

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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

Plaintiffs,)

v.)

No. 3:15-cv-463-JD-CAN

CONCORD COMMUNITY SCHOOLS,)

Defendant.)

**AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES**

Introductory Statement

1. Concord Community Schools (“the School Corporation”) is a public school corporation that operates several schools—including Concord High School (“the High School”)—in Elkhart, Indiana. Each winter for the past several decades, the High School has staged a “Christmas Spectacular,” a series of performances taking place at the High School in which students perform various holiday songs and to which other students, family-members, and members of the community are invited to attend. While the holiday songs chosen for the Christmas Spectacular vary somewhat each year, the Christmas Spectacular always closes with an approximately 20-minute depiction—also featuring students of the High School—of the story of the birth of Jesus.
2. At the time that this case was initiated, this portion of the Christmas Spectacular had always consisted of a living nativity scene whereby students of the High School were selected to portray biblical figures—including the Virgin Mary, Joseph, the Three Wise

Men, and various angels and shepherds—present in the biblical story of the birth of Jesus. While students portrayed these figures, the High School’s musical groups performed religious hymns and a faculty-member recited the story of the birth of Jesus as it appears in the New Testament. The Christmas Spectacular did not contain performances devoted to any other religion. This version of the living nativity scene was presented for approximately 47 years, through 2014. At the time that this action was initiated, the High School intended to also stage this version in 2015 and in future years.

3. Following the initiation of this action, and in direct response to the initiation of this action, the High School made two changes to the Christmas Spectacular for 2015: it added short performances acknowledging Hanukkah and Kwanzaa; and it decided that a faculty-member would not recite the story of the birth of Jesus as it appears in the New Testament. However, it again intended to present an approximately 20-minute living nativity scene with students portraying the above-described biblical figures while student groups performed religious hymns. Prior to this performance, however, this Court preliminarily enjoined the School Corporation “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). In response to this Court’s order, the School Corporation made only one change to the program for 2015: it replaced the students that would portray the biblical figures on stage with mannequins.
4. The School Corporation intends to include a nativity scene in the Christmas Spectacular again in early December of 2016 and in future years. The plaintiffs—a non-profit membership organization devoted to the separation of church and state, the fathers of

students at the High School who have attended and/or will attend the event, and a student at the High School who has participated and will participate in the “living nativity” performance—all object to this portion of the “Christmas Spectacular.” This nativity scene—in the version performed prior to 2015, in the version that the School Corporation intended to stage in 2015 before this Court’s preliminary injunction, and in the version that the School Corporation actually staged in 2015—violates the Establishment Clause of the First Amendment to the United States Constitution, and declaratory and injunctive relief must issue. The plaintiffs are also entitled to nominal damages.

Jurisdiction, Venue, and Cause of Action

5. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331.
6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
7. Declaratory relief is authorized by Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.
8. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the U.S. Constitution.

Parties

9. Freedom From Religion Foundation (“FFRF”) is a nationwide not-for-profit membership organization with its primary place of business in Madison, Wisconsin. The organization is devoted to protecting the constitutional principle of the separation of church and state. FFRF has 23,000 members in the United States and 361 members in Indiana.
10. John Doe is the pseudonym of an adult resident of Elkhart County, Indiana.
11. Jack Doe is the pseudonym of a minor resident of Elkhart County Indiana.
12. John Roe is the pseudonym of an adult resident of Elkhart County, Indiana.

13. John Noe is the pseudonym of an adult resident of Elkhart County, Indiana.
14. Concord Community Schools is a public school corporation that operates several public schools in Elkhart County, Indiana.

Factual Allegations

The Christmas Spectacular

Background to the Christmas Spectacular

15. For several decades, toward the beginning of each winter trimester the High School's Performing Arts Department has planned and produced a "Christmas Spectacular."
16. In 2015, five performances of the Christmas Spectacular were staged: a school-day performance on December 11th that was not open to the public but was instead only open to (and was attended by) students and faculty-members of elementary schools operated by the School Corporation; and two performances each on December 12th and December 13th that were open to the public.
17. The Christmas Spectacular will again occur in 2016 and in future years, and each year will be performed in early December, with one school-day performance open only to students and faculty-members of elementary schools operated by the School Corporation and with four weekend performances open to the public.
18. The Christmas Spectacular is planned by the faculty of the High School's Performing Arts Department and features performances by students enrolled in elective, for-credit performing arts classes. According to the School Corporation's webpage, the Performing Arts Department "involves approximately half of the school's 1,500 students at the high school. Students are involved in marching band, 3 concert bands, 2 jazz bands, pep band, string orchestra, symphony orchestra, 6 choirs, piano, and dance." Attendance and

performance at the Christmas Spectacular is mandatory for students enrolled in these classes.

