by the Chamber Strings, one of the School's orchestras. (ECF No. 35-1 at 9). During this performance, the only students on stage would be the musicians who participate in the Chamber Strings, although the School initially considered using nearby video screens to show images associated with Hanukkah (such as a menorah). (ECF No. 35-1 at 10). Although "Ani Ma'amin" no doubt represents the Jewish faith, it pertains not to Hanukkah specifically but rather to the thirteen principles of Jewish law. *See* Rabbi Steven H. Resnikoff, Jewish Law: Duties of the Intellect, 1 Univ. St. Thomas L.J. 386, 391-92 (2003). "Harambee," on the other hand, would be performed by the School's Symphonic Choir and is not strictly instrumental although it is also not

performed in English. (ECF No. 35-1 at 11).

At the Rule 30(b)(6) deposition in this case, the School's designate testified that he intended the changes to the 2015 version of the event to be permanent. (*Id.* at 13). However, on December 2, 2015, the district court issued its Opinion, Order, and Preliminary Injunction, in which it enjoined 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." (ECF No. 40 at 23).

II. The School's response to the preliminary injunction and the current version of the Christmas Spectacular[3]

In response to the preliminary injunction, the primary change that the School made to its intended 2015 performance was to employ life-sized figurines or mannequins to portray biblical figures on stage rather than to rely on students to play-act the Nativity. (ECF No. 52-2 at 2; ECF No. 52-4 at 3; *see also* 2015 Video at 1:39:17). Given that the plaintiffs' cross-appeal concerns exclusively this performance, it is described at length. The video of this performance is, again, in the record.

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[3] The record in this case was developed during summary-judgment proceedings that pre-dated the 2016 Christmas Spectacular (as well, of course, as the Christmas Spectacular in future years). Nonetheless, in response to interrogatories, the School indicated that, in the event that the preliminary injunction was made permanent and the performance that was staged in 2015 was not separately enjoined, it did not anticipate making significant changes to the religious portion of the program in future years. (ECF No. 52-7 at 2). It is thus clear that the School intends in future years to stage the religious aspects of the Christmas Spectacular substantially identically to the manner in which they were staged in 2015. This version of the event is therefore referenced simply as the "current version."

The entirety of the Christmas Spectacular after intermission is devoted to performances concerning three winter holidays. Immediately following intermission, "Ani Ma'amin" and "Harambee" are performed by the Chamber Strings and Symphonic Choir, respectively. (2015 Video at 1:13:22 through 1:22:36). Each performance is prefaced by a two- or three-sentence oral announcement providing very basic information concerning Hanukkah and Kwanzaa, followed by a one-sentence description of each song: the narratives last 40 and 38 seconds, respectively. (*Id.* at 1:13:22 & 1:18:17). Notwithstanding the fact that, in advance of the preliminary-injunction decision, the School had indicated that it was contemplating the use of video screens behind the performers to display images associated with each holiday, in reality no such images are displayed during the performance of "Ani Ma'amin (*id.* at 1:13:22 through 1:18:08), although the video screens are utilized during the performance of "Harambee" (*id.* at 1:18:09 through 1:22:36). These two performances combined—the former instrumental and the latter in a foreign language—last just over nine minutes.

After "Harambee" concludes, the Symphonic Choir remains in the center of the stage, although both wings of the stage are immediately illuminated to reveal that the Symphonic Choir has been joined by two other choirs, each clad in a solid color reminiscent of a church choir. (*Id.* at 1:22:50). The three choirs, comprising well over one hundred students and with an unseen instrumental group, then perform a rowdy rendition of "One Amazing Night," a song that the School's Rule 30(b)(6) designate

indicated was not particular to any religion (ECF No. 35-1 at 11) but whose lyrics speak for themselves:

> The angel voices sang a jubilee / One amazing night.
> Shepherds hurried on their way to see / One amazing sight.
> The wise men came to worship Him / By following a star.
> And we still come to worship Him / By following our hearts.
>
> All the wonder of the ages / Came to earth in that one night.
> All the mercy of the Father / Came to us in that one life.
> All the wonder of the ages / Came to earth in that one night.
> All the mercy of the Father / Came to us in that one life.
>
> All the power, all the glory / All the music, all the light.
> Came to earth in one amazing Gift / One amazing night.

(2015 Video at 1:22:25 through 1:26:35). The oral narrative concerning Christmas, unlike the narratives accompanying the performances of "Ani Ma'amin" or "Harambee," is incorporated into the nine-song set (it follows "One Amazing Night" and precedes the remaining eight) and provides significant detail into the birth, life, and death of Jesus Christ:

> 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 barn 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.

(ECF No. 36-2 at 2; *see also* 2015 Video at 1:26:35). The remainder of the event is then a

lengthy assortment of religious hymns that specifically relate to the nativity story, performed by multiple groups within the Performing Arts Department. (ECF No. 35-8 at 2).

This assortment begins with the celebratory opening refrain to "A Medieval Christmas," which is set to the backdrop of multiple decorated Christmas trees (2015 Video at 1:27:30 through 1:27:42), before continuing with a series of hymns that the district court on preliminary injunction described as conveying "solemnity and reverence" (ECF No. 40 at 16): "Angels We Have Heard on High" is first performed by the Concord Singers while the auditorium is dark and the only visual is a religious figure intended to emulate the stained glass of a church (2015 Video at 1:30:12 through 1:32:19); the lights remain dimmed as the orchestra performs an instrumental version of "O Little Town of Bethlehem" (*id.* at 1:32:20 through 1:33:49), and only when multiple choirs again take the stage to perform "Jesus, Jesus, Rest Your Head" ("Jesus, Jesus, rest your head / You have got a manger bed / All the evil folk on earth / Sleep in feathers at their birth.") is the auditorium again lit (*id.* at 1:33:50 through 1:36:59). A piano soloist then performs a song titled "Stars Were Gleaming" (*id.* at 1:37:00 through 1:39:03), which, although strictly instrumental as presented, also pertains to the birth of Jesus. *See* Church of Jesus Christ of Latter-Day Saints, *Children's Songbook: Stars Were Gleaming, at* https://www.lds.org/music/library/childrens-songbook/stars-were-gleaming?lang=eng (last visited June 1, 2017).

After this performance, the lights are dimmed again until a traditional nativity scene is unveiled on stage, resulting in a lengthy ovation from the audience. (2015 Video at 1:39:04 through 1:39:37). The following is taken from the video of the performance:

(*Id.* at 1:39:17). The nativity remains the only visible element as one of the choirs, unseen, performs a somber version of "O Holy Night." (*Id.* at 1:39:38 through 1:41:08). Several choirs and the orchestra then combine to perform "Peace, Peace" (*id.* at 1:41:09 through 1:44:04)—another reverent piece that features also the lyrics to "Silent Night"—before hundreds of musicians fill the stage (and surrounding areas) to perform a jubilant rendition of "Hark, the Herald Angels Sing," which leads directly into an equally celebratory version of "Joy to the World" as the lights go up and the audience finally applauds (*id.* at 1:44:05 through 1:46:40).

All told, this musical telling of the story of the birth of Jesus Christ lasts more than twenty-four minutes.

III. The plaintiffs and their objections[4]

At the time that this case was litigated in the district court, Jack Doe was a minor student at the School who was actively involved in the Performing Arts Department. (ECF No. 13-3 at 2). He performed during the Christmas Spectacular from 2014 through 2016 (ECF No. 13-3 at 3; ECF No. 52-3 at 2, 4), and, in addition to performing in other elements of the Christmas Spectacular, was required to perform one or more of the religious hymns that are part of the nativity scene and the portrayal of the story of the birth of Jesus Christ (ECF No. 13-3 at 5; ECF No. 52-3 at 2, 4). He thus participated in the nativity portion of the event seven times in 2014 and another seven times in 2015 (five performances and two rehearsals each year). (ECF No. 52-3 at 4). Jack Doe loves performing and greatly valued his participation in the performing arts and in the non-religious aspects of the Christmas Spectacular, an event for which he spent months rehearsing each year. (ECF No. 13-3 at 2-4).[5]

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[4] Following the issuance of the preliminary injunction in this cause, the plaintiffs filed their Amended Complaint for Declaratory and Injunctive Relief and Nominal Damages (ECF No. 45). In pertinent part, the amended complaint added John Noe and John Roe as plaintiffs. All individual plaintiffs are proceeding pseudonymously. They are doing so, after briefing, with the permission of the district court and without objection from the School. (ECF Nos. 37 & 49).

[5] Jack Doe graduated in 2017, during the pendency of this appeal, and is therefore no longer a student at the School. This does not, however, affect the justiciability of his claims, both because he continues to seek (and was awarded) his nominal damages and because he will

John Doe is the father of Jack Doe, and attended the Christmas Spectacular from 2014 through 2016 in order to support his son. (ECF No. 13-2 at 2-3; ECF No. 52-2 at 2, 4). John Roe is also the father of a student who performed during the Christmas Spectacular from 2014 through 2016 (including during the nativity program). (ECF No. 52-4 at 1). And, while John Noe did not attend the Christmas Spectacular during 2014 or 2015, one of his family members became actively involved in the School's Performing Arts Department in 2016—he therefore attended the Christmas Spectacular that year. (ECF No. 52-5 at 1-2). The individual plaintiffs each intend to continue attending the Christmas Spectacular in the future, as members of their families will be participating in the event, including during the nativity program. (ECF No. 52-2 at 4; ECF No. 52-3 at 4; ECF No. 52-4 at 5; ECF No. 52-5 at 1).

All of the individual plaintiffs feel marginalized by the School's presentation of a nativity scene and its celebration of the religious aspects of Christmas in each of the three versions of the Christmas Spectacular. (ECF No. 52-2 at 3; ECF No. 52-3 at 2-3; ECF No. 52-4 at 4; ECF No. 52-5 at 3). These presentations impose on the plaintiffs—as well as on students and other members of the audience—specific religious doctrines that do not comport with their religious beliefs. (ECF No. 52-2 at 3; ECF No. 52-3 at 2-3;

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continue attending the Christmas Spectacular in the future in order to support a sibling. (ECF No. 52-3 at 4). In addition, the other individual plaintiffs will also continue to attend the Christmas Spectacular in the future, and have standing to assert their own rights as well as those of their children, *see, e.g.*, *Smith v. Organ. of Foster Families for Equality & Reform*, 431 U.S. 816, 841 n.44 (1977); *Engel v. Vitale*, 370 U.S. 421, 423 (1962).

