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

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns three versions of a "Christmas Spectacular" holiday program that Concord Community Schools ("the School Corporation") stages annually. In entering a preliminary injunction against the version of that program that the School Corporation intended to present in December 2015, this Court concluded that a twenty-minute musical telling of the story of the birth of Jesus, complete with a "living nativity" featuring students portraying biblical characters, violated the Establishment Clause. By extension, the version of the Christmas Spectacular that was presented for decades prior to the initiation of this litigation, and which featured also a scriptural reading from the New Testament, is clearly unconstitutional—indeed, not once during this litigation, including on summary judgment, has the School Corporation even attempted to justify the constitutionality of this version of the event. On summary judgment, the School Corporation presents no reason for this Court to reconsider its preliminary-injunction decision, and it is therefore clear that a permanent injunction should issue against the first two versions of its Christmas Spectacular (and that the plaintiffs should be awarded their

corresponding nominal damages). Instead, the School Corporation focuses its attention on the version of the event that it actually presented in 2015 and that it will present in future years if it is not permitted to revert to one of the other performances. This third version, however, made only a single change from the version that this Court preliminarily enjoined: it replaced stationary student actors portraying biblical figures present at the nativity with life-sized mannequins. But this is a distinction without a difference. Whether the School Corporation utilizes students or mannequins, the effect of the Christmas Spectacular's grand finale on participants and attendees is the same: it is a lengthy celebration of the religious aspects of Christmas. This performance is unconstitutional, and the School Corporation's arguments to the contrary are without merit.

ISSUES CONCERNING THE FACTS

The School Corporation does not dispute any of the facts as previously articulated by the plaintiffs. These facts must therefore be accepted as true on summary judgment. *See* N.D. Ind. L.R. 56–1(b)(2); *see also, e.g.*, *Williams v. Canarecci*, No. 3:11-CV-047, 2014 WL 505336, at *3 (N.D. Ind. Feb. 6, 2014). The School Corporation also does not submit any new evidentiary materials of its own and this Court has before it video recordings of the 2014 Christmas Spectacular and the 2015 Christmas Spectacular, and it is therefore clear that this case does not hinge on a disputed issue of material fact. Nonetheless, the School Corporation describes several "undisputed facts" pertaining to the presentation of the Christmas Spectacular that either do not properly reflect the record or are not supported by record evidence. While none of these issues ultimately influences the outcome of this case—and certainly they do not create a triable issue—they nonetheless must be clarified at the outset.

1. First, the School Corporation describes the length—in minutes—of various

portions of the 2015 Christmas Spectacular. (ECF No. 56 at 7-8). In making these representations, it cites repeatedly to Mr. Spradling's affidavit, which was prepared and submitted prior to the event (and prior to the changes made as a result of this Court's preliminary-injunction decision). Mr. Spradling's affidavit is not accurate in several respects. Nonetheless, this does not create a disputed issue of fact insofar as the video of this performance appears in the record and, even on summary judgment, this Court is not bound to accept factual submissions that contradict such a recording (the authenticity of which is not in doubt). *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 378-81 (2007). Rather, under those circumstances, courts "should . . . view[] the facts in the light depicted on the videotape." *Id.* at 381. The School Corporation's factual representations are inaccurate in the following respects:

- The School Corporation indicates that the 2015 Christmas Spectacular ran about 90 minutes (with the pre-intermission segment titled "The Magic of the Season" lasting approximately 60 minutes and the post-intermission segment titled "The Spirit of the Season" lasting approximately 30 minutes). The video of the event, however, establishes that the program ran nearly 107 minutes total, with about 73 minutes occurring before intermission ("The Magic of the Season") and about 34 minutes occurring after intermission ("The Spirit of the Season"). Moreover, the video appears to have been edited to exclude set changes and time spent for the various musical groups to replace one another on-stage, and it seems likely that in reality the program was even lengthier.

- The School Corporation indicates that the portion of the program dedicated to Christmas lasted approximately 19 minutes. (ECF No. 56 at 7). In reality, it lasted 24 minutes. (*See* 2015 Video at 1:22:45 through 1:46:40).[1]

- The School Corporation then relies on these calculations to assert that "the challenged portion of the program makes up only 13% of the overall Christmas Spectacular

[1] It is not clear whether the School Corporation's error in this regard results from the fact that Mr. Spradling's affidavit was prepared and submitted prior to the event or whether the School Corporation and Mr. Spradling have excluded specific performances from their calculations. After all, the 19-minute figure may be reached if "the Christmas portion" of the event is treated as beginning when a narrator reads from the script pertaining to Christmas and ending when the audience begins to applaud at the end of the event. (*See* 2015 Video at 1:26:36 through 1:45:40). However, the reading of this script is immediately preceded by a multi-choral performance of "One Amazing Night" (*see id.* at 1:22:45 through 1:26:35)—a song that, as indicated previously (ECF No. 54 at 8 n.6), and as not disputed by the School Corporation, pertains exclusively to the birth of Jesus—and the performance of "Joy to the World" continues as the audience applauds, the lights come on, and persons begin to disburse (*see id.* at 1:45:41 through 1:46:40). To the extent that the School Corporation has intentionally excluded these performances from its calculations, it is not clear why the School Corporation feels these portions excludable.

> program." (ECF No. 56 at 7). Using the figures made apparent from the video recording, the portion of the event that celebrates Christmas comprises 22.4% of the overall program and a whopping 70.6% of the portion of the program dedicated to celebrating winter holidays.[2]

2. Second, at page 5 of its summary judgment memorandum, the School Corporation describes three purported "purposes" of the Christmas Spectacular, and then concludes by indicating as follows: "Despite the changes to the program as required by the Court, student participation in the Spectacular is still paramount as the program's purpose is educational." Absolutely no citation to the record is given for any of these stated purposes, and they therefore may not be accepted. *See* Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record."). Although the School Corporation cites to paragraph 8 of Scott Spradling's affidavit at the end of the paragraph in question (ECF No. 56 at 6), Mr. Spradling's statements only support different factual representations (concerning the identity of the performing arts groups) made in that paragraph. (*See* ECF No. 27 at 4 [¶ 8]). In any event, as described both previously and below, whatever the overall purpose of the Christmas Spectacular may be, the plaintiffs have demonstrated that the portion celebrating Christmas has a religious, not educational, purpose.

3. Third, and finally, the School Corporation indicates that the religious portion of the 2015 Christmas Spectacular included "music from each of the three major holidays

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[2] In a footnote, the School Corporation also provides a calculation that takes into account other performances staged by the performing arts department throughout the year. (ECF No. 56 at 7 n.5). This is, of course, immaterial insofar as the fact that a governmental body acts constitutionally on some occasions does not permit it to act unconstitutionally on others. Regardless, the School Corporation's assertion that the challenged program represents as "*de minimis* religious reference[]" (*id.* [citing *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015)]) is legal argument, not a factual submission. Moreover, it is an argument that the School Corporation does not further advance, and it is therefore not addressed other than to say that the distinctions between this case and *Smith*—where "students . . . were not exposed to any religious instruction, prayer, or any mentions of religion at all" and the "school building was devoid of any religious imagery," 788 F.3d at 590—could not be more readily apparent.

celebrated during the season." (ECF No. 56 at 7). The plaintiffs, of course, do not dispute that numerous songs celebrated Christmas, and they likewise do not dispute that the performance of "Harambee" pertained to Kwanzaa. However, as noted previously, "Ani Ma'amin" does not pertain specifically to Hanukkah but instead represents Judaism generally. (ECF No. 54 at 8-9). The School Corporation appears to accept this fact, for it does not challenge the plaintiffs' factual statement, and Mr. Spradling's cursory statement that the song is "from . . . Chanukah" (ECF No. 27 at 7 [¶ 18]) does not create a factual dispute: as indicated previously, Mr. Spradling acknowledged that he had very little understanding of Hanukkah (ECF No. 54 at 33) and he is therefore not qualified to opine on the origins or meaning of this musical selection. Regardless, this detail also is ultimately immaterial to the outcome of this case.[3]

[3] The School Corporation makes reference to several background facts that are also not supported by the record. Given that these facts provide only some background to the parties, and clearly have no impact on the resolution of this case, treating these issues at length is not necessary. Nonetheless, the School Corporation's description of the Freedom From Religion Foundation ("FFRF") (ECF No. 56 at 3) is not supported by reference to any record materials; rather, the School Corporation simply directs the Court to two unsuccessful challenges to particular practices that were previously made by FFRF. Previous court decisions, of course, are not "facts" that may be accepted on summary judgment, *see, e.g.*, *Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993), and the specific decisions cited by the School Corporation do not even stand for the broad proposition that it articulates—they stand only for the proposition that FFRF initiated two lawsuits challenging the specific practices at issue in those cases. The School Corporation's citation-less description of the Does as "generally shar[ing] FFRF's goals" (ECF No. 56 at 3) likewise finds no record support and is irrelevant.

Additionally, the School Corporation's description of the "strength" of Concord High School's performing arts program (ECF No. 56 at 4) is not supported by any citation to the record. And its description of the various groups that participate in this program and the number of students who do so (ECF No. 56 at 4-5) relies on the allegations of the plaintiffs' complaint, which were taken from the School Corporation's website. These allegations were contradicted somewhat by the School Corporation's Rule 30(b)(6) designate (*see* ECF No. 54 at 2-3), and the plaintiffs in their summary judgment motion relied on this deposition testimony rather than the information publicized on the School Corporation's website. Any minor differences in the precise number of the High School's performing arts groups and the precise number of students who participate in those groups clearly are not material to the ultimate resolution of this case.

And finally, the School Corporation indicates that, in 2015, the "selection of the music and program design" for the Christmas Spectacular was "pushed back into early November." (ECF No. 56 at 6). The plaintiffs do not dispute that the selection of some pieces may have been delayed in 2015; this, however, does not include the songs that have traditionally been presented during the portion of the program dedicated to Christmas (and the story of the birth of Jesus) itself—for, as indicated repeatedly throughout this litigation, these pieces generally do not change from year to year. And Mr. Spradling made clear in his deposition that at least some groups began rehearsing the songs that they would perform during the Christmas Spectacular as early as mid-October (Spradling Dep. [ECF No. 33-2] at 28). Moreover, to the extent that the selection of some songs was "pushed back into early November," clearly they were not "pushed back" very far into November: Mr. Spradling's affidavit—which is undated but was

ARGUMENT

As indicated, none of these factual issues create a disputed issue of material fact. The undisputed facts reveal quite clearly that the plaintiffs are entitled to judgment as a matter of law. This Court should enjoin all three versions of the Christmas Spectacular at issue in this case, and award the plaintiffs their nominal damages as previously set forth.

I. The School Corporation does not attempt to justify two of the three versions of the Christmas Spectacular at issue in this case, and it is therefore undisputed that the plaintiffs are entitled to injunctive and declaratory relief, as well as nominal damages, arising from the staging of these events

In their initial summary judgment memorandum, the plaintiffs described the three versions of the Christmas Spectacular at issue in this case—the version that was staged for decades before this action was initiated, the version that the School Corporation intended to stage until this Court issued its preliminary injunction, and the version that was actually staged in 2015—and described the relief stemming from each version to which they are entitled. This Court concluded on preliminary injunction that the second version of the event runs afoul of the Establishment Clause, and the School Corporation presents no reason to revisit this decision. The plaintiffs acknowledge that the School Corporation has preserved this argument for a future appeal by referencing its previous arguments (*see* ECF No. 56 at 3 n.1), but at present it is clear that, at the very least, this Court's preliminary injunction must be made permanent.

But the plaintiffs have also raised a challenge to the first version of the Christmas Spectacular, which was presented for decades before this litigation was initiated. Given the

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filed on November 5th and presumably prepared and signed in advance of that date—already recounts virtually every song that was placed on the 2015 program. (*Compare* ECF No. 27 at 6 [¶ 16] [Spradling Aff.] *with* ECF No. 33-9 at 1-2 [2015 Program]). (It appears that sometime after the preparation of the affidavit but before the creation of the program, a song titled "Santa's Workshop" was replaced with one titled "Hot Chocolate." [*Compare* ECF No. 27 at 6 {¶ 16} {Spradling Aff.} *with* ECF No. 33-9 at 1 {2015 Program}]. This change is confirmed by a viewing of the video of the 2015 Christmas Spectacular. [*See* 2015 Video {ECF No. 52-1} at 29:21 through 32:04]. Given this change, the School Corporation's factual recitations pertaining to the "Santa's Workshop" performance [ECF No. 56 at 7 n.4] clearly cannot be credited and are irrelevant.)

changes to the program after the filing of this lawsuit, the constitutionality of this version of the event was not litigated on preliminary injunction. (*See, e.g.*, ECF No. 35 at 5 ["The plaintiffs concede . . . that preliminary injunction proceedings must necessarily focus primarily on the 2015 program."]). The School Corporation may therefore not incorporate by reference any argument, not previously made, concerning the constitutionality of this version, and any opposition to the plaintiffs' requested relief arising from this performance has been waived. *See, e.g.*, *Narducci v. Moore*, 572 F.3d 313, 323-24 (7th Cir. 2009).

Accordingly, the plaintiffs are entitled to an injunction prohibiting the pre-2015 version of the Christmas Spectacular, an injunction prohibiting the 2015 version of the Christmas Spectacular as contemplated prior to the issuance of this Court's preliminary injunction, appropriate declaratory relief respecting these two versions of the event, and nominal damages in the following amounts: FFRF -- $1.00; John Doe -- $1.00; Jack Doe -- $7.00; John Roe -- $1.00. These nominal-damages amounts represent nominal damages based on the plaintiffs' exposure to the 2014 version of the event but not the 2015 version of the event. (*See* ECF No. 54 at 36). Summary judgment clearly must enter in favor of the plaintiffs on these issues.[4]

II. The slight modification made to the 2015 version of the Christmas Spectacular does not render the performance constitutional

In issuing a preliminary injunction in this cause, this Court concluded that the anticipated performance of the Christmas Spectacular—which included brief performances dedicated to Hanukkah and Kwanzaa followed by a lengthy climax dedicated to celebrating the religious aspects of Christmas during which students stood stationary on stage portraying biblical

[4] As indicated previously, an injunction must issue against these versions of the School Corporation's Christmas Spectacular performance notwithstanding the changes made to the program in the heat of litigation. The plaintiffs described previously the "heavy burden" that the School Corporation must meet in order to demonstrate that its cessation of allegedly unconstitutional conduct renders a claim for prospective relief moot (*see* ECF No. 54 at 15 n.7), and the School Corporation does not attempt to meet this burden either with respect to the pre-2015 version of the Christmas Spectacular or with respect to the version that this Court preliminarily enjoined.

figures—constituted unconstitutional religious endorsement. (*See* ECF No. 40 at 11-21). But the version of the event actually staged in 2015, which is the only version of the event that the School Corporation defends, made only a single change: it replaced the students standing on stage with mannequins. There is, however, no theory of the Establishment Clause wherein religious endorsement hinges on this detail. After all, the message conveyed by the performance is unaltered. For this reason alone, the School Corporation's arguments must be viewed with skepticism. These arguments are rife with error.

A. The School Corporation does not attempt to justify the 2015 version of the Christmas Spectacular under the coercion test

In seeking summary judgment, the plaintiffs raised three arguments under the Establishment Clause: that the Christmas Spectacular violates the endorsement test first articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (ECF No. 54 at 21-26); that it violates the coercion test at issue in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992) (ECF No. 54 at 26-30); and that it violates the first prong of the traditional *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), insofar as it lacks a primarily secular purpose (ECF No. 54 at 30-33). (The plaintiffs also asserted that the Christmas Spectacular violates the second prong of the *Lemon* test—whether the principle effect of the performance is religious in nature—although they acknowledged that this test is largely co-extensive with the endorsement inquiry. [ECF No. 54 at 33-34]).

Of these three arguments, the School Corporation addresses almost exclusively the endorsement test, although its brief mention of the "secular purpose of the nativity scene" (ECF No. 56 at 13) might be interpreted as preserving an argument under *Lemon*'s first prong. To be sure, in issuing a preliminary injunction this Court concluded that the endorsement test "is most

applicable here" and that, because the plaintiffs were likely to prevail under this rubric, it was therefore unnecessary to reach their other arguments. (ECF No. 40 at 11). But the fact that the Court may avoid these separate analyses by resolving one argument in favor of the plaintiffs does not mean that other tests under the Establishment Clause are wholly irrelevant. Nor does it mean that they may be avoided if the Court reverses course and determines that the plaintiffs' argument under the endorsement test is without merit. This Court was clear in its preliminary-injunction decision that the varying approaches to Establishment Clause analysis are independent of one another (ECF No. 40 at 9-11), and case law establishes this principle as well:

> We are free to apply any or all of the three tests [endorsement, coercion, or *Lemon*], and to invalidate any measure that fails any one of them. The Supreme Court has not repudiated *Lemon*; in *Santa Fe*, it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee*, the Court invalidated the policy solely on the basis of the coercion test. Although this court has typically applied the *Lemon* test to alleged Establishment Clause violations, we are not required to apply it if a practice fails one of the other tests.

Newdow v. U.S. Congress, 292 F.3d 597, 607 (9th Cir. 2002), *reiterated in amended opinion on denial of rehearing en banc*, 328 F.3d 466 (9th Cir. 2002), *rev'd on other grounds sub nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The 2015 version of the Christmas Spectacular is unconstitutional if it runs afoul of the coercion test, even if it does not violate the endorsement test or *Lemon*'s purpose prong. The School Corporation's failure to address this argument, advanced by the plaintiffs, means that any opposition to this argument has again been waived.[5]

[5] The plaintiffs acknowledge that, in a footnote, the School Corporation insists that the Christmas Spectacular is not unconstitutionally coercive insofar as a student may "opt out" of portions of the Christmas Spectacular to which he or she objects. (ECF No. 56 at 8 n.6). To the extent that this is the School Corporation's only argument in opposition to the plaintiffs' coercion claim, it has not been waived. However, as this Court noted previously, "[e]ven assuming that [a student] is fully able to opt out . . . that fact would not impact the [coercion] analysis." (ECF No. 40 at 11 n.4). The School Corporation's assertion cannot be reconciled with, and flies in the face of, the decisions of the U.S. Supreme Court in *Santa Fe* and *Lee* as well as the decision of the Seventh Circuit in *Doe ex rel. Doe v. Elmbrook School District*, 687 F.3d 840 (7th Cir. 2012) (*en banc*). It is unfortunate that the

B. The 2015 version of the Christmas Spectacular violates the endorsement test

1. The School Corporation ignores the overall visual and auditory impact of the religious aspects of the Christmas Spectacular

In asserting that the changes made to the Christmas Spectacular following this Court's preliminary injunction render its program constitutional, the School Corporation draws specific attention to several individual factors that it believes pertinent to the analysis. The emphasis that the School Corporation places on these factors is erroneous, and the flaws in its logic are addressed below. But the focus on these individual factors in the first place misses the forest for the trees. After all as this Court noted on preliminary injunction (*see* ECF No. 40 at 11), 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." *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989)).

What cannot be denied is the overwhelming impact that the grand finale of the Christmas Spectacular has on those in attendance. After brief musical selections—neither of which is presented in English—that the School Corporation believes (erroneously) to concern Hanukkah and Kwanzaa, three separate choirs (comprised of well over 100 students) take the stage for a rowdy rendition of "One Amazing Night," a song that the School Corporation's 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.

School Corporation continues to view requiring a student to absent himself—and, in so doing, not only endure the ridicule and ostracism of his peers but also forgo the scholastic, social, and extracurricular benefit of the event itself—as a realistic alternative. It is not.

> 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). A narrator then reads a script providing insight into the birth, life, and death of Jesus Christ—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 performances dedicated to Hanukkah and Kwanzaa. (*Id.* at 1:26:36 through 1:27:28). The remainder of the event is then a lengthy assortment of religious hymns performed by multiple groups within the Performing Arts Department of Concord High School. (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 this Court has previously 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 clearly 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" that appears to have been added to the program after the issuance of the preliminary injunction (*id.* at 1:37:00 through 1:39:03), and the lights are then dimmed again after this performance until a traditional nativity scene is unveiled on stage, resulting in a lengthy ovation from the audience, presumably in light of this litigation (*id.* at 1:39:04 through 1:39:37). 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).

This performance, which forms the climax to an annual tradition of the School Corporation and is presented to thousands of persons each year, is prodigious in its religiosity. There can be no doubt that a reasonable theater-goer—let alone a reasonable participant such as Jack Doe—"will think religion, not history." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001). Although the School Corporation acknowledges that the endorsement test necessarily focuses on the "totality of the circumstances" to determine whether religious activity runs afoul of the Establishment Clause (ECF No. 56 at 9), its decision to immediately turn its attention to specific elements of the Christmas Spectacular while ignoring the overwhelming impact of its performance gives short shrift to this acknowledgement. Viewed as a whole, the portion of the Christmas Spectacular dedicated to a celebration of the religious aspects of Christmas is clearly unconstitutional.

2. The School Corporation's specific arguments are without merit

The School Corporation nonetheless advances several arguments in support of its contention that the 2015 version of the Christmas Spectacular, as presented, does not constitute impermissible religious endorsement. While, as indicated, it is a mistake to focus on individual elements rather than the performance as a whole, each of the School Corporation's arguments is addressed in turn.

1. First, the School Corporation insists that its decision to replace students standing stationary on stage with mannequins standing stationary on stage constitutes a "significant change" that requires the Court to "evaluate[] anew" the analysis it undertook on preliminary injunction. (ECF No. 56 at 11). This is so, argues the School Corporation, because there exists a constitutionally significant distinction between live performers and mannequins. The importance of this superficial change, however, is dramatically overstated, and, notably, the School Corporation does not argue—nor could it—that this single change actually alters the message conveyed by the Christmas Spectacular. Given that the very purpose of the endorsement analysis is to provide a means through which to analyze the message conveyed by government activity, *see, e.g.*, *County of Allegheny*, 492 U.S. at 593 (collecting cases); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), the School Corporation's failure to insist that the message itself was somehow altered by this change means that its arguments never get off the ground.

Regardless, the attempt to find relevance in this distinction is off-base. As they did in their previous briefing, the plaintiffs acknowledge that this Court determined that the use of student performers "further increases the likelihood that [the performance] will be seen as an endorsement of religion." (ECF No. 40 at 16; *see also* ECF No. 54 at 19-20). But as the plaintiffs also previously noted (ECF No. 54 at 20), the School Corporation has adopted an

impermissibly narrow view of what it means to be a performer—for students are the *only* performers during the Christmas Spectacular, and they are relied upon to tell the story of the birth of Jesus Christ through religious hymns and other songs performed from the stage and even the aisles of the auditorium regardless of whether they also portray biblical figures on-stage. The School Corporation does not address this issue, even though it was previously raised. On top of this, the Ninth Circuit in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994)—the case relied upon by this Court in finding relevance in the use of student performers—made clear that this fact was only relevant insofar as requiring "active participation in 'ritual'" distinguishes a performance from the "literary or historic study of the Bible" or from "merely reading, discussing or contemplating witches, their behavior, or witchcraft." *Id.* at 1380. But the School Corporation here has not advanced, and clearly cannot advance, an argument that employing mannequins rather than live bodies to depict the nativity somehow transforms an overtly religious performance into mere "literary or historical study." Its repeated emphasis on the solitary change that it made in response to the Court's preliminary-injunction decision attempts to find constitutional significance where there is none.[6]

2. Second, the School Corporation again notes that in 2015, unlike in previous years, it chose to include in the Christmas Spectacular brief elements dedicated to other wintertime holidays. (ECF No. 56 at 13). These additions, it surmises, mean that the event simply serves "to educate students regarding the various holidays celebrated during December." But these changes were made before the Court's preliminary-injunction decision, and, as the Court held,

[6] In their previous brief, the plaintiffs noted that the Ninth Circuit's reliance in *Brown* on *Lee v. Weisman*, *supra*, for its active-participation holding makes clear that the *Brown* court was also concerned with a captivated audience. (ECF No. 54 at 20-21). The School Corporation attempts to minimize this argument (ECF No. 56 at 15), but in so doing does not deny that *Brown*'s reliance on *Lee*—where a school used "an invited cleric to offer a prayer during its graduation ceremony," 27 F.3d at 1380—makes clear that the *Brown* court's reference to "active participation" was not limited to student performers.

they do not cure the program's constitutional infirmity:

> [T]he way in which Chanukah and Kwanzaa are being presented in the show in comparison to the Christmas portion in general and the nativity scene in particular actually serves to place greater emphasis on and suggest greater preference of the religious message conveyed by the nativity scene. The Chanukah and Kwanzaa portions will each include a single song performed by a single ensemble, and will last about three or four minutes each. In addition, those portions will not include any live visual components but may have images representing those holidays projected on a screen. Meanwhile, the nativity scene is on stage for twelve minutes—more than the other holiday performances combined—and the Christmas portion as a whole lasts about twenty minutes, includes ten different religious songs, and is performed by multiple ensembles from a cross-section of the performing arts department. The nativity scene also includes students on stage in costumes, with props, standing in a set and portraying the definitive religious symbol of the Christmas holiday, whereas the other holidays will have images projected onto a screen. The disparity is striking.

(ECF No. 40 at 18).[7] To be sure, this Court focused in part on the fact that students would appear on stage in costume to represent the various biblical figures present in the story of the birth of Jesus—for, of course, until the preliminary injunction issued this was the School Corporation's intention. But, as noted immediately above, the fact that the School Corporation responded to the preliminary injunction by replacing these students with life-sized mannequins is of no moment: the visual effect on the observer is the same and it is undeniably religious.

The plaintiffs previously described the dramatic differences between the School Corporation's emphasis on Christmas and its emphasis on the holidays of Hannukah and Kwanzaa (*see* ECF No. 54 at 32-33), and the School Corporation does not once address these striking disparities. Indeed, its argument that it is simply recognizing three wintertime holidays can hardly be taken seriously: the evening itself remains a *Christmas* Spectacular.

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[7] This Court's preliminary-injunction decision, of course, predated the actual staging of these performances, and so the conclusion that the Hanukkah and Kwanzaa performances would each last "three or four minutes" was based on the best estimate of the School Corporation. The video of the 2015 Christmas Spectacular makes clear that each performance, including the short introductory narration, lasted approximately four and a half minutes. (*See* 2015 Video at 1:13:20 through 1:18:00 [Hanukkah]; *id.* at 1:18:12 through 1:22:37 [Kwanzaa]).

By contrast, as indicated, the portion of the Christmas Spectacular devoted to Christmas is nearly twenty-four minutes in length. (*See id.* at 1:22:45 through 1:46:40).

3. Third, while the School Corporation admits (as it must [*see* ECF No. 54 at 21]) that its 45-year tradition of celebrating only the Christmas holiday—complete with a reading from the New Testament—is relevant to endorsement analysis, it nonetheless argues in cursory fashion that it should not operate as "a shackle that prevents a reasonable observer from weighing bona fide and significant changes to performances made in order to satisfy Establishment Clause concerns." (ECF No. 56 at 15). However, its sole support for this argument appears to be the Third Circuit's decision in *ACLU of New Jersey ex rel. Lander v. Schundler*, 168 F.3d 92 (3d Cir. 1999). But this case is highly distinguishable.

In *Schundler*, a city with a lengthy history of displaying both a crèche and a menorah in front of City Hall responded to a court order enjoining that display by adding several other elements: a plastic Santa Clause and Frosty the Snowman, a sled, Kwanzaa symbols, and two secular signs. *Id.* at 95-96. In other words, the city always intended the display to be inclusive. Applying the holiday display cases of *Lynch* and *County of Allegheny*, the court nonetheless determined that the initial display ran afoul of the Establishment Clause. *Id.* at 96-97. Addressing the relevance of the initial display to the constitutionality of the modified display, the court held as follows:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose or that it was intended to convey a message of endorsement or disapproval of religion. . . . [T]he Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith. Although the original Jersey City display was ultimately struck down, no Supreme Court or Third Circuit precedent clearly established that it was unconstitutional until the prior panel handed down its decision, and therefore the city officials' decision to continue to erect that display, which had been put up for decades, can hardly be viewed as evidence of an intent to flout the Establishment Clause.

Id. at 105 (internal quotations, citations, and alterations omitted). But the present case is not one where the School Corporation spent decades presenting an inclusive holiday program that was teetering on the brink of constitutionality. To the contrary, for 45 years it staged a tribute to the religious aspects of Christmas, presenting for thousands of persons each year a grand finale, complete with a scriptural reading set to a nativity centerpiece, whereby the story of the birth of Jesus is celebrated. The School Corporation's decision to jettison portions of this program as soon as it was sued is a tacit admission that it had not simply "miscalculate[d]." While the plaintiffs acknowledge, of course, that no one factor in the endorsement analysis is likely to prove dispositive by itself, the School Corporation cannot undo a half-century worth of flagrantly unconstitutional behavior by making cosmetic alterations at the eleventh hour. This Court previously found relevance in the history of the Christmas Spectacular (*see* ECF No. 40 at 18-19), and the School Corporation does not address this holding.

Moreover, the relevance of the historical presentation of the Christmas Spectacular here need not be assessed in the abstract. After all, when the nativity scene was unveiled after this Court issued its preliminary injunction, the result was a 33-second round of applause (2015 Video at 1:39:05 through 1:39:38), even though in previous years the audience had been instructed to hold its applause until the very end of the celebration of Christmas (ECF No. 36-1 at 1)—a clear recognition, given this litigation, of the significance of this portrayal. The School Corporation's attempt to ignore the lengthy history of its religious activity is without merit.

4. Next, the School Corporation attempts to find relevance in what it characterizes as the comparatively short duration of its Christmas celebration. (ECF No. 56 at 12-14). As noted repeatedly, this is erroneous as a factual matter: the entirety of the Christmas Spectacular exists as a crescendo to the 24-minute grand finale that is the school-wide telling of the story of the

birth of Jesus—through song and visual depictions, if no longer through a scriptural reading. Regardless, this is a curious argument given the School Corporation's acknowledgment that the Establishment Clause may not be reduced to a "mathematical calculation." (ECF No. 56 at 15). A governmental entity simply may not justify its religious involvement on the basis of the fact that it is also involved in non-religious activities.

The School Corporation nonetheless asks this Court to re-examine its earlier holding and to consider the district court's decision in *Doe v. Wilson County School System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008). Of course, although the School Corporation does not acknowledge as much, this Court clearly *did* consider *Wilson County* in issuing its preliminary injunction. (*See* ECF No. 40 at 14). That fact aside, the holiday program at issue in *Wilson County* is highly distinguishable from the Christmas Spectacular. In that case, the kindergarten classes primarily presented a skit of "Twas the Night Before Christmas," complete with a student portrayal of Santa Clause and other holiday figures (such as a toy soldier, a teddy bear, reindeer, ballerinas, and a mouse—presumably one that was not even stirring), secular holiday songs, and a reader. 564 F. Supp. 2d at 783-84. However, for two minutes at the end of the program, "students dressed as Mary, Joseph, and angels stepped out of the chorus group of students to stand near a crib to portray the nativity scene and the audience and students sang two religious Christmas carols." *Id.* at 800. Given the absence of any countervailing images during this portion of the event, and given the clear religious message conveyed by a student exhibition of the nativity, the plaintiffs believe that *Wilson County* was wrongly decided; indeed, other than this Court's preliminary injunction decision it does not appear that *Wilson County* has been cited by *any* court for its Establishment Clause holding as it pertains to this kindergarten performance. But this is not an issue with which the Court need concern itself, for even the holding in that case was

premised on the notion that the brief nativity presentation was "rather meager" and "stark" compared to the other portions of the event—which were "an extravaganza"—and that, ultimately, "the nativity scene was presented in a prudent, unbiased, and objective manner to present the traditional historical, cultural, and religious meaning of the holiday in America." *Id.*

The same can clearly not be said for the nativity and the telling of the story of the birth of Jesus that form the climax to the Christmas Spectacular. To the contrary, for 24 minutes the auditorium is *filled* with religion. Students from multiple choirs begin with a rowdy rendition of "One Amazing Night" ("The Hand of Heaven touched the Heart of Earth / One Amazing Night / Where lonely hearts beheld a Holy Birth / One Amazing Night"), a song that sets the stage for all that follows: a narrative detailing the birth, life, and death of Jesus (ECF No. 36-2 at 2); a series of religious hymns, in which the vast majority of the performing arts groups participate, celebrating the religious aspects of Christmas; and, ultimately, the unveiling of the nativity, still set to religious music, that forms the visual centerpiece to the evening's grand finale. This Court previously addressed the unique status afforded the Christmas celebration (*see* ECF No. 40 at 15-16), and the School Corporation does not address this holding. The performance "conveys solemnity and reverence, as if the audience is being asked to venerate the nativity, not simply acknowledge or appreciate its place in the winter holiday season." (ECF No. 40 at 16). The last minute decision to place life-sized mannequins on stage rather than actual students does not change these fundamental facts, nor does it alter the undeniable religious message conveyed by the scene to observers, and the School Corporation's reliance on *Wilson County* is misplaced. In the present case, it is the religious performance that is the "extravaganza."

5. Finally, the School Corporation asks this Court to place additional emphasis on the "passive display" cases, by which it presumably means *Lynch* