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

FREEDOM FROM RELIGION FOUNDATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Cause No. 3:15-CV-00463-JD-CAN
CONCORD COMMUNITY SCHOOLS,	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. Introduction.

"[C]andor compels acknowledgment ... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Notwithstanding the fact that "[t]hroughout the turbid history of Establishment Clause jurisprudence, the Supreme Court has announced no less than four judicially crafted "tests" to analyze whether governmental action violates the Constitution"[1], in its December 2, 2015 Opinion this Court stated that "[t]he Court believes that the endorsement test is most applicable here".

> The endorsement test "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." In applying this test, courts "evaluate the effect of the challenged government action by 'assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion.'" More specifically, courts ask "whether an objective, reasonable observer, 'aware of the history and context of the

[1] *Freedom from Religion Found., Inc. v. New Kensington-Arnold Sch. Dist.*, 919 F. Supp. 2d 648, 653 (W.D.Pa. 2013).

> community and forum in which the religious display appears,' would fairly understand the display to be a government endorsement of religion."

Freedom From Religion Found. v. Concord Cmty. Sch., 148 F. Supp.3d 727, * 5 (N.D.Ind. 2015). This decision serves as the "law of the case" and the School will utilize this analytical framework on summary judgment.

II. Statement of Material Facts Not in Dispute.

The School concurs with the FFRF that by and large, while there are minor disputes over the facts between the parties, "[r]egardless, this detail also is ultimately immaterial to the outcome of this case." (D. # 57, FRFF Brief, p. 5).

However, the School must take issue with the FFRF's contention that the School has failed to provide evidence to support the conclusion that "the program's purpose is educational." *Id.*, p. 4. This statement ignores the facts pled and admitted in the Amended Complaint which demonstrate to the contrary. The FFRF has alleged and the School has admitted that the program was a co-curricular part of the School's educational curriculum, which meant that the program was "planned and produced" by the "High School's Performing Arts Department" (D. # 45, Am. Compl., ¶ 17), that it consisted of "performances by students enrolled in elective, for credit performing arts classes … [a]ttendance and performance at the Christmas Spectacular is mandatory for students enrolled in these classes [absent an opt-out}" (*Id.*, ¶ 18), and that "[r]ehearsals for the Christmas Spectacular typically occur both during and after school and on the premises of the High School." *Id.*, ¶ 20 (parenthetical supplied).

In conjunction with these undisputed facts is Mr. Spradling's undisputed testimony noting that the Christmas Spectacular is just one "part of its [the School's] educational program and the courses noted in the preceding paragraph." (D.# 27. Spradling Aff'd., ¶ 5; parenthetical supplied). While the FFRF discounts paragraph 8 of the Spradling Affidavit, the testimony was

unrebutted: "As with all performances listed in paragraph 5, the 2015 Christmas Spectacular merges several educational and performing ensembles within Concord's performing Arts Department … to provide intense challenges to each performer through the planning and programming of this event." (*Id.*, ¶ 8). His deposition confirms the educational nature of the program, noting that "the natural progression of performing a show like this is to evolve and to make it artistically and music educationally important" and specifically with respect to the challenged portion of the show: "Q. I also understood you correctly for Hanukkah, Kwanza and Christmas there will be spoken introduction or spoken summary of the holidays; is that right? A. Yes. Q. That will include both historical and educational components for each? A. Yes, it will." (D. # 33-2, Spradling Depo., p. 43, 65).

III. Discussion.

The School will address each of the FFRF's arguments in the order presented in the FFRF's Response/Reply Brief.

1. The Pre-2015 Program & the Proposed 2015 Program.

At the outset the FFRF contends that it is entitled to a summary judgment granting it injunctive relief and damages against the School's pre-2015 program "that was staged for decades before this action was initiated" because the School has not presented any evidence or argument relating to the Constitutionality of those programs. (D. # 57, FFRF Brief, p. 7).