ECF No. 52-4 at 4; ECF No. 52-5 at 3). With these elements, they believe that the Christmas Spectacular sends the message that students (and their families) who practice and share the Christian faith are favored by the School, while persons such as the plaintiffs are relegated to outsider status. (ECF No. 52-2 at 3; ECF No. 52-3 at 2-3; ECF No. 52-4 at 4; ECF No. 52-5 at 3). John Doe and John Roe also feel that the decision to include a nativity scene and religious story in this event interferes with their rights as parents to direct their children's religious upbringing. (ECF No. 52-2 at 3; ECF No. 52-4 at 4). At the same time, the individual plaintiffs do not feel like they can avoid this portion of the Christmas Spectacular. (ECF No. 52-2 at 3; ECF No. 52-3 at 3-4; ECF No. 52-4 at 4; ECF No. 52-5 at 3-4).

John Doe is also a member of FFRF, a non-profit membership organization dedicated to defending the constitutional principle of the separation between state and church. (ECF No. 13-2 at 2; ECF No. 52-2 at 1; ECF No. 13-4 at 2). FFRF, like the individual plaintiffs, feels that the portion of the Christmas Spectacular consisting of a nativity scene in any of the aforementioned forms greatly marginalizes its members and others who do not adhere to the Christian faith. (ECF No. 13-4 at 3; ECF No. 52-6 at 2). It believes that the performances send the message that students, family members, and members of the community who practice the preferred Christian faith are favored by the School District, while those who do not are outsiders and second-class citizens. (ECF No. 52-6 at 2).

IV. Summary-judgment proceedings, the School's assertion of mootness, and the district court's decisions

On April 29, 2016, the plaintiffs filed their Motion for Summary Judgment (ECF No. 52) and supporting brief (ECF No. 54). In so doing, they sought an injunction against all three versions of the religious performance that the School had presented or sought to present: the version that was presented for nearly half a century through 2014, the version that the School would have presented in 2015 but for the preliminary injunction, and the version that was actually presented in 2015 and would be presented in future years were the injunction not lifted. (ECF No. 54 at 14-15, 30). They also sought their nominal damages for their exposure to the 2014 version of the event. (ECF No. 54 at 30-33). The School responded and filed its Cross-Motion for Summary Judgment on May 27, 2016. (ECF Nos. 55 & 56). While the School defended the constitutionality only of the third iteration of its religious performance, it noted that it was not addressing the first two versions simply because it did not wish to "re-argue" an issue that had been addressed at the preliminary-injunction stage; it "ha[d] not yet determined whether it will challenge that [preliminary-injunction] decision through an appeal" and "preserve[d] all of the arguments made during the preliminary injunction phase of th[e] case." (ECF No. 56 at 3 n.1). At no point during the first round of briefing did the School argue that the plaintiffs' challenges to the first two versions of the event had been rendered moot.

On September 14, 2016, the district court issued its Opinion and Order (ECF No.

62), in which it concluded that the version of the Christmas Spectacular that was staged in 2015 "satisfied each of the Establishment Clause tests" and therefore "did not violate the Establishment Clause." (ECF No. 62 at 37 [Short Appendix of Appellant {"App"} 37]). While it did not revisit its holding on preliminary injunction that the earlier versions of the event *were* unconstitutional, it requested supplemental briefing on two issues (as is pertinent here): (a) whether the requests for injunctive relief pertaining to these versions had been rendered moot by subsequent events establishing that the unconstitutional conduct was not likely to recur; and (b) whether, if these claims were moot, the court nonetheless had jurisdiction to resolve the plaintiffs' claim for nominal damages. (ECF No. 62 at 15-16 [App. 15-16]).

In responding to this request for supplemental briefing, the School asserted for the first time that the plaintiffs' challenges to the pre-2015 versions of the Christmas Spectacular were moot. (ECF No. 63 at 2-5). Although it acknowledged the district court's observation that it was required to meet a "heavy burden" to establish that the voluntary cessation of unconstitutional conduct created mootness, the evidence on which it relied was sparse: an affidavit from its Superintendent recounting conversations immediately after the 2015 event "at the local park, over the water cooler, and across the fence" that "resulted in what appeared to be a consensus that the program was a success and that the changes [in 2015] should be made permanent." (ECF No. 63-1 at 2). The School did not acknowledge in its supplemental brief that, five

months after these water-cooler conversations took place, it informed the district court that it was still contemplating an appeal pertaining to the first two versions of the event.

On March 6, 2017, the district court issued its second Opinion and Order. (ECF No. 70). The court concluded that, given the "unofficial" and non-binding nature of any shift in policy, as well as the "subjective and transitory nature of public opinion" relied on by the School, it had not "met its 'stringent' burden of showing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (ECF No. 70 at 12-13 [App. 49-50] [citation omitted]). The district court therefore had no occasion to reach the issue of whether the plaintiffs' claim for nominal damages alone sufficed to "present a justiciable controversy" (ECF No. 70 at 14 n.2 [App. 51]), and it declared the first two versions of the event to be unconstitutional (but found no need to enter a permanent injunction) and awarded the plaintiffs their nominal damages (ECF No. 70 at 20 [App. 57]).

SUMMARY OF THE ARGUMENT

While the School's appeal concerns the district court's jurisdiction to hear the plaintiffs' challenge to the first two versions of the grand finale of the Christmas Spectacular, the plaintiffs' cross-appeal concerns the constitutionality of the current version of that performance.

1. The current version of the show's finale violates three independent tests under the Establishment Clause of the First Amendment: the coercion test, the

endorsement test, and the purpose test. *See generally Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849-50 (7th Cir. 2012) (*en banc*) (detailing the various tests employed to determine whether governmental action runs afoul of the Establishment Clause).

a. As the U.S. Supreme Court has recognized, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," such that "prayer exercises in public schools carry a particular risk of indirect coercion." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (collecting cases). In light of these "heightened concerns," in *Lee* the Court held unconstitutional prayers during the graduation ceremonies of public schools; applying this holding, the Court likewise invalidated prayers before high school football games, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), and this Court in *Elmbrook* held unconstitutional the practice of simply conducting graduation ceremonies in a church.

The present case cannot be meaningfully distinguished from this authority. For twenty-four minutes, the School employs high school students to stage a musical telling of the story of the birth of Jesus in front of a captive audience of their friends, their family, members of the community, and, once a year, elementary school students from within the district. This grand finale of the Christmas Spectacular stands head and shoulders above any other routine, and neither the enormity nor the religiosity of the performance can be denied. The district court acknowledged that some persons present might "derive[] additional meaning from the presence of the nativity" although it found

this insufficient to create a coercive environment. (ECF No. 62 at 33 [App. 33]). But *Elmbrook* teaches that once the government has created a pervasively religious environment, the mere observance of "classmates . . . meditating on [religious] symbols" is sufficient to create an impermissible coercive dynamic. 687 F.3d at 855. The district court's decision cannot be squared with *Elmbrook*, *Lee*, or *Santa Fe*.

b. The religious performance also violates the endorsement test, which asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the [performance], would perceive it as a state endorsement of [religious activity] in public schools." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment)).

Controlling precedent establishes a distinction between permissible practices that merely "provide public school students with knowledge of Christian tenets" and impermissible practices that "tend to promote religious beliefs" such that "students might feel pressure to adopt them." *Elmbrook*, 687 F.3d at 851. The district court recognized that the first two versions of the Christmas Spectacular traverse this line, and unconstitutionally endorse religious doctrine. In nonetheless upholding the constitutionality of the current version, however, the district court overstated the changes to the performance made in the heat of litigation and did not do justice to the oft-repeated proposition that the reasonable observer is presumed to be "aware of the history and context of the community and forum in which the religious display occurs."

Books v. Elkhart County ("*Books II*"), 401 F.3d 857, 867 (7th Cir. 2005). The current version of the grand finale is nothing more than a 24-minute musical telling of the biblical story of the birth of Jesus. The featured songs are virtually identical to those that have been presented for nearly half a century, and the performance still builds to the unveiling on stage of a nativity scene—a visual that is, of course, iconic to the Christian faith. And this finale continues to overwhelm every other performance of the event, including the two short songs that purportedly concern other winter holidays. In other words, to the reasonable observe the current version of the Christmas Spectacular is business as usual. It is unconstitutional for this reason as well.

c. Finally, the grand finale of the Christmas Spectacular lacks a secular purpose, and thus violates the first prong of the test established by *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). While the district court relied on statements in this Court's precedents indicating that a "secular purpose" need not be the *only* purpose (ECF No. 62 at 34 [App. 34]), the U.S. Supreme Court has repeatedly made clear that governmental activity will run afoul of *Lemon*'s purpose prong even where there exists a secular purpose that is "secondary [to] a predominantly religious one": "the secular purpose . . . has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 865 (2005) (citations omitted). Precedent is also clear that the history of a religious performance is highly probative of its true purpose. *See, e.g., id.* at 866; *Books v. City of Elkhart* ("*Books I*"), 235 F.3d 292, 303

(7th Cir. 2000).

Although the district court found the grand finale of the Christmas Spectacular to be justified as an educational endeavor, this finding "bucks common sense." *McCreary Cnty.*, 545 U.S. at 866. For nearly half a century, the School has presented an emphatically Christian performance—complete with a scriptural reading and a "living nativity" featuring students portraying biblical figures—without any suggestion that it was simply educating onlookers about winter holidays. Even now, notwithstanding the addition of short individual selections purportedly dedicated to other holidays, that religious grand finale remains largely unaltered and continues to stand alone in terms of sheer enormity. The religiosity of the performance cannot be denied, and any secular purpose advanced by the School's eleventh-hour changes to the event is merely secondary to the religious purpose.

2. The School argues in its appeal that, given the changes that it made to its performance in the heat of litigation, the district court erred in reaching the merits of the plaintiffs' challenges to the first two versions of the Christmas Spectacular's grand finale. It does not dispute that it carries a "formidable" burden of demonstrating that its voluntary cessation of unconstitutional conduct has rendered the plaintiffs' challenges moot, *see, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000), for absent the district court's decision it would be "free to return to [its] old ways," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Given this burden, the informality of the School's assurances that it would not revert to previous versions of the religious performance is startling. It relies primarily on literal "water cooler" conversations, recounted by its Superintendent, that resulted in "what appeared to be a consensus that the program was a success and that the changes should be made permanent." (ECF No. 63-1 at 2). The School's argument cannot be reconciled with this Court's decision in *Elmbrook*. *See* 658 F.3d 710, 702 (7th Cir. 2011), *adopted in relevant part by en banc court*, 687 F.3d 840, 842-43 (7th Cir. 2012). There, the defendant offered only "a few scattered representations" that it would not revert to the challenged practice, and "presented no evidence of a formal or even an informal policy change." *Id.* at 720. This did not suffice to render the case moot, even when the Superintendent of the school district and the principals of the two high schools at issue all "represented that they d[id] not intend" to conduct graduation ceremonies at the church again. *Id.* Nor can it be reconciled with the U.S. Supreme Court's holding earlier this week in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ S. Ct. __, 2017 WL 2722410 (June 26, 2017), that even a gubernatorial announcement of a change in policy failed to "make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*, 2017 WL 2722410, at *6 n.1 (alteration and citation omitted).

So too here, and the district court did not err in rejecting the School's mootness argument.

3. Even were the plaintiffs' claims for prospective relief with respect to the first two versions of the grand finale moot, the district court had jurisdiction to award the plaintiffs nominal damages for their past exposure to these unconstitutional performances.

The School's argument to the contrary relies almost entirely on two district-court decisions. However, the vast majority of circuit-level precedent holds squarely that a plaintiff may seek an award of his nominal damages for exposure to unconstitutional conduct, even in the absence of a claim for prospective relief or for compensatory damages. *See generally* 13C Wright & Miller, Federal Practice & Procedure § 3533.3 (3d ed. 1998) ("A valid claim for nominal damages should avoid mootness."); *see also, e.g.*, *Calhoun v. DeTella*, 319 F.3d 936, 941-42 (7th Cir. 2003) ("We long ago decided that, at a minimum, a plaintiff who proves a constitutional violation is entitled to nominal damages."). These holdings flow naturally and inevitably from *Carey v. Piphus*, 435 U.S. 247 (1978), where the U.S. Supreme Court held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 267. The School's argument cannot withstand the weight of this authority, and it must be rejected.

STANDARD OF REVIEW

The standard under which this Court reviews a grant of summary judgment is well established:

> We review grants of summary judgment *de novo*. We construe the evidence in the light most favorable to the non-moving party . . . and give that party the benefit of genuine conflicts in the evidence and all reasonable, favorable inferences. Summary judgment is appropriate when no material fact is disputed and the moving parties are entitled to judgment as a matter of law, meaning that no reasonable jury could find for the other party based on the evidence in the record.

Carman v. Tinkes, 762 F.3d 565, 566 (7th Cir. 2014) (internal citations omitted). This standard applies even where, as here, the parties filed cross-motions for summary judgment. *See, e.g., Int'l Brotherhood of Elec. Workers, Local 176 v. Balmoral Racing Club, Inc.*, 293 F.3d 402, 404 (7th Cir. 2002).

ARGUMENT

I. The current version of the grand finale to the Christmas Spectacular violates the Establishment Clause

A. Background to Establishment Clause analysis

The First Amendment to the United States Constitution 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 U.S. Supreme Court established a three-part test to determine whether governmental action runs afoul of the Establishment Clause: in order to pass constitutional muster, (1) the

action must have a secular purpose, (2) the action must have a principal or primary effect that neither advances nor inhibits religion, and (3) the action must not foster excessive governmental entanglement with religion. *Id.* at 612-13.

In addition to this so-called *Lemon* test, "[t]he Supreme Court has . . . advanced two other approaches by which an Establishment Clause violation can be detected." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*). One approach—termed the "endorsement test"—has its roots in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), and was subsequently adopted by the entire Court in *County of Allegheny*, 492 U.S. at 592-93. Under this test, courts

> ask[] 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.

Freedom From Religion Foundation v. City of Marshfield, 203 F.3d 487, 493 (7th Cir. 2000) (internal quotation and citation omitted) (emphasis in original). This Court has observed that the endorsement test is "a legitimate part of *Lemon*'s second prong." *Elmbrook*, 687 F.3d at 850. The final approach to Establishment Clause jurisprudence is the "coercion test" derived from *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). This test "seeks to determine whether the state has applied coercive pressure on an individual to support or participate in

religion." *Elmbrook*, 687 F.3d at 850. Applying the coercion test, the Supreme Court has emphasized that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *Lee*, 505 U.S. at 592, and the federal courts have thus "been particularly vigilant in monitoring compliance with the Establishment Clause" in the public-school context, *see Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

B. The performance violates the Establishment Clause

Although the district court sought to minimize the religious import of the current version of the Christmas Spectacular's grand finale, this attempt is belied by the overwhelming impact of the event itself. For twenty-four minutes, the School relies on hundreds of high school students to tell the story of the birth of Jesus to a captive audience of their friends, family, and other members of the community. This performance alternates between the celebratory and the reverent before reaching a climax wherein a traditional nativity scene is revealed on stage: it stands apart from every other performance both in terms of its sheer enormity and by the fact that it is presented as a department-wide performance rather than as the performance of a single group. The pure religiosity of this event is at least on par with the school prayers invalidated in *Lee* and *Santa Fe* or the iconography deemed unconstitutional in *County of Allegeny*, *Elmbrook*, and *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), and the School's purpose in presenting the modified version of the performance

is just as illicit as was the governmental purpose in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). Under any test, the current version of the performance is unconstitutional.

1. The performance constitutes unconstitutional religious coercion

Both of the Supreme Court's leading coercion cases—*Santa Fe* and *Lee*—addressed school districts' attempts to introduce their students to religious exercises for brief periods of time during an otherwise secular event. This Court's most recent pronouncement on the issue—*Elmbrook*—also concerned religious exercise incorporated into a school event. The present case cannot be meaningfully distinguished from this authority.

In *Lee*, the Court held unconstitutional a school district's policy of including prayer in its graduation ceremonies. The Court explained the acute coercive pressure on public-school students in that context:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the . . . prayer. That was the very point of the religious exercise. . . . What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. . . . To

> recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

505 U.S. at 593-94. In *Santa Fe*, a policy of permitting student-led prayer prior to high school football games was likewise invalidated. There, too, the Court held that the Establishment Clause simply does not permit a school "to exact religious conformity from a student as the price of joining her classmates at a varsity football game." 530 U.S. at 312 (internal quotation omitted). After all, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," such that "prayer exercises in public schools carry a particular risk of indirect coercion." *Lee*, 505 U.S. at 592 (collecting cases). *See also, e.g.*, *Edwards*, 482 U.S. at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.").

In *Elmbrook*, this body of case law was applied to a school district's use of a church to conduct graduation ceremonies, even though the church was selected to host this event only for secular reasons—because it "had more comfortable seats [than the school gymnasium], air conditioning and ample free parking." 687 F.3d at 844. Noting that that case could not be "meaningfully distinguished" from *Lee* and *Santa Fe*, this Court, sitting *en banc*, concluded as follows:

> Although *Lee* and *Santa Fe* focus on the problem of coerced religious *activity*, it is a mistake to view the coercion at issue in those cases as divorced from the problem of government endorsement of religion in the classroom generally. In fact, they are two sides of the same coin . . . .

> [T]here is an aspect of coercion here. It is axiomatic that "[n]either a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will." The first principle is violated when the government directs students to attend a pervasively Christian, proselytizing environment. Once the school district creates a captive audience, the coercive potential of endorsement can operate. When a student who holds minority (or no) religious beliefs observes classmates at a graduation event taking advantage of Elmbrook Church's offerings or meditating on its symbols (or posing for pictures in front of them) or speaking with its staff members, "[t]he law of imitation operates," and may create subtle pressure to honor the day in a similar manner. The only way for graduation attendees to avoid the dynamic is to leave the ceremony. That is a choice, *Lee v. Weisman* teaches, the Establishment Clause does not force students to make.

Id. at 855-56 (internal citations omitted) (emphasis in original). The bottom line is that "constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom or at events it hosts." *Id.* at 856 (internal citations omitted).

The district court's conclusion that the 24-minute-long grand finale to the Christmas Spectacular satisfies the coercion test does not do justice to these precedents. Each year, the School stages five performances wherein hundreds of students, through musical performances, tell the story of the birth of Jesus. After the opening performance, a narrator provides an oral synopsis of this story, complete with language ("*Our* country's Christmas season" and "the basis for the celebration of two major holidays widely recognized by many throughout the United States and the world") designed to underscore the importance of these events—that contrasts starkly with the cursory introductions afforded the brief performances dedicated to Hanukkah and

Kwanzaa. The musical performances, many consisting of multiple groups, then flow seamlessly into one another, fluctuating between the celebratory and the reverent, until a traditional nativity scene is revealed on stage—indeed, not only is it the only item on stage but it is the only visual in the entire auditorium, for it is separately lit while the remainder of the room is entirely darkened. After another hymn is performed in the darkened auditorium, the stage is again lit to reveal numerous choirs performing "Hark! The Herald Angels Sing." The closing words of the performance are undeniably religious: "Glory to the newborn King."

There is nothing subtle about the religious message conveyed, and the School has quite clearly "create[d] a pervasively religious environment." *Elmbrook*, 687 F.3d at 856. Although the district court found relevance in the supposed lack of "proselytizing materials" and the lack of "any opportunity for students or audience members to engage in any religious activity or observance" (ECF No. 62 at 32 [App. 32]), this emphasis is clearly off-base. For students like Jack Doe and the other children of the adult plaintiffs, participation in the musical telling of a biblical story is coercive in the most literal sense: as a participant in one of the School's many musical groups, the religious activity is a *required* part of their educational experience. And the coercive aspects of this religious activity are not significantly lessened for students, family members, and members of the community (or, for one performance each year, the elementary school students of Concord Community Schools) who attend the Christmas

Spectacular, for they are part of a captive audience as hundreds of their classmates (and children and peers) fill the auditorium with an extensively choreographed version of a pervasively religious story—a performance that overwhelms every other routine in the evening's program, and one that forms the grand finale not only to the Christmas Spectacular but also, in many respects, to the entire fall semester.

"Once the school district creates a captive audience, the coercive potential of endorsement can operate." *Elmbrook*, 687 F.3d at 855. The district court relied on too fine a distinction in emphasizing the fact that students in *Elmbrook* might have been witnessed "taking advantage of [the church's] offerings," for certainly a fellow classmate seen reflecting on a religious hymn or applauding wildly at the mere display of the Nativity just as clearly "create[s] subtle pressure to honor the [occasion] in a similar manner." *Id.* Indeed, the district court's conclusions ultimately cannot sustain themselves, for the court acknowledged that "some of the performers" may have "derived additional meaning from the presence of the nativity during their performance," although it found this insufficient to create a coercive environment. (ECF No. 62 at 33 [App. 33]). But *Elmbrook* teaches that once the government has created a pervasively religious environment, the mere observance of "classmates . . . meditating on [religious] symbols" is sufficient to create an impermissible coercive dynamic. 687 F.3d at 855.

To be sure, the current version of the religious performance no longer includes a

scriptural reading from the New Testament, nor does it rely on students to portray the figures present in the story of the birth of Jesus (though students continue to perform all other aspects of the grand finale). And, to be sure, the nativity scene is displayed for a shorter period of time and the Christmas Spectacular as a whole was primarily secular, even though the visual of the Nativity was still incorporated into the 24-minute telling of the story of the birth of Jesus. But the prayers at issue in *Lee* and *Santa Fe* were doubtless of short duration as well and the events taken as a whole (a football game and a graduation) were not pervasively Christian, and nothing in the Court's decisions suggests that religious activity ceases to be coercive if it is temporally limited or if it only forms a small portion of an otherwise secular event.

Lee, *Santa Fe*, and *Elmbrook* all teach that courts must be particularly vigilant in guarding against religious coercion in the public school setting. The district court failed to heed this teaching, for the current version of the Christmas Spectacular cannot be meaningfully distinguished from this precedent. It runs afoul of the coercion test and the district court erred in holding otherwise.

2. The performance violates the endorsement test

The current version of the religious performance also violates the endorsement test, which asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religious activity] in public schools." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*,

472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment)). "Every government practice must be judged in its unique circumstances to determine" if there has been an endorsement. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

Employing this test, "Establishment Clause jurisprudence has long guarded against government conduct that has the effect of promoting religious teachings in school settings, and the case law has evinced special concern with the receptivity of schoolchildren to endorsed religious messages." *Elmbrook*, 687 F.3d at 851.

> Displaying 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. The concern is that religious displays in the classroom tend to promote religious beliefs, and students might feel pressure to adopt them.

Id. at 851 (internal citation omitted). In *Elmbrook*, the high school graduation ceremony conducted in a church setting, and thus before a backdrop of religious symbolism, was also deemed an unconstitutional endorsement of religious doctrine insofar as "high school students and their younger siblings were exposed to . . . ceremonies that put a spiritual capstone on an otherwise-secular education." *Id.* at 852. The "sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state. That is, the activity conveyed a message of endorsement." *Id.* at 853.

The nativity, of course, is a symbol iconic to the Christian faith—as is the story conveyed by that symbol and told musically through the grand finale to the Christmas

Spectacular. Unlike in *Elmbrook*, these religious symbols are not just passively present during an event hosted by the School. Rather, the story of the birth of Jesus is performed at the behest of the School, by students who participate (oftentimes for credit) in one or more of the School's various performing arts groups, and for an audience consisting of thousands of students, family members, and members of the general public (and, once a year, for elementary-school students). In other words, unlike in *Elmbrook*, here the School directs its students to *engage* with the religious message of the nativity performance and *intends* the performance—and the religious significance of the nativity—to captivate. This is underscored by the unique status that the performance holds (and has always held) among the songs that are performed during the Christmas Spectacular. As indicated, it is presented as the grand finale to the show, a lengthy enactment that stands alone not only by its duration but also by the sheer fact that it represents the only performance consisting of multiple songs and the only performance in which multiple musical groups appear simultaneously.

Nor is this emphasis lessened by the post-litigation decision to add short songs—one instrumental and the other in a foreign language—that purport to represent two other winter holidays, Hanukkah and Kwanzaa. As indicated, the presentation of these songs pales in comparison to the School's tribute to the religious aspects of Christmas: combined, they barely last a third as long as the musical telling of the story of the birth of Jesus. Unlike the presentation devoted to Christmas, the songs representing

Hanukkah and Kwanzaa are each presented by a single musical group with few, if any, recognized visuals to underscore the import of the holiday. They are introduced only in the most cursory fashion rather than with an entire religious story. And, of course, the title of the evening's event—the *Christmas* Spectacular—remains unaltered, and the portion of the event dedicated to the religious aspects of Christmas remains the grand finale to the evening's entertainment. As the district court concluded in issuing a preliminary injunction in favor of the plaintiffs, "when the School places such disproportionate emphasis . . . on the Christmas holiday, and in particular the religious aspect of that holiday through the live depiction of the nativity scene, it adds to the perception that the School is actually endorsing that religion." (ECF No. 40 at 18). *See also, e.g.*, *Cnty. of Allegheny*, 492 U.S. at 593 ("[I]t has been noted that the 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*.") (quotation and citation omitted) (emphasis in original).[6] The decision to rely on mannequins rather than students to portray the Nativity, a change that may

[6] As noted previously, the disproportionate emphasis afforded to the religious aspects of Christmas is underscored by the fact that the song purportedly dedicated to Hanukkah ("Ani Ma'amin") does not, in fact, pertain to Hanukkah at all. The district court discounted this fact entirely by noting in a footnote that "no reasonable observer of the show would be aware of that distinction." (ECF No. 62 at 28 n.12 [App. 28]). As a legal matter, it is not clear that the theoretical "reasonable observer" is so uninformed. But more importantly, the district court's observation that the audience likely does not even understand the message conveyed by the brief portion of the show dedicated to a minority religion only underscores the outsized meaning that the audience doubtless derives from the grand finale of the event, the religious import of which is undeniable.

scarcely be noticed by the audience, does not eliminate the School's endorsement of religion—after all, the vast majority of religious-display jurisprudence concerns lifeless exhibits. *See, e.g.*, *id.* at 579-80; *Books v. Elkhart Cnty.* ("*Books II*"), 401 F.3d 857, 858-59 (7th Cir. 2005); *Books v. City of Elkhart* ("*Books I*"), 235 F.3d 292, 296 (7th Cir. 2000); *City of Marshfield*, 203 F.3d at 489.

At the same time, it is a mistake to rely on this religious-display jurisprudence, as the district court appeared to do, as standing for the proposition that the constitutionality of a religious performance can be assessed by comparing the duration of that performance to the duration of the event as a whole (or even to the duration of other performances within the event). After all, the prayers at issue in *Lee* and *Santa Fe* were no doubt of short duration compared to the graduation ceremony (in *Lee*) or the football game (in *Santa Fe*); and the religious iconography present in *Elmbrook* was likewise only a comparatively small element of an otherwise secular occasion. The fact of the matter is that, while the overall theme of an event no doubt weighs into endorsement analysis, a religious performance may not be viewed as strictly a part of a secular whole in the same manner as the displays in *County of Allegheny* and *Books II*. When each musical group takes the stage at the Christmas Spectacular, its performance has an effect on the audience independent of what came before and what comes after—the performance stands largely on its own footing. That is particularly so in a case such as this, where the religious performance is set apart from the secular performances by

an intermission and where the religious finale stands alone as a department-wide performance rather than as the performance of a singular group. *Cf. O'Bannon*, 259 F.3d at 773 (noting that the placement of a secular text on a different side of a monument from the Ten Commandments "inhibits observers from visually connecting the texts," thus causing the reasonable observer to be "hard-pressed to make any analytical connection between the texts").[7]

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[7] The district court cited four instances in which courts have upheld religious performances as a part of the educational curriculum (*see* ECF No. 62 at 22-23 [App. 22-23]), but each of these cases is highly distinguishable. In *Bauchman ex rel. Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), the Tenth Circuit held generally that the performance of Christian devotional music (in addition to secular music) by a school choir at religious sites did not run afoul of the Establishment Clause given that the song selections generally exhibited a "diverse array" of performances. *Id.* at 555. While there is some doubt as to whether *Bauchman* can be reconciled with this Court's holding in *Elmbrook*, this issue need not be explored here: the present case does not concern a decision by a single choir to perform a religious selection capable of exhibiting the choir's musical talents; it concerns a decision by the School itself, year after year, to use musical selections in order to tell the biblical story of the birth of Jesus.

The district court's reliance on *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980)—a case that pre-dates the endorsement test—is confusing. *Florey* did not concern a specific performance but rather concerned a formal policy statement "recogniz[ing] that one of [the school district's] educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization" and corresponding rules authorizing the observance of holidays with both a religious and a secular basis and allowing music having a religious theme to be included in the curriculum only if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." *Id.* at 1314. In the absence of a specific performance that was alleged to be unconstitutional, the court had no difficulty finding that this policy, on its face, furthered a "secular program of education." *Id.* at 1316-17. The district court's interpretation of this decision as standing for the general proposition "that Christmas carols can be sung at school assemblies" is curious.

The Ninth Circuit in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994), upheld the use of a text that bore a "coincidental resemblance" to "witchcraft ritual," *id.* at 1381, although that case appears to have been relied on by the district court only for the non-

The district court's decision also does not do justice to the history of the Christmas Spectacular: as noted repeatedly, for nearly half a century the *only* holiday celebrated by the event was Christmas, and it was celebrated not only with the image of the Nativity but with a lengthy scriptural reading by a member of the faculty. Not only does endorsement analysis allow courts to examine the history and tradition of a religious performance, but it *requires* them to assume that an observer is "aware of the history and context of the community and forum in which the religious display occurs." *Books II*, 401 F.3d at 867; *see also Santa Fe*, 530 U.S. at 309 (placing substantial weight on "the evolution of the [prayer] policy"). The district court acknowledged this authority but erroneously concluded that the history of the Christmas Spectacular would only serve to underscore the changes made to the current program, thus apparently absolving it of religious significance. (ECF No. 62 at 29-30 [App. 29-30]).

As an initial matter, the changes to the current version of the Christmas Spectacular appear to have been overstated: the musical pieces currently presented are

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controversial general proposition that "[s]ome student participatory activity involving school-sponsored ritual may be permissible . . . where the activity is used for secular pedagogical purposes," *id.* at 1380 n.6. And, while the district court in *Doe v. Wilson County School System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008), did uphold "a brief two minute nativity scene at the end of a twenty-two minute Christmas program put on at the school by . . . kindergarten students," *id.* at 800, that holding does not appear to have been relied on by any court other than the district court below and it stands on questionable footing given the religious nature of this performance by kindergartners. But even were that not so, the *Wilson County* court's holding was premised on its finding that the secular portions of the program were "much more of an extravaganza with more student participation and fanfare than the rather meager, stark nativity scene placed at the very end," *id.*—but here, it is the *religious* aspects of the Christmas Spectacular that are out-sized.

virtually identical to those presented under the guise of telling "The Story of Christmas" in previous years (*compare* ECF No. 33-8 at 20 *with* ECF No. 36-2 at 2), and the revealing of the visual of the nativity still forms the climax of the performance. But even were that not so, the district court's holding would be applicable to virtually any case in which a governmental entity changes policies mid-stream. The school's eleventh-hour decision in *Santa Fe* to change a policy permitting prayer to a policy permitting "messages" or "statements" was deemed unpersuasive, *see* 530 U.S. at 309; so too here. The proverbial "reasonable person" observing the current version of the Christmas Spectacular will be eminently familiar with the half-century tradition of that event. To a reasonable observer acquainted with the School's 45-year tradition of promoting the biblical story of Jesus's birth, the current enactment is business as usual and will appear to be an attempt to preserve the performance's religious significance. Indeed, as the sustained applause at the revelation of the nativity in 2015 confirms, that is precisely how the modifications have been perceived.

* * *

The First Amendment does not permit the government to "observe [Christmas] as a Christian holy day by suggesting people praise God for the birth of Jesus." *Cnty. of Allegheny*, 492 U.S. at 601. A reenactment of Jesus's birth, whether done through a reading of biblical scripture, a display of a nativity, or simply a narrative followed by religious songs designed to tell that story, transgresses that line. The religious

performance that concludes the Christmas Spectacular—even in its current version—violates the Establishment Clause. When viewing a 24-minute performance of the story of the birth of Jesus, "[a] reasonable person will think religion" and "[n]othing in the context of the [performance] mitigates the religious message conveyed." *O'Bannon*, 259 F.3d at 773.

3. The performance lacks a primarily secular purpose and therefore violates the first prong of the traditional *Lemon* test

Finally, because the religious performance at issue in this case violates both the coercion test and the endorsement test, there is no need for this Court to separately determine whether it also runs afoul of the traditional *Lemon* test. However, if the Court chooses to delve into these issues, the religious aspects of the Christmas Spectacular violate the first prong of that test insofar as they lack a primarily secular purpose. *See Lemon*, 402 U.S. at 612-13. Although the district court relied on statements in this Court's precedents indicating that a "secular purpose" need not be the *only* purpose (ECF No. 62 at 34 [App. 34]), the U.S. Supreme Court has repeatedly made clear that governmental activity will run afoul of *Lemon*'s purpose prong even where there exists a secular purpose that is "secondary [to] a predominantly religious one": "the secular purpose . . . has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty.*, 545 U.S. at 865 (citations omitted); *see also, e.g.*, *O'Bannon*, 259 F.3d at 771 (Courts "generally defer to the purpose offered by the [government] for its action as long as it is not a sham. Beyond assessing the purpose

expressly articulated by the [government], we ensure that the stated secular purpose is legitimate by also examining the context and the content of the [performance].") (citing *Books I*, 235 F.3d at 302-04). When governmental action is religious on its face, as it is here, the burden of demonstrating a permissible, predominant secular purpose rests on the government. *See Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995). The School cannot carry this burden.

The district court purported to articulate several related secular purposes that pertain to the Christmas Spectacular as a whole, such as "provid[ing] students with experience performing in front of live audiences," "making the show both musically and visually pleasing and engaging," and allowing the students to present "challenging and educational" musical selections. (ECF No. 62 at 34-35 [App. 34-35]). But reliance on these objectives paints with far too broad a brush, for they simply explain why the School hosts a concert in general and not why it has chosen religious content for that concert. Indeed, these asserted purposes might justify *any* religious performance or display, but a governmental entity, of course, cannot justify the display of a religious monument on the basis of aesthetics, *see McCreary Cnty.*, 545 U.S. at 870-74; *Stone v. Graham*, 449 U.S. 39, 41-43 (1980), nor can it justify school prayer on the basis of a desire to provide students with experience in public speaking, *see Santa Fe*, 530 U.S. at 301; *Lee*, 505 U.S. at 585-86. The same principles of course hold true for a religious performance. The fact of the matter is that the School allows the directors of individual groups wide

latitude in making musical selections that serve these objectives, and yet year after year the School itself seizes control of the religious content of the show—choreographing a lengthy, department-wide production of the story of Christmas that serves (and has always served) as the grand finale to the event.

The only issue, therefore, is whether the religious performance primarily serves the School's asserted purpose in educating students about the major winter holidays, or whether that purpose is merely a "sham." Of course, this asserted purpose does not begin to justify the version of the event that was staged for forty-five years until this litigation was initiated—a version that did not include any elements remotely dedicated to Hanukkah or Kwanzaa and that included a scriptural reading. And this lengthy tradition of celebrating Christmas, and only Christmas, also serves to undermine the School's stated purpose of the current version of its program. It is clear from the facts of this case that the School's eleventh-hour nod to the history of three holidays is nothing more than a "sham."

Although the district court gave short shrift to the 45-year history of its religious performance, precedent is clear that such a history is extremely probative of a religious purpose, and the suggestion that it should be ignored "bucks common sense." *McCreary Cnty.*, 545 U.S. at 866; *see also Books I*, 235 F.3d at 303 (describing "this history of . . . involvement" in a religious display as "emphasiz[ing] a religious purpose in [that] display"). As indicated repeatedly, for nearly half a century a "living nativity"

was staged at the Christmas Spectacular—complete with a scriptural reading of the story of the birth of Jesus—without performances devoted to other religions. Even now, the musical telling of the story of the birth of Jesus remains the undeniable climax of that event. Indeed, even the additional (brief) performances devoted to other holidays only serve to emphasize the School's dedication to Christianity. The differences between these performances are stark: (a) the nativity performance is far longer in duration and serves as the grand finale of the show; (b) the nativity performance is the only performance that includes multiple songs performed by multiple groups; (c) persons viewing the story of the birth of Jesus are provided with the visual of an actual nativity scene on stage whereas a viewer of the other performances would only see images flashed across a video screen; and (d) "Ani Ma'amin" is strictly instrumental and "Harambee" is performed in a foreign language whereas the nativity story is performed in English. The manner in which the School elevates Christmas—and its religious aspects—is even underscored by the narratives that it developed, in the heat of litigation, to introduce the three holidays: on the one hand, the narratives introducing Hanukkah and Kwanzaa contain a couple sentences indicating generally *how* each holiday is celebrated, followed by a sentence simply identifying the piece to be performed (ECF No. 36-2 at 1); on the other hand, the narrative introducing Christmas contains an abbreviated description of the life of Jesus Christ, absolutely no mention of the songs that would be performed, and verbiage such as "[o]ur country" and "widely

recognized" that serves to underscore the unique importance that the School attributes to this holiday and to relegate those who do not appreciate its religious significance, once again, to outsider status (ECF No. 36-2 at 2).

Like the case at bar, *McCreary County* itself concerned governmental attempts to modify a religious display in the heat of litigation; there, as here, those attempts were insufficient to establish a secular purpose. Indeed, while the School claimed its goal was to "educate students and the general public," when it decided to add brief narratives and performances concerning Hanukkah and Kwanzaa—after this lawsuit was filed—it is clear that the School had very little understanding of what it was adding. The only information that the School's Rule 30(b)(6) designate could provide concerning Hanukkah was as follows: "It's a Jewish celebration. I haven't done a lot of research in that area but, I mean, I know it's a very important celebration to the Jewish culture." (ECF No. 35-1 at 9). And his understanding of Kwanzaa was simply that it is "a celebration through the African American culture that dates back to the mid 60's." (*Id.* at 10). The limited understanding of the School's designate is particularly concerning given that no other person—other than those who were not identified due to an objection based on attorney-client privilege—was involved in the decision to change the program for 2015. (*Id.* at 13).[8]

[8] In a footnote, the district court deemed unpersuasive the plaintiffs' criticisms concerning the School's knowledge of other winter holidays and its use of a song purportedly concerning Hanukkah that, in fact, does not concern Hanukkah at all. (ECF No. 62 at 36 n.15 [App. 36]

The School's *post hoc* justification for the religious aspects of the Christmas Spectacular, made in the heat of litigation, is a "sham." Once this asserted secular purpose is rejected, there is no remaining plausible secular purpose for including such a purely religious performance in the Christmas Spectacular. The true purpose is the same as it has always been: to celebrate the Christian faith.

II. The School failed to meet its "formidable" burden of demonstrating that its voluntary cessation of the first two versions of its religious performance rendered the plaintiffs' challenge to these versions moot

While the School does not attempt to defend the constitutionality of the first two versions of its religious performance, its appeal focuses on the district court's conclusion that the plaintiffs' challenges to these versions were not rendered moot by the changes to the 2015 program. The first version, of course, was presented without interruption for nearly half a century until this litigation was commenced; and the second version, which would have been presented in 2015 were it not for the entry of a preliminary injunction, was the version advocated by the School's Rule 30(b)(6)

[citing *Books II*, 401 F.3d at 866]). But this Court in *Books II* simply rejected the notion that a display of multiple historical texts (including the Ten Commandments) could not serve an educational purpose when the text accompanying *all* documents was "quite cursory." 401 F.3d at 865-66. At the same time, "the content of a religious display might in some instances force a conclusion that the government's asserted secular purpose is merely a sham." *Id.* at 866. While that conclusion was not warranted with respect to an exhibit containing eight secular documents with clear historical significance in addition to and displayed on par with the Ten Commandments, *see id.* at 858, it *is* warranted when a performance devoted to one religious holiday is dramatically out-sized with respect to every other performance and when the governmental officials responsible for preparing purportedly "educational" performances devoted to other holidays cannot provide even rudimentary information concerning those other holidays.

designate.[9] Although, as set forth above, summary-judgment determinations are reviewed *de novo*, "factual determinations necessary to the question[] of . . . mootness" are reviewed "for clear error." *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004). The School has failed to demonstrate that its eleventh-hour changes to the Christmas Spectacular rendered the plaintiffs' challenges to these versions moot, and the district court properly declared them unconstitutional.

A. A defendant arguing that its voluntary cessation of unconstitutional conduct renders a claim moot must meet a "formidable" burden of demonstrating that it will not revert to the challenged practice

"It 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." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). After all, in such a case, absent an injunction "[t]he defendant is free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "The test for mootness in cases such as this is a stringent one": a case will become moot only "if subsequent events made it absolutely

[9] The School insists in passing that the affidavit of its Superintendent—wherein he asserts that "a variety of informal discussions" after the 2015 Christmas Spectacular "resulted in what appeared to be a consensus . . . that the changes should be made permanent" (ECF No. 63-1 at 2)—"is consistent" with this Rule 30(b)(6) testimony, which indicated that its head of the Performing Arts Department anticipated that the changes to the 2015 program would be permanent (ECF No. 35-1 at 13). (School's Br. at 15; *see also* School's Br. at 17 n.6 [reiterating this assertion]). This insistence is clearly misplaced: while the Superintendent's affidavit addresses the 2015 Christmas Spectacular as it *was* presented (that is, the current version of the event), its Rule 30(b)(6) designate, testifying before the entry of the preliminary injunction, was talking about the event as it would have been presented in 2015 *were it not for the preliminary injunction* (that is, the second version of the event). The School ignores these facts, and it erroneously relies on its own Rule 30(b)(6) testimony as support for an assertion that that testimony simply does not support.

clear that the allegedly wrongful behavior could not be reasonably expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). "And the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (*per curiam*) (quotation, citation, emphasis, and alterations omitted). This burden has also been described as "formidable." *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (quoting *Concentrated Phosphate*, 393 U.S. at 203).

B. The School has not met its burden of establishing that its "voluntary cessation" of unconstitutional conduct renders the challenges to the first two versions of the event moot

The School first (in response to this litigation) sought to make alterations to the version of the event that it had presented for 45 years and then (in response to the preliminary injunction) altered the event in a manner that the district court erroneously determined to be constitutionally material. At every turn, it has failed to commit in any meaningful sense to the permanence of changes made in the heat of litigation, and absent the district court's declaration that the first two versions run afoul of the Establishment Clause it would have been and will be free to revert to either of these previous versions. In other words, the School cannot meet the heavy, formidable burden of demonstrating that its voluntary cessation of unconstitutional conduct rendered moot the plaintiffs' challenges. In attempting to meet this burden, the

informality of the evidence on which the School relies is startling; this evidence does not make it "absolutely clear" that it will not revert to either of the previous versions of the event, and the district court properly rejected the School's eleventh-hour assertion of mootness.

The School describes "a variety of informal discussions" that took place "at the local park, over the water cooler, and across the fence" that resulted in "what appeared to be a consensus that the program was a success and that the changes should be made permanent." (ECF No. 63-1 at 2). There is, of course, absolutely no authority for the proposition that literal "water-cooler conversations" suffice to establish mootness, and this is particularly so given the School's admission of the role of public opinion (which clearly might sway in the future if it has not already). Simply put, the School's mootness argument cannot be squared with the U.S. Supreme Court's holding earlier this week that even a gubernatorial announcement of a change in policy failed to "make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ S. Ct. __, 2017 WL 2722410, at *6 n.1 (June 26, 2017) (alteration and citation omitted). Nor does the School's representation that its Superintendent "met" and reached a "consensus" with the school board add any degree of formality to its determination: under Indiana law, all "meetings" of a school board—defined as any "gathering of a majority" of its members "for the purpose of taking official action upon public business," Ind. Code § 5-

14-1.5-2(c)—must be "open at all times" (Ind. Code § 5-14-1.5-3(a)) and may only take place following the posting of notice (Ind. Code § 5-14-1.5-5). Given that "official action" is defined broadly to include the receipt of information, deliberations, or the making of recommendations or decisions, Ind. Code § 5-14-1.5-2(d), the Superintendent's conversations with school board members not only *did not* result in a binding decision but *could not* have resulted in such a decision (or even in a recommendation or a deliberation).[10] Regardless, according to the School, these conversations (both with school board members and with members of the public) took place in December 2015 (ECF No. 63-1 at 2), five months *before* it represented on summary judgment that it was still contemplating an appeal of the district court's conclusions on preliminary injunction (ECF No. 56 at 3 n.1)—a possibility that apparently caused to the School to refrain from asserting mootness until the district court requested supplemental briefing addressed to that issue. At the very least, these facts highlight the flimsy nature of the School's eleventh-hour representations.[11]

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[10] The record contains the school board meeting minutes for December 2015 and January 2016, which establish that no deliberation, discussion, or decision regarding the Christmas Spectacular took place during the time period referenced by the School. (ECF No. 66-1).

[11] The non-committal nature of the School's last-minute assertion of mootness is underscored by its emphasis on the supposed "consensus" of community-members—in other words, on public opinion. As the district court noted (ECF No. 70 at 12 [App. 49]), shortly after the decision upholding the now-current version of the event, a local media outlet asked readers how that decision should affect future performances by the School. Over two thirds of voters, 68%, voted for the option "school leaders should resume the traditional live Nativity scene and stand firm against the Freedom From Religion Foundation and the American Civil Liberties Union." Goshen News, *How should Concord schools leaders respond to judge's ruling?* (Sept. 17,

To demonstrate mootness, a defendant must do more than recount a series of casual conversations. This Court has thus explicitly rejected the notion that "a mere informal promise or assurance on the part of the defendants that the challenged practice will cease" may render a claim moot. *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975). And yet that is all that the School offers, a shortcoming that is particularly noteworthy insofar as it, as a governmental body, has the ability to act in a formal manner if it chooses.[12] After all, a formal regulation or directive speaks for the entity itself—the School—whereas here, at best, it has offered only the word, offered in the

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2016), *at* https://goo.gl/6Ly254 (last visited June 7, 2017).

The School—relying on a case standing generally for the principle that the motivation of a handful of voters does not demonstrate that a housing referendum was enacted with sufficient "discriminatory animus" to render it violative of equal protection, *see City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195-96 (2003)—insists that the district court's reliance on "public opinion" was error (School's Br. at 19). But the School misses the point of the district court's emphasis: the School itself notes that its decision was made based on what it perceived as a "consensus" among community-members, therefore clearly making relevant evidence of the fluidity of any consensus (which had apparently shifted dramatically in the mere months following the "decision" of the Superintendent). Indeed, the record also reflects the public outcry that resulted when the school board was convened to formally respond to FFRF's pre-litigation letter concerning the constitutionality of the Christmas Spectacular. That meeting was attended by hundreds of persons in pre-printed t-shirts supporting the religious aspects of the show. (ECF No. 4-1 at 2). Additionally, yard signs appeared expressing support for the Christmas Spectacular as it was then presented, and a petition in support of maintaining the event was circulated. (*Id.*). At that time, the Superintendent responded to FFRF's allegations of unconstitutionality by reiterating his support for the Christmas Spectacular as it then existed. (ECF No. 13-2 at 16).

[12] The School notes in passing that it "cannot pass an ordinance." (School's Br. at 18). Under Indiana law, a school board has the authority "[t]o prepare, make, enforce, amend, or repeal rules, regulations, and procedures . . . for the government and management of the schools, property, facilities, and activities of the school corporation," Ind. Code § 20-26-5-4(a)(18)(A), whether or not an enactment is actually called an ordinance.

heat of litigation, of its present Superintendent; clearly such an informal assurance is not binding on the School and is subject to being revisited in the future. For when "government actors voluntarily modif[y]" a challenged practice after a lawsuit is initiated, "but d[o] not institute any new policy or procedure that would provide assurances that the voluntary cessation [i]s other than temporary," a case is not moot. *D.C. Prof. Taxicab Drivers Ass'n v. District of Columbia*, 880 F. Supp. 2d 67, 76 (D.D.C. 2012) (citing examples).

This is precisely what this Court demanded in *Doe ex rel. Doe v. Elmbrook School District*, 658 F.3d 710 (7th Cir. 2011), *adopted in relevant part by en banc court*, 687 F.3d 840, 842-43 (7th Cir. 2012). There, the defendant offered only "a few scattered representations" that it would not revert to the challenged practice of holding high school graduation ceremonies in a church, and "presented no evidence of a formal or even an informal policy change." *Id.* at 720. This did not suffice to render the case moot, even when the Superintendent of the school district and the principals of the two high schools at issue all "represented that they d[id] not intend" to conduct graduation ceremonies at the church again. *Id.* Indeed, the school district there failed to indicate "that it would veto a decision of the individual schools . . . or a student movement to return to the Church." *Id.* In other instances, this Court has refused to accept a defendant's representation that it "has no present intention of reinstating" a challenged policy (*see Sasnett v. Litscher*, 197 F.3d 290, 291 (7th Cir. 1999), *abrogated on other grounds*

by Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009)) and even a defendant's representation that it would not revert to unconstitutional conduct when it "produced no pre-existing documentation of the [change in] policy" (*see Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988)).

Although the School insists that the case at bar falls "outside the holding" of *Elmbrook* (*see* School's Br. at 16-17), at no point does it explain why, if a defendant's indication that it "d[id] not intend" to revert to its former policy and "would veto" any decision to do so is insufficient to cause mootness (as in *Elmbrook*), the informal conversations here that resulted in a "what appeared to be a consensus . . . that the changes should be made permanent" somehow are sufficient. If anything, the equivocation in this case—an "apparent" consensus, purportedly based on community opinion, that the changes "should" be made permanent—is far greater than in *Elmbrook*. It is certainly greater than in *Trinity Lutheran*.[13]

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[13] Despite the School's argument to the contrary, this case does not fall in line with *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485 (7th Cir. 2004), which had a unique procedural history. Before that case—which challenged the constitutionality of a campaign-finance statute—was even initiated, the Wisconsin Attorney General publicly took the position that the statute was unconstitutional and litigation resulted in a judicial determination that the statute was "void" in its entirety. *Id.* at 487. Nonetheless, because the statute was not formally removed from the books, Wisconsin Right to Life (and its associated political action committee) filed separate litigation challenging the statute, which resulted in the hasty issuance of a letter indicating that the statute would not be enforced against Wisconsin Right to Life. *Id.* at 488. And, while the appeal was pending, the governmental body responsible for enforcing the statute went so far as to add a disclaimer to its website making clear that it would not attempt to "enforce, adopt, or apply" the statute. *Id.* at 491. Under these circumstances, this Court had no difficulty in concluding, first, that the plaintiffs lacked Article III standing insofar as they could not show a credible threat that the statute would be enforced against them, *see id.* at 489-

Nor may the School rely, as it attempts to do (School's Br. at 16-17), on its submission of an offer of judgment, in which it expressed its willingness to make the preliminary injunction permanent (in exchange, of course, for the plaintiffs' agreement that the current version of the event could proceed in future years). As an evidentiary matter, the School's reliance on this offer is misplaced: "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).[14] This issue aside, as offer of judgment is precisely that—an offer to have judgment taken against a defendant in lieu of risking the uncertainties (and costs) of continued litigation. It says nothing about the behavior of the School in future years should the offer be rejected (as it was) and should an injunction fail to issue; indeed, the

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90, and second, even assuming that standing existed, that the plaintiffs' claims were moot: "[t]he statute was declared to be unconstitutional before it went into effect, and it has never been enforced." *Id.* at 492. The distinctions between *Wisconsin Right to Life* and this case are significant and self-evident.

The School also relies on the district court's decision in *Freedom From Religion Foundation, Inc. v. Franklin County*, 133 F. Supp. 3d 1154 (S.D. Ind. 2015). But in that case the mootness-causing event was the passage of a formal ordinance: not only did the defendant in that case fail to make the same affirmative justifications for its behavior as the School has here, but it acted, even before the issuance of an injunction, with the type of formality with which it is entitled under Indiana law to act. Under these circumstances, even the plaintiffs in that case agreed that prospective relief was unnecessary and that their injunctive claim was moot. *Id.* at 1159. The School ignores these distinctions.

[14] To be sure, this Court has held that an offer of judgment might nonetheless be admitted under Rule 408 of the Federal Rules of Evidence "for a purpose other than proving liability." *See Thomas v. Law Firm of Simpson & Cybak*, 244 Fed. App'x 741, 744 (7th Cir. 2007). But cases such as *Thomas* allow an offer to be taken into consideration under certain circumstances when the only pertinence of the offer is the *fact that it was made*. Here, the School is attempting to use its offer of judgment as evidence of its future conduct. That is not allowable under the Federal Rules of Civil Procedure or the Federal Rules of Evidence.

fact that the School saw fit to have judgment taken against it rather than simply asserting mootness is powerful evidence that it did not view the Superintendent's representations as binding. The School has cited no authority whatsoever relying, even in part, on the tender of an offer of judgment as evidence that a defendant will not revert to unconstitutional practices, and the plaintiffs are aware of no such authority. The rejected offer of judgment is of no moment.

Absent the issuance of a permanent injunction, the School will be "free to return to [its] old ways." *W.T. Grant*, 345 U.S. at 632. It has failed at every turn to meet its formidable burden of demonstrating that its voluntary cessation of challenged practices renders moot the plaintiffs' challenges to the first two versions of the religious performance at issue in this case. The district court properly concluded that these challenges are not moot.

III. Even were the plaintiffs' challenge to the first two versions of the religious performance moot, the district court had jurisdiction to award nominal damages

Finally, the School argues that the plaintiffs' nominal-damages claim does not supply jurisdiction for the adjudication of an otherwise-moot claim. The district court determined it unnecessary to reach this argument insofar as the School failed to demonstrate that the plaintiffs' challenges to the pre-2015 versions of the religious performance were, in fact, moot. Because the district court did not err in that determination, there is no need for this Court to proceed further either. However, while

the district court, in ordering supplemental briefing, noted a perceived split in authority with respect to whether a party may receive nominal damages in the absence of a viable claim for injunctive relief (ECF No. 62 at 16 & n.7 [App. 16]), the extent of this split was overstated. Authority is clear that a claim for nominal damages presents a live controversy. *See generally* 13C Wright & Miller, Federal Practice & Procedure § 3533.3 (3d ed. 1998) ("A valid claim for nominal damages should avoid mootness.").

In *Carey v. Piphus*, 435 U.S. 247 (1978), two students filed separate lawsuits challenging their suspensions from school as having been instituted without the procedural due process mandated by the Fourteenth Amendment insofar as they never received "any adjudicative hearing of any type." *Id.* at 249-52. After the district court found damages to be inappropriate and dismissed the plaintiffs' complaints, this Court reversed, holding, in pertinent part, that the plaintiffs would be "entitled to recover substantial 'nonpunitive' damages" even if their suspensions were justified "simply because they had been denied procedural due process." *Id.* at 252. After granting certiorari and holding that compensatory damages may not be awarded absent proof of actual injury, the U.S. Supreme Court addressed the issue of whether nominal damages may be sought under such circumstances:

> Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. . . .
>
> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through

> the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . .
>
> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.

Id. at 266-67; *see also*, *e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) ("[N]ominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.").

This Court recently applied *Carey* to uphold an award of nominal damages where a plaintiff's constitutional rights were violated but he suffered no actual injury. *See Moore v. Liszewski*, 838 F.3d 877, 879-80 (7th Cir. 2016). Although the *Liszewski* Court reviewed several policy reasons for why such an award may or may not be appropriate, it ultimately concluded that "[a]t present . . . the nominal-damages rule is entrenched." *Id.* at 879. Indeed, in a series of earlier cases this Court acknowledged the permissibility of nominal-damages awards even in the absence of other relief. In *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982), for instance, a former pretrial detainee alleged that restrictions on reading material at a county jail violated his constitutional rights and sought

damages against the sheriff. *Id.* at 740.[15] After affirming the district court's finding that the plaintiff had "failed to prove any damages from the alleged constitutional deprivations," *id.* at 746, and even though the plaintiff's release from jail rendered any injunctive claim moot, the circuit court nonetheless (citing, *inter alia*, *Carey*) held that the demonstration that the plaintiff's "right were violated by [the] enforcement of restrictive policies governing access to reading material . . . entitled [him] to an award of nominal damages in the sum of one dollar." *Id.* at 746 (citations omitted). This holding has been thrice affirmed and reiterated by this Court. *See Calhoun v. DeTella*, 319 F.3d 936, 941-42 (7th Cir. 2003) ("We long ago decided that, at a minimum, a plaintiff who proves a constitutional violation is entitled to nominal damages."); *Madison County Jail Inmates v. Thompson*, 773 F.2d 834, 844 (7th Cir. 1985) ("We agree with the district court that the evidence was insufficient to establish actual harm . . . . While the evidence does not support a finding of consequential damages, nominal damages are appropriate."); *Freeman v. Franzen*, 695 F.2d 485, 493 (7th Cir. 1982).

To be sure, in each of these cases the plaintiffs sought actual damages in addition to nominal damages, whereas here the plaintiffs have pressed (and continue to press) a claim for prospective relief, but that is a distinction without a difference: if a court lacked jurisdiction to award nominal damages in the absence of other permissible relief then that would be the case regardless of the form of the other relief sought. This Court

[15] As this Court recognized in *Salazar v. City of Chicago*, 940 F.2d 233, 240 (7th Cir. 1991), *Kincaid* was subsequently abrogated on unrelated grounds.

is also not alone in holding that a valid claim for nominal damages presents a justiciable controversy. In *Committee for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), for instance, the plaintiffs challenged a public university's refusal to show a particular film at a student theater. *Id.* at 1519. After their injunctive claim was rendered moot by the university's decision to permit the film to be aired, the plaintiffs continued to press their claim for nominal damages. The Tenth Circuit held:

> Neither the showing of the film on the originally scheduled dates, nor the subsequent enactment of the 1991 policy erases the slate concerning the alleged First Amendment violations in connection with the film. Therefore, the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct. If proven, a violation of First Amendment rights . . . entitles a plaintiff to at least nominal damages.

Id. at 1526-27 (emphasis in original). In *Murray v. Board of Trustees*, 659 F.2d 77 (6th Cir. 1981), the district court found the plaintiffs' injunctive claims to be moot and that they failed to demonstrate actual damages, and therefore dismissed the complaint in its entirety. *Id.* at 78. On appeal, the Sixth Circuit accepted the holdings pertaining to mootness and actual damages, but nonetheless concluded that "the Supreme Court's holdings in *Carey* . . . require remand for the District Judge to consider in this § 1983 action plaintiff's claims for nominal damages and attorney fees." *Id.* at 79. And in *Harris v. City of Houston*, 151 F.3d 186 (5th Cir. 1998), the Fifth Circuit noted explicitly that a plaintiff whose injunctive claims became moot "could have preserved his suit by requesting even nominal damages as opposed to resting completely on the request for

injunctive relief." *Id.* at 191 n.6. *See also, e.g.*, *Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001); *Beyah v. Coughlin*, 789 F.2d 986, 988-89 (2d Cir. 1986) (holding that the plaintiff's "claim for damages would not be moot since it is now well established that if he can prove that he was deprived of a constitutionally protected right . . . [he] will be entitled to recover at least nominal damages"); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986) ("The Supreme Court has held that even when no actual damages are suffered as a result of a violation of section 1983, a plaintiff still may be entitled to nominal damages.") (citing *Carey*, 435 U.S. at 266-67); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983).[16]

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[16] These holdings are well established in many of these circuits, and have been applied repeatedly by appellate and district courts under circumstances indistinguishable from those presented by the case at bar, even if this Court determines that the plaintiffs' injunctive claims are moot. *See, e.g.*, *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 521 (5th Cir. 2014) ("This court and others have consistently held that a claim for nominal damages avoids mootness.") (quoting *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009)); *Utah Animal Rights Coalition v. Salt Lake City Co.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) ("[P]laintiffs . . . could avoid the potential for mootness by simply expressly pleading that . . . nominal money damages are requested."); *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979) ("[R]egardless of actual damages, appellant could be entitled to nominal damages if he prevailed. His action therefore was not mooted."); *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) ("If the wrong complained of is a mere technical violation of the plaintiff's constitutional rights and she is unable to prove actual damages, she would nevertheless be entitled to a recovery of nominal damages. . . . The availability of either nominal or substantial damages is sufficient to prevent this case from becoming moot."); *Fitzgerald v. City of Portland*, No. 2:14-cv-00053-NT, 2014 WL 5473026, at *5 (D. Me. Oct. 27, 2014) ("A valid claim for nominal damages avoids mootness.") (citing *Kuperman v. Wrenn*, 645 F.3d 69, 73 & n.5 (1st Cir. 2011)); *Combs v. Valdez*, No. 3:05-cv-831, 2005 WL 2291626, at *7 (N.D. Tex. Sept. 13, 2005) ("Although Plaintiff cannot seek declaratory or injunctive relief as he is no longer incarcerated in the [jail], he could still seek nominal damages for the alleged violation of his constitutional rights.") (internal citation omitted); *Smith v. Keycorp Mortg., Inc.*, 151 B.R. 870, 874

The School ignores this weight of authority, instead insisting that "the majority [of courts]" follow a contradictory rule. (School's Br. at 21). This assertion is erroneous, plain and simple, and is made notwithstanding the fact that the plaintiffs extensively traced this authority in the court below (*see* ECF No. 65 at 3-9). To be sure, some individual jurists have reached contradictory conclusions. (*See* ECF No. 62 at 16 & n.7 [App. 16]). Of these opinions, the most extensive treatment of this issue is given by Judge McConnell in his lone concurrence in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004). This concurrence, however, did not alter the law in the Tenth Circuit or elsewhere. Judge McConnell himself recognized this when, in a procedural oddity, he *also* authored the panel opinion in that case, which concluded that,

> although the conduct at issue is long past and will not be repeated, the Ordinance under challenge has been amended to correct its alleged constitutional flaw, and Plaintiff concedes that it suffered no compensable injury, under our precedents this panel is required to determine on the merits whether Defendant's past conduct and no-longer-operative Ordinance comported with the First Amendment.

Id. at 1258. This was so because the plaintiff, in addition to seeking the now-moot

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(N.D. Ill. 1993) ("A valid claim for nominal damages should avoid mootness.") (citation omitted); *Barcik v. Kubiaczyk*, 895 P.2d 765, 779 (Or. 1995) ("We conclude that a claim for nominal damages for a past deprivation of a federal constitutional right withstands a challenge based on mootness."); *Doria v. Univ. of Vermont*, 589 A.2d 317, 319-20 (Vt. 1991) ("Nominal damages are available in federal civil rights actions, and a number of federal courts have held that a civil rights act claim for nominal damages alone is sufficient to avoid mootness.") (internal citation omitted).

injunctive relief, "also sought nominal damages of one dollar." *Id.* at 1257.[17]

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[17] As Judge McConnell noted (both in the panel in opinion and in his separate concurrence), on two previous occasions the Tenth Circuit had already concluded that a claim for nominal damages is sufficient to support jurisdiction, *see Comm. for First Amendment*, 962 F.2d at 1526; *O'Connor v. City & County of Denver*, 894 F.2d 1210, 1215-16 (10th Cir. 1990); this holding has subsequently been reiterated by the circuit court at least twice, *see Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 528 (10th Cir. 2016) ("This award of nominal damages creates an injury in fact."); *R.M. Inv. Co. v. U.S. Forest Serv.*, 511 F.3d 1103, 1107 (10th Cir. 2007) ("Rather than saying [in *Utah Animal Rights Coalition*] that nominal damages are irrelevant, we said that they could be dispositive.").

Judge McConnell's view that, if he were writing on a blank slate, nominal damages would be treated like declaratory relief, is unpersuasive for the very simple reason that nominal damages are *not* declaratory relief; they are a type of *damages*. This is evident from the Tenth Circuit's previous decision in *Committee for the First Amendment*, in which the court explicitly held that a nominal-damages claim "relates to *past* (not future) conduct." 962 F.2d at 1526 (emphasis in original). It is also evident from the U.S. Supreme Court's holding in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), in which a plaintiff sought to save her lawsuit from mootness by relying on a request for nominal damages from the defendant Governor (who was sued in her official capacity). *Id.* at 68-69. The Court held this remedy to be barred insofar as "[s]tate officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983." *Id.* at 69 n.24 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989)). This was so because nominal damages represent "retrospective relief" or a "retrospective monetary award" and thus do not fall within the limited exception established by *Ex parte Young*, 209 U.S. 123 (1908), which permits prospective relief against state officials in their official capacities. In other words, they represent a "solution to mootness." *See* 520 U.S. at 69 n.24.

The School also cites the Third Circuit's decision in *Freedom From Religion Foundation Inc. v. New Kensington Arnold School District*, 832 F.3d 469 (3d Cir. 2016), apparently as an example of a case following the rule that a nominal-damages claim does not supply jurisdiction to hear an otherwise-moot claim. (School's Br. at 21). While Judge Smith, largely echoing Judge McConnell's opinion, suggested this to be the case in a separate concurrence in *New Kensington*, the Third Circuit itself reached no such conclusion. The School appears to have erroneously cited Judge Smith's concurrence. The only circuit-level majority opinion supporting the School's argument appears to be the Eleventh Circuit's decision in *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254 (11th Cir. 2007), which was then applied in *Freedom From Religion Foundation, Inc. v. Orange County School Board*, 610 Fed. App'x 844 (11th Cir. 2015). But *DA Mortgage* is an outlier opinion in which the Eleventh Circuit held—contrary to all other precedent—that claims for nominal damages only survive mootness when they are "for violations of procedural due process." 486 F.3d at 1259. There is absolutely no principled

This leaves the School with two decisions from district courts within this circuit, both of which pre-date this Court's recent pronouncement in *Liszewski*. *See Freedom From Religion Found., Inc. v. Franklin County*, 113 F. Supp. 3d 1154 (S.D. Ind. 2015); *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019 (E.D. Wis. 2008). The district court's decision in *Green Bay* is particularly curious, for the court concluded that it lacked jurisdiction to hear a claim for only nominal damages notwithstanding the fact that the defendants in that case "concede[d] . . . that [this Court] has held that a claim for only nominal damages is sufficient to support federal jurisdiction and assert[ed] that they raise[d] the issue . . . merely to preserve it for appeal." *Id.* at 1029 n.6. Regardless, in reaching its decision it did not address this Court's decisions in *Kincaid*, *Madison County Jail Inmates*, or *Freeman*—all cited above—nor did it address the vast majority of the contradictory authority from other jurisdictions. It did address *Calhoun v. DeTella*, *supra*, although it distinguished that case as "a case about the Prison Litigation Reform Act . . . rather than Article III." 581 F. Supp. at 1032. While this is true as a technical matter, this Court's holding in *Calhoun*—

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theory of Article III that makes the viability of a nominal-damages claim depend on the provision of the Constitution allegedly violated—this Court has made this clear in describing numerous instances where courts have awarded nominal damages for other constitutional violations, *see Calhoun*, 319 F.3d at 941-42. In fact, the holding of *DA Mortgage* is contradicted by its own citation to *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). *See* 486 F.3d at 1259. In that case, the Court explicitly rejected the notion that there exists "a two-tiered system of constitutional rights," 477 U.S. at 309, and held that "nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury," *id.* at 308 n.11. The Eleventh Circuit's holdings stand on feeble footing.

that a prisoner who suffers emotional but no physical harm may seek nominal damages (but not compensatory damages) under the PLRA for an alleged Eighth Amendment violation—presupposes that a court will have jurisdiction to hear that claim. *See Calhoun*, 319 F.3d at 940-41. And, regardless, this Court's earlier decision in *Kincaid* explicitly pertained to jurisdiction. *See* 670 F.2d at 746.

The district court's decision in *Franklin County* is also unpersuasive. This conclusion was reached notwithstanding the court's acknowledgment that this Court "holds that, at a minimum, a plaintiff who first proves a constitutional violation is entitled to nominal damages." 133 F. Supp. 3d at 1159 (internal alteration omitted) (citing *Calhoun*, 319 F.3d at 941). It appears, however, that the court found compelling the perceived distinction, adopted by the Eleventh Circuit, between allegations that a defendant has violated "due process" guarantees and allegations that a defendant has violated some other constitutional right. *See id.* But *Calhoun* described several instances courts had "approved the award of nominal damages for Eighth Amendment violations" and also cited Fourth Amendment cases resulting in an award of nominal damages. 319 F.3d at 941-42. *Franklin County* thus contradicts this precedent.[18]

[18] The district court in *Franklin County* noted in passing that the Sixth Circuit had also "recently held that a case is moot when the only relief sought by the plaintiff was an award of nominal damages." 133 F. Supp. 3d at 1159 (citing *Morrison v. Board of Educ. of Boyd Cty.*, 521 F.3d 602 (6th Cir. 2008)). *Morrison*, however, was a procedurally odd case wherein the only injury alleged by the plaintiff was a subjective "chill" on his speech arising from a school's anti-harassment policy that explicitly indicated that it would not be interpreted as applying to constitutionally protected speech. 521 F.3d at 605-06. Because the student's injury resulted not

The School's cursory argument to the contrary notwithstanding, a claim for nominal damages supplies jurisdiction even when a claim for prospective relief has been rendered moot. The award of nominal damages to the plaintiffs for their past exposure to the Christmas Spectacular must therefore stand even if this Court determines that the district court erred in concluding that the plaintiffs' challenges to the first two versions of this event were not moot.

CONCLUSION

The district court erred in holding the current version of the School's annual religious performance to be constitutional, and this holding must be reversed. The district court committed no other error, and its judgment should be affirmed in all other respects.

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from the school's policy but from the plaintiff's "choice to chill his own speech," the Sixth Circuit concluded both that he had not suffered any injury in fact and that, in any event, that non-injury was not redressable by an award of nominal damages. *Id.* at 610-11. In so doing, the court cited two of its precedents as presenting traditional examples of instances where it had "allowed a nominal-damages claim to go forward in an otherwise moot case." *Id.* at 611 (citing *Lynch v. Lies*, 382 F.3d 642, 646 n.2 (6th Cir. 2004), and *Murray v. Board of Trustees*, 659 F.2d 77, 79 (6th Cir. 1981)).

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation allowed by this Court's Order of June 23, 2017 insofar as it contains 19,882 words, excluding the parts of the brief exempted by Appellate Rule 32(a)(7)(B)(iii).

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CIRCUIT RULE 30(D) CERTIFICATION

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rule 30 in the plaintiffs' cross-appeal are included within the previously filed Defendants-Appellees Required Short Appendix.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on the following ECF-registered counsel by operation of the Court's electronic system:

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