19. The pieces to be performed during the Christmas Spectacular are selected by the faculty-members of each class, although the religious performances and depiction of the story of the birth of Jesus are staged as the result of a decision of the School Corporation.
20. Rehearsals for the Christmas Spectacular typically occur both during and after school and on the premises of the High School. Additionally, “run throughs”—in which the entire Christmas Spectacular is rehearsed from beginning to end—occur both during and after school. These rehearsals are led by various faculty-members in the Performing Arts Department of the High School.
21. The performances of the Christmas Spectacular take place in the High School’s auditorium. The public performances (as opposed to the performance for the elementary schools of the School Corporation) are open to students, faculty, family-members, and members of the community at large, and are typically attended by thousands of persons.
22. During the event, several musical numbers are performed. While some of the precise songs chosen differ each year, these songs generally celebrate Christmas and the winter season. For instance, the following songs (among others) were presented during the 2014 Christmas Spectacular: “Joy to the World”; “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.” The songs featured during the 2015 Christmas Spectacular included “Almost Christmas”; “Underneath the Tree”; “Winter Wonderland”; “Text Me Merry Christmas”; and “Parade of the Wooden Soldiers.”

The Nativity Scene Staged Through 2014

23. Prior to the initiation of this litigation, every performance of the Christmas Spectacular ended with an approximately 20-minute telling of the story of the birth of Jesus, including a live nativity scene and a scriptural reading from the Bible. During this segment, students at the High School portrayed the Virgin Mary, Joseph, the Three Wise Men, shepherds, and angels. Portraying these biblical figures, the students gathered on stage with a manger backdrop, which included a cradle and the Star of Bethlehem.
24. While students of the High School portrayed the various characters present in the story of the birth of Jesus, a faculty-member (acting as narrator) recited the story as it appears in the Christian Bible (Luke 2:6-14 and Matthew 2:1-11).
25. At the same time, other students performed various religious hymns—either singing or instrumentally—such as “Christ in the Manger,” “Silent Night,” and “Hark! The Herald Angels Sing.” These hymns were performed by the High School’s various choirs, which were placed throughout the school’s auditorium, including to the side of the stage and in the aisles of the auditorium.
26. The Christmas Spectacular did not contain performances devoted to any religion other than Christianity.
27. A video of the 2014 Christmas Spectacular is available at https://www.youtube.com/watch?v=6ni2anXa_H4&feature=youtu.be (last visited Jan. 20, 2016). Several photographs of the 2014 Christmas Spectacular are available at <https://concordmusic.smugmug.com/Christmas-Spectacular-2014/Christmas-Spectacular-2014> (last visited Jan. 20, 2016).
28. But for the initiation of this litigation, this live Nativity Scene would have been presented in its 2014 version in December 2015 and in future years. If this version is not

permanently enjoined, the School Corporation reserves its right to present this version of the live nativity scene in future years.

The Nativity Scene in 2015

29. After the initiation of this action, and as a direct result of the initiation of this action, the School Corporation made two changes—and only two changes—to the program for the 2015 Christmas Spectacular: it decided that a faculty-member would not recite the story of the birth of Jesus as it appears in the New Testament; and it added short performances acknowledging Hanukkah and Kwanzaa. However, the School Corporation intended to again present an approximately 20-minute living nativity scene with students portraying the above-described biblical figures while student groups performed religious hymns.
30. The short performances related to Hanukkah and Kwanzaa consisted of one song devoted to each tradition performed by a single musical group within the High School’s Performing Arts Department; the song chosen to represent Hanukkah was “Ani Ma’amin,” a strictly instrumental piece. During the performance of each of these songs, still images associated with each tradition were displayed on a video screen near the stage. The only performers on stage, however, were the students participating in the musical group performing each song.
31. The School Corporation intended to then close its program with the same 20-minute version of the living nativity scene that it had used to close its program each year through 2014, except, as indicated, that a faculty-member would not recite the story of the birth of Jesus as it appears in the New Testament.
32. Prior to this performance, however, this Court preliminarily enjoined the School Corporation “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). In response to this Court’s order, the School Corporation made only one change to the program for 2015: it replaced the students that would portray the biblical figures on stage with mannequins.

33. Prior to and during the 2015 Christmas Spectacular, the School Corporation still organized, rehearsed, and presented, and student performances still participated in, a live, 20-minute performance devoted to the biblical story of the birth of Jesus.
34. If the School Corporation is not permitted to stage the live nativity scene that it staged prior to 2015, in future years it intends to stage the religious performances that it would have staged but for this Court’s preliminary injunction. If it is not permitted to stage this version of the living nativity scene, it intends in future years to stage the same performance except with mannequins instead of students portraying biblical figures on stage.

The Plaintiffs

35. FFRF is a non-profit membership organization dedicated to defending the constitutional principle of the separation between state and church.
36. After receiving a complaint about the Christmas Spectacular from one of its members, FFRF sent a letter in August 2015 to the Superintendent of the School Corporation 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. A true and correct copy of that letter is attached and incorporated herein as Exhibit 1. (Originally attached to the letter was a portion of the program for the 2014 Christmas Spectacular identifying the student musicians and cast-members that participated in the

live nativity scene. This program excerpt has been omitted from the attached exhibit insofar as most, if not all, of these students are presumably minors.)

37. In response to the letter from FFRF, the Superintendent of the School Corporation issued a statement, which he read during the September 2015 meeting of the school board. A true and correct copy of that statement is attached and incorporated herein as Exhibit 2.
38. As a result of the objectionable portion of the Christmas Spectacular in any of its three iterations—as it was presented before 2015, as the School Corporation intended to present in 2015 until this Court issued its preliminary injunction, and as the School Corporation actually presented in 2015—FFRF has been forced to expend resources in order to investigate the School Corporation’s actions and to advocate on behalf of its mission and on behalf of FFRF’s members. The resources that FFRF has expended and will continue to expend concerning the Christmas Spectacular have necessarily been diverted from other projects about which FFRF is concerned, and FFRF will continue to expend these resources in future years. Thus, in addition to traditional membership standing, FFRF has suffered injury-in-fact within the meaning of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
39. John Doe is the pseudonym of an adult resident of Elkhart County, Indiana, and is a member of FFRF. John Doe is the father of Jack Doe, which is the pseudonym of a minor resident of Elkhart County, Indiana, who is currently a student at the High School.
40. John Doe attended the 2014 Christmas Spectacular and the 2015 Christmas Spectacular and intends to attend the Christmas Spectacular again in 2016 and in future years.
41. Jack Doe is actively involved in the music department at the High School and performed during the 2014 Christmas Spectacular and the 2015 Christmas Spectacular. In addition

to performing in other elements of the Christmas Spectacular by virtue of his participation in the music department, Jack Doe performed one or more of the religious hymns that were part of the nativity scene in 2014 and in 2015. He will also attend and perform in the 2016 Christmas Spectacular as he intends to remain actively involved in the music department.

42. John Roe is the pseudonym of an adult resident of Elkhart County, Indiana. He is the father of a student who is actively involved in the music department at the High School and performed during the 2014 Christmas Spectacular and the 2015 Christmas Spectacular.
43. John Roe attended the 2014 Christmas Spectacular and the 2015 Christmas Spectacular and intends to attend the Christmas Spectacular again in 2016 and in future years.
44. John Noe is the pseudonym of an adult resident of Elkhart County, Indiana. He is a family-member of a student enrolled in the High School who is actively involved in the Performing Arts Department and who performed during the 2015 Christmas Spectacular and will perform during the 2016 Christmas Spectacular. He is also a family-member of a second student who will be actively involved in the High School's Performing Arts Department in the fall of 2016 and who will also perform during the 2016 Christmas Spectacular.
45. Members of John Noe's family will thus participate in the Christmas Spectacular in 2016 and in future years, and will perform one or more of the religious hymns that will be part of the nativity scene at that time. John Noe will thus attend the Christmas Spectacular in 2016 and in future years.

46. FFRF, John and Jack Doe, John Roe, and John Noe all object to the portion of the Christmas Spectacular with the nativity scene, whether it is staged in the version performed prior to 2015, in the version that the School Corporation intended to stage in 2015 before this Court's preliminary injunction, or in the version that the School Corporation actually staged in 2015.
47. All of the plaintiffs except for John Noe have thus come into, and all plaintiffs will in the future come into, direct and unwelcome contact with the objectionable portions of the Christmas Spectacular.
48. The nativity scene and the story of the birth of Jesus are, of course, well-recognized symbols of the Christian faith. Their presence at the Christmas Spectacular—in any of the aforementioned versions—is coercive, represents an endorsement of religion by the High School and the School Corporation, has no secular purpose, and has the principal purpose and effect of advancing religion.

Concluding Factual Allegations

49. The defendant has, at all times, acted under color of state law.
50. As a result of the actions of the defendant, the plaintiffs are suffering irreparable harm for which there is no adequate remedy at law.

Legal Claim

51. The portion of the Christmas Spectacular with the Nativity Scene, in any of the three versions described above, violates the Establishment Clause of the First Amendment to the United States Constitution.

Request for Relief

WHEREFORE, the plaintiffs request that this Court do the following:

1. Accept jurisdiction of this cause and set it for hearing.
2. Declare that the defendant has violated the rights of the plaintiffs for the reason noted above.
3. Enter a permanent injunction enjoining the defendant from organizing, rehearsing, presenting, or allowing to be presented the portion of the Christmas Spectacular with the nativity scene, in any of the three versions described above.
4. Award all plaintiffs \$1.00 in nominal damages for each occasion in which they observed and/or participated in an objectionable performance
5. Award the plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. § 1988.
6. Award all other proper relief.

/s/ Gavin M. Rose

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on this 7th day of February, 2016. Parties may access this document through the Court's electronic system. The following persons will be served with this filing by operation of the Court's electronic system:

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