This is an odd argument given the acknowledged and undisputed fact that the 2015 program was far different from the prior programs, even before litigation was filed. This issue was specifically raised and discussed by the School in detail on November 5, 2015, in the "Defendant's Memorandum in Opposition to Plaintiff's Request for a Preliminary Injunction" in the context of a ripeness/mootness challenge. *See* D. # 26, School's Memo., p. 10-12. The

School contended that the FFRF's challenge based on the prior year's programs were moot, and that the challenge to the 2015 program was unripe because it had not yet been finalized when suit was filed. *Id.* By the time this Court entered its Order on December 2, 2015, in ruling on that specific challenge, it correctly noted that in the intervening twenty-eight (28) days "plans for the Christmas Spectacular have now been finalized for the most part, so the Court need not speculate as to whether the event will occur or in what form, and can assess the merits of the case based on the content of the show as it is actually set to occur." *Concord*, 148 F. Supp.3d at * 4.

Notwithstanding the School's argument and this Court's discussion, the FFRF again asks the Court to speculate on what might be done in 2016 and future years based on the pre-2015 programs which the School had already completely modified by the time suit was filed. This request is the classic example of asking the Court issue an advisory opinion on a no longer "live" controversy, the classic definition of mootness. As noted in the School's initial memorandum, "[t]o say a claim is moot is to say that it is too late for the judiciary to affect anyone's entitlements." (D. # 26, School's Memo., p. 10 *quoting Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010).

For the FFRF to demand an injunction against the pre-2015 programs is the quintessential claim coming "too late for the judiciary to affect anyone's entitlements." A claim that does not involve an actual ongoing controversy is moot, and the court must dismiss it for lack of jurisdiction. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 490-491 (7th Cir. 2004). This case falls squarely within the *Schober* case where it was argued, as here, that "Right to Life insists that the Board's 'voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Id.*, 366 F.3d at 491. The 7th Circuit noted that where, as here, the governmental entity has "corrected" the alleged unconstitutional

behavior of the past and indicated that it will not return to those pre-correction portions, the claim is moot:

> Furthermore, "when the defendants are public officials ... we place greater stock in their acts of self-correction, so long as they appear genuine." *Federation*, 326 F.3d at 929 (*quoting Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir.1991)). It is true that the Wisconsin legislature failed to formally repeal the offending statute. *See Federation*, 326 F.3d at 930 (holding that the repeal of a contested ordinance moots an injunction request and noting that "[o]nly in cases where there is evidence that the repeal was not genuine has the [Supreme] Court refused to hold the case moot"). But we follow *Ragsdale* in holding that a case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the failure of the legislature to remove the statute from the books. *See Ragsdale*, 841 F.2d at 1365–66. III. Conclusion. For the foregoing reasons, we Affirm the district court's determination that no case or controversy exists as required by Article III.

Schober, 366 F.3d at 492. In the present case the School has made it clear that it will not return to the pre-2015 program, indeed the evidence is undisputed that it had already made significant changes even before this suit was filed and certainly the 2015 program is far different than pre-2015 programs. As a consequence, as in *Schober*, the claims relating to the pre-2015 programs are moot because "no case or controversy exists as required by Article III." Given the foregoing, for the FFRF to argue that it is entitled to this injunction because the School has purportedly "waived" this issue is disingenuous.

Moreover, regardless of whether the School had presented the mootness argument in prior pleadings, mootness is a jurisdictional issue which cannot be waived: "Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions,' our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (U.S. 1971). Mootness is "always a threshold jurisdictional question" that the court must resolve at the outset. *Worldwide Street*

Preachers' Fellowship v. Peterson, 388 F.3d 555, 558 (7th Cir. 2004). Because it is jurisdictional it cannot be waived; "Furthermore, courts are required to notice jurisdictional faults at any time. *See, e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17–18, (1951); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir.1986). There is no authority to 'waive' these issues just because a party might have been hiding the ball." *Wellness Cmty.-Nat'l v. Wellness House*, 70 F.3d 46, 51 (7th Cir. 1995).

Thus even if the School had failed to raise the mootness issue as to the pre-2015 programs, this Court would have an independent duty to address the issue *sua sponte*.

2. The Inapplicability of the "Coercion Test."

Next the FFRF asserts yet again that the Court should adopt a "coercion" test and apply it to this case instead of the modified *Lemon* test which this Court used in its prior Order. The FFRF makes this argument notwithstanding the fact that the parties briefed and argued the applicability of the "coercion test" in the preliminary injunction pleadings, and that after analyzing these arguments, "[t]he Court believes that the endorsement test is most applicable here." *Concord*, 148 F. Supp.3d at * 5. This decision represents the "law of the case". "The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' The doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided,' but it does not 'limit [courts'] power.'" *Musacchio v. United States*, -- U.S. --, 136 S. Ct. 709, 716 (2016).

Thus under this doctrine the decision to reject the "coercion test" in favor of the endorsement test decision is the "law of the case" and the School treated it as such in its May 27, 2016 Memorandum, as it was required to do. (D. # 56, School Memo., p. 8, Ftnt. 5). The School

is aware that the Court has the power, as noted in *Musacchio* to reconsider that decision, and in the event that the Court chooses to do so, the School would ask for the opportunity to brief the issue and specifically the impact of the School's opt-out policy[2] on the coercion analysis as discussed in the School's Preliminary Injunction Brief (D. # 26, School's PI Brief, p. 14-17) and in light of "opt out" cases like *Chaudhuri v. State of Tenn.*, 130 F.3d 232, 239 (6th Cir. 1997) and *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997) (Where there is an "opt out", "[u]nlike *Lee*, here there was no coercion—real or otherwise—to participate.").[3]

Second, the School is also aware that some courts, citing *Lee v. Weisman*, 505 U.S. 577 (1992) have viewed "coercion" as an element of the endorsement test rather than an independent dispositive test. However, in this case that factor cuts against the FFRF's claim with respect to student participants in the program based on the opt-out provisions noted above, and against a claim by audience members, mostly adult relatives of participants such as John Doe (D. # 52-2, Doe Supp. Aff'd., ¶ 8) as their participation was completely voluntary (having chosen to purchase tickets), they could leave at any time and specifically during the intermission before the challenged portion of the program. *See e.g. Tanford*, 104 F.3d at 985 (rejecting a coercion claim

[2] Board Policy 2240, entitled "Controversial Issues" contains an "opt-out" provision that allows parents who object to a portion of the educational curriculum to opt their students out of that portion of a class without penalty: "The Board recognizes that a course of study or certain instructional materials may contain content and/or activities that some parents find objectionable. If after careful, personal review of the program lessons and/or materials, a parent files a complaint in accordance with Board Policy 9130 regarding either the content or activities that conflict with his/her religious beliefs or value system, the school will honor a written request for his/her child to be excused from a particular class for specified reasons. The student, however, will not be excused from participating in the course and will be provided alternate learning activities during times of such parent-requested absences." (D. # 27, Spradling Aff'd., ¶ 3; Exhibit "A").

[3] This opt-out is not stigmatic as the Christmas Spectacular is just one of six (6) different shows performed by the Warsaw High School's Performing Arts Department during the course of the school year. (D. # 27, Spradling Aff'd., ¶ 5; Exhibits "C-1" – "C-6"). Moreover, the Christmas Spectacular itself was divided so that students or audience members wishing to "opt out" could still perform or observe the completely secular first section of the program, roughly ¾'s of the program, and not the final ¼ if they had concerns over it without any stigma due to the placement of the intermission.

noting that the audience members were "adults" and "left during the invocation, then returned and exited before the benediction."). The Supreme Court rejected just such a coercion argument: "Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." *Lee, supra*, at 597." *Town of Greece, N.Y. v. Galloway*, -- U.S. --, 134 S. Ct. 1811, 1827 (2014).

3. The Endorsement Test.

Over the course of the briefing, the parties and the Court, have discussed exhaustively the elements of the *Lemon* "endorsement test" and the School will not repeat those discussions in this final reply brief, but instead will focus on a couple of specific areas of concern noted in the FFRF's response.

The School and the FFRF agree with this Court's conclusion that "under the endorsement test courts 'are charged with the responsibility of assessing the totality of the circumstances surrounding [a] display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion." (D. # 57, FFRF Brief, p. 10 *quoting Concord*, 148 F. Supp.3d at * 6). The School agrees with this statement, but parts ways when the FFRF concludes that the School "misses the forest for the trees." *Id.*

Where the parties diverge is in the definition of the "forest" and the "trees". The FFRF's definition of the forest is the last 24 minutes of the 107 minute 2015 Christmas Spectacular. (D. # 57, FFRF Brief, p. 3, 10-11). They ignore the content of the full 107-minute program, and indeed the fact that the Christmas Spectacular is just one of six (6) different shows performed by the Warsaw High School's Performing Arts Department, despite the fact that this was

specifically argued in the School's various briefs. *See e.g.* D. # 26. School's PI Brief, p. 4, 24-25 noting that the challenged portion of the show "is only 2% of the entire annual performing arts music performances.")

Rather than focus on the totality of the 2015-16 performing arts programs, or even the totality of the 2015 Christmas Spectacular, the FFRF asks this Court to myopically focus on just the 24 minutes that form the core of their challenge. This is the same invitation which the FFRF offered and the Court rejected at the preliminary injunction stage where the FFRF asked that the Court ignore context and focus only on the religious element: "Therefore, the Court disagrees with the Plaintiffs that the nativity scene in question necessarily endorses religion because it is performed instead of merely observed and that the Court need not consider the context in which that performance takes place." *Concord*, 148 F. Supp.3d at * 6.

As with the "Living Nativity" argument, the FFRF urges the Court to ignore "context". They essentially ignore the vast majority of the program which under their calculations is eighty-three minutes of secular programming. This is akin to the plaintiffs in *Lynch v. Donnelly*, 465 U.S. 668 (1984) asking the court to focus solely on the crèche and ignore the totality of the circumstances in which the crèche was displayed, which included "such objects as a Santa Claus house, a Christmas tree, and a banner that reads 'SEASONS GREETINGS.'"

> The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

Lynch, 465 U.S. at 680.

Focusing on the totality of the circumstances and the context of the display, the following factors support the conclusion that a reasonable observer "view[ing] in the proper context of the Christmas Holiday season", would not view the program as a whole as a prohibited endorsement of religion, but instead as one element of an integrated educational performance:

- Accepting the FFRF's numbers, the challenged religious aspect of the program made up only 24 minutes of the 107-minute program or 22.5%. However, that 24-minute number used throughout the FFRF brief is incorrect. The FFRF itself concedes in the brief that several performances within those 24 minutes are non-religious, noting for example that "[a] piano soloist then performs a song titled 'Stars Were Gleaming' … (*id.* at 1:37:00 through 1:39:03)" which is a non-secular instrumental. (D. # 57, FFRF Brief, p. 12). Similarly, the purportedly Christian portion of the program began with the Orchestra playing an instrumental piece (flanked by three large lit Christmas trees) entitled "A Medieval Christmas." (01:27.35 – 01:30.04). These two "secular" pieces interspersed in the alleged "religious" portion totaled 4:32 minutes (2:03 plus 2:29) thus reducing the alleged endorsing portion of the program to 19:30 minutes of the 107 minutes, or just 18%.

- The remaining 82% of the program was purely secular[4] filled with non-secular performances, dances and songs including the following:

  The Holly and The Ivy an instrumental medley of traditional holiday songs by the Combined Bands & String Orchestra. (00:00.26 – 00:03:32).
  Almost Christmas a vocal performance about eagerly waiting for Christmas "[a]nd I feel like I'm eight years old again; Waiting for December 25th; It's almost Christmas." Combined Bands, Choirs & String Orchestra. (00:03:42 – 00:06:56).
  That's Christmas to Me a vocal performance about the secular elements of Christmas, "[a]nd I wait all night 'til Santa comes to wake me from my dreams; Oh, why? 'Cause that's Christmas to me." Beginning Women's and Intermediate Men's Choirs. (00:07:05 – 00:11:00).
  One More Sleep a vocal performance that focuses on the fact that "My baby's coming home for Christmas; I've been up all night inside my bedroom." Advanced and Intermediate Women's Choirs. (00:11:02 – 00:14:35).
  Underneath the Tree a vocal performance that focuses on "[y]ou're here where you should be … You're all that I need; Underneath the tree." Concert Choir. (00:14:40 – 00:17: 54).

[4] The remaining portion is the 9 ½ minutes that were devoted to Channukah and Kwanza. (01:13:14 – 01:22:43).

December Prayer a vocal performance that focuses on "[o]pen your heart and look around, listen... listen... Hear the song within a silence, See the beauty when there's nothing there, Sing a song within a silence That hope and love are everywhere, to the song, the song within the silence … a December Prayer, a December Prayer." Symphonic Choir. (00:18:04 – 00:22:09).

Winter Wonderland an instrumental performance of the classic song about "walking in a Winter Wonderland." Jazz I. (00:22:17 – 00:26:18).

Text Me Merry Christmas a humorous vocal piece about the impact of technology on Christmas. Concord Singers. (00:26:24 – 00:29:17).

Hot Chocolate a dance number about serving up Hot Chocolate. Concord Dance Team. (00:29:19 – 00:31:53).

I'll Be Home for Christmas a vocal solo of the classic 1943 Bing Crosby song about World War II accompanied by old home movies of Concord student families celebrating Christmas. (00:31:58 – 00:35:08)

Secret Agent Santa a humorous skit about Santa as a Secret Agent. Combined Bands. (00:35:17 – 00:39:38).

White Winter a vocal performance about walking in winter snow. Acapella Choir. (00:39:49 – 42:47).

Christmas Eve/Sarajevo 12/24 a cover of Trans-Siberian Orchestra's instrumental about Christmas Eve in war town Sarajevo. Concord String Orchestra. (00:42:51 – 00:46:24).

The Twelve Drum Fills of Christmas a percussion version of the Twelve Days of Christmas. Percussion Council. (00:46:44 – 00:50:30).

A Mad Russian's Christmas a cover of Trans-Siberian Orchestra's instrumental featuring Tchaikovsky's Nutcracker. Chamber Strings. (00:50:41 – 00:54:02).

I'll Be Home a vocal solo "I'll be home with my love this Christmas; I promise, I promise." Elizabeth Schrock. (00:54:04 – 00:56:52).

Parade of the Wooden Soldiers marching wooden soldiers with accompanying music. Combined Bands & Dance. (00:56:56 – 00:59.39).

Santa Baby a solo vocal performance of the classic song. Jenni Estrada. (00:59:48 – 01:01:46).

Big Noise from the North Pole an instrumental jazz performance. Jazz I & II. (01:01:52 – 01:05:28).

It's Our Christmas Cheer a clever song about the holidays that turns Christmas "cheer" into the cheering at a football pep rally. Combined Choirs. (01:05:32 – 01:08:26).

White Christmas a performance of the 1942 Bing Crosby/Irving Berlin classic. Combined Bands, Combined Choirs, String Orchestra. (01:08:36 – 01:12:52).

- During the course of the 107-minute program dozens of symbols were on stage, including three very large illuminated Christmas trees, reindeer, Christmas presents, wooden soldiers, backdrops of snowy village streets,

snowflakes, hot chocolate, screen video of "Secret Agent Santa", screen video of home movies of families unwrapping presents, and thousands of individual lights and wreathes. *See* 2015 Video, *passim*. The only challenged "religious" symbols, the passive Nativity and the "angel" were featured for only four minutes of the program (*See e.g.* 2015 Video, 1:30:11 through 1:32:18 and 1:39:06 through 1:41:05), and these two symbols were preceded by symbols from the two other major holidays celebrated in December, Chanukah[5] and Kwanza.[6]

- The FFRF contends that certain portions of the religious program are performed in the dark which they contend solemnizes and emphasizes those performances leading to endorsement. (D. # 57, FFRF Brief, p. 11). This is incorrect. The primary secular purpose of the darkness is, as in all theatre performances, to hide set and performer changes and movements. Many of the performances throughout the entire program are performed in darkness or to the side to allow these movements to set up the next performance. *See e.g.* "I'll Be Home" - a vocal solo (00:54:04 – 00:56:52); "That's Christmas to Me" – side stage, main stage dark (00:07:05 – 00:11:00); "I'll Be Home for Christmas", a vocal on dark stage with video screen (00:31:58 – 00:35:08); "Santa Baby" a vocal solo (00:59:48 – 01:01:46).

- The FFRF contends that the inclusion of the educational narratives and the Chanukah and Kwanza portions of the program have no impact on the endorsement inquiry, because of the disparate nature of the manner in which they are presented (time on stage and live performers). (D. # 57, FFRF Brief, p. 14-15). This analysis is flawed because, as noted below, the FFRF Brief ignores the changes in the manner in which the passive Nativity was presented, and that as performed the Nativity was given essentially the same "symbol" two-minute treatment with a single song as were the Menorah and the Star of David that accompanied "Ani Ma'amin", and the mat, candles and the Seven Symbols that accompanied "Harambee".

The FFRF places great weight in its "endorsement" argument on the fact that during the 107 minute program, 19 minutes involve Christian religious hymns ("One Amazing Night" - 01:22:46 – 1:26:30; "Angels We Have Heard On High" (01:30:11 – 01:32:18); "O Little Town

[5] These included symbols projected on screens such as Menorahs, Dreidels, and the Star of David. (01:14:02 - 1:18:00).

[6] These included celebratory symbols projected on screens such as a mat (Mkeka) on which other symbols are placed: a Kinara (candle holder), Mishumaa Saba (seven candles) mazao (crops), Muhindi (corn), a Kikombe cha Umoja (unity cup) for commemorating and giving shukrani (thanks) to African Ancestors, and Zawadi (gifts). *See* (01:18:11 - 01:22:43).

of Bethlehem" (01:32:20 – 01:30:04); "Jesus, Jesus, Rest Your Head" (01:33.51 – 01:36;49); "O Holy Night" (1:39.06 – 1:41:05); "Peace, Peace" (01:41:14 – 01:44:05); and, "Hark, the Herald Angels Sing" (01:44:12 – 01:45:39)) and two religious symbols a "visual [that] is a religious figure clearly intended to emulate the stained glass of a church" which appears for two minutes during Angels We Have Heard on High and the passive Nativity which appears for two minutes during "O Holy Night." (D. # 57; FFRF Brief p. 10-12).

As discussed in earlier briefs and by this Court, the continued focus on a single practice and a single point in time is erroneous, nor is the fact that religious hymns are sung a violation:

> For example, there is little question that a choir can not only study but sing sacred music. *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 554–55 (10th Cir. 1997) ("[I]t is recognized that a significant percentage of serious choral music is based on religious themes or test. Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs."); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407–08 (5th Cir. 1995). Even though singing sacred music may be a religious exercise for adherents to that religion, performing such music in public schools is acceptable when it is an appropriate part of the study of choral music; a reasonable observer would be able to perceive the religious songs as part of the context of the performance as a whole. *Bauchman*, 132 F.3d at 555.

Concord, 148 F. Supp.3d at * 6.

As noted by the 5th Circuit in *Doe* "60–75 percent of serious choral music is based on sacred themes or text" and specifically Christian themes, thus:

> As a matter of statistical probability, the song best suited to be the theme is more likely to be religious than not. Indeed, to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it is religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion.
>
> A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often

> than other songs. Such animosity towards religion is not required or condoned by the Constitution.

Doe, 70 F.3d at 407-08.

The Supreme Court recently utilized this same reasoning in affirming legislative prayers that were largely Christian in nature:

> Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee*, 505 U.S., at 617 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

Galloway, 134 S.Ct. at 1824.

As this Court noted in its opinion, based on these factors, "there is little question that a choir can not only study but sing sacred music." *Concord*, 148 F. Supp.3d * 6.[7]

[7] It can also be fairly argued that some of these carols, while having a Christian origin, have taken on such a secular status that they can no longer be said to "endorse" religion. "It is difficult to argue that lyrics like "Good Christian men, rejoice," "Joy to the world! the Savior reigns," "This, this is Christ the King," "Christ, by highest heav'n adored," and "Come and behold Him, Born the King of angels" have acquired such a secular nature that nonadherents would not feel "left out" by a government-sponsored or approved program that included these carols. See W. Ehret & G. Evans, The International Book of Christmas Carols 12, 28, 30, 46, 318 (1963). We do not think for a moment that the Court will ban such carol programs, however. Like Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court, they constitute practices that the Court will not proscribe, but that the Court's reasoning today does not explain." *Allegheny*, 492 U.S. at 674 n. 10 (Kennedy, concurring in the judgment in part and dissenting in part).

Therefore, the question is whether the addition of the passive Nativity display for two minutes in the program is sufficient to tip the balance.[8] In its prior decision regarding the "Living Nativity" this Court noted as follows:

> Here, the nativity scene is emphasized in a manner unlike any other aspect of the show. To begin with, the nativity scene is on stage continuously for twelve minutes. While that is not a large percentage of the show as a whole, no other performance lasts that long, or even nearly so. For example, the wooden soldiers (whose song will be part of the 2015 show) were on stage for just over two minutes as part of their respective number in the 2014 show. Further, the nativity scene provides the visual centerpiece for an uninterrupted medley of performances that includes ten different songs and that lasts about twenty minutes. By comparison, the rest of the performances during the show last around three minutes each—the first half of the show is scheduled to last one hour, and includes nineteen separate performances. That twenty-minute segment is nearly a quarter of the show, and dominates the show following the intermission.

Concord, 148 F. Supp.3d * 7.

Unlike what was contemplated in the Order, in the 2015 show as actually performed and as it would be performed into the future, the passive nativity, like every other performance, was featured for only two minutes of the program (01:39:06 through 01:41:05), and this symbol was preceded by symbols from the two other major holidays celebrated in December, Chanukah and Kwanza, as well as dozens of other secular symbols throughout the program. Thus the passive Nativity symbol was no different in character or nature than the other two dozen secular performances. It was a symbol highlighting the accompanying song, "O Holy Night", for two

[8] The FFRF also complains about a "visual [that] is a religious figure clearly intended to emulate the stained glass of a church". (D. # 57; FFRF Brief p. 10-12). However, while angels may be religious in nature, they can hardly be said to endorse any specific religion. "Angels constitute important figures in a great many world religions, including all three Abrahamic faiths: Judaism, Islam and Christianity. Additionally, angels and angel lore are found in Baha'i, Zoroastrianism and Sikhism." https://www.reference.com/world-view/religions-believe-angels-131ce8871106a243 (visited July 3, 2016).

minutes[9], just as the video that accompanied "Secret Santa", the three very large lit Christmas Trees accompanied "Almost Christmas" and "I'll be Home by Christmas", the wrapped presents accompanied "That's Christmas to Me", the Menorah and the Star of David accompanied "Ani Ma'amin", and the mat, candles and the Seven Symbols accompanied "Harambee", as well as many other symbols used throughout the show. When presented in this fashion the passive Nativity eliminated the concerns expressed by this Court and is permissible:

> Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with *Lynch*.

Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 616 (1989).

Based on the foregoing factors, the School respectfully submits that in light of all of those factors, a reasonable observer would fairly believe that the challenged portion of the program when viewed in the particular context, circumstances, and history of the Christmas Spectacular and the overall Performing Arts curriculum and performances throughout the year, does not convey a message of endorsement of religion, or that a particular religious belief is favored or preferred. "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed,

[9] For some unknown reason the FFRF's Brief chooses to completely ignore the changes to the Nativity's role in the 2015 program as performed from the program as proposed prior to the Court's Order. The FFRF characterizes the changes to the Nativity portion as simply "replac[ing] students standing on stage with mannequins standing on stage" and contends that this is not a "significant change". (D. # 57, FFRF Brief, p. 13). This is inaccurate and the argument based on this inaccurate statement should be rejected. In addition to moving from a "living" Nativity with student performers to a "passive" Nativity with mannequins, the Nativity was reduced to a two-minute appearance accompanying a single song. This brings the display into line with all the other symbols displayed as well as all of the other two to three minute performances. Ignoring this significant if not dispositive change undercuts the FFRF's entire argument in this regard.

and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993),

4. The Secular Purpose.

The FFRF concludes its analysis by contending that the School has not established a legitimate secular purpose for the program. (D. # 57, FFRF Brief, p. 21-24). Under the *Lemon* test a challenged activity violates the Establishment Clause if it "lacks a legitimate secular purpose." *Lemon*, 403 U.S. at 612–13.

As discussed earlier, given the undisputed facts regarding the educational purpose of the program discussed in Section II of this Brief, it is a little difficult to understand the genesis of the FFRF's argument. Indeed, this Court made mention of the educational context of the program in the first portion of its Order, noting the overall music program, the role of the Christmas Spectacular within that context and that "[t]he performing arts department presents a number of programs throughout the school year that allow the students to experience performing in front of live audiences." *Concord*, 148 F. Supp.3d at * 1-2. Mr. Spradling also testified that specifically for the challenged portion: "Hanukkah, Kwanza and Christmas there will be spoken introduction or spoken summary of the holidays; is that right? A. Yes. Q. That will include both historical and educational components for each? A. Yes, it will." (D. # 33-2, Spradling Depo., p. 43, 65).

The fact that the educational component includes information about religions does not defeat a secular purpose. As this Court recognized in detail in its December 2, 2015 Order, courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally, consequently:

> As the Eighth Circuit explained in *Florey*, discussing the applicability of this analysis to performances with religious content in schools: "[T]he study of religion is not forbidden "when presented objectively as part of a secular program of education." *Abington School Dist. v. Schempp, supra*, 374 U.S. at 225. We

> view the term "study" to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of "study." It does mean, however, that when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content." *Florey v. Sioux Falls Sch. Dist. 49–5*, 619 F.2d 1311, 1315–16 (8th Cir. 1980). Likewise, as the Ninth Circuit noted in *Brown*, "having children act out a ceremonial American Indian dance for the purpose of exploring and learning about American Indian culture may be permissible even if the dance was religious ritual. Similarly, a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 n. 6 (9th Cir. 1994).

Concord, 148 F. Supp.3d at * 6.

Thus the express secular purpose for the program as a whole and the challenged portions of the program in particular is to allow students to perform live music before audiences, and to educate them about the holidays celebrated during December just as other programs focus on other events throughout the year. This evidence is unrebutted and therefore the Court must treat it as conclusive. "[T]he Court is normally deferential to a State's articulation of a secular purpose, [but] it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)(parenthetical supplied). Given the FFRF's failure to introduce any evidence to demonstrate that the School's articulated secular purpose is a "sham", under *Edwards* the Court should defer to this articulation and find that the secular purpose prong has been met in this case.

IV. Conclusion

The Concord Community Schools respectfully request that the Court deny the Plaintiffs' Motion for Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of July, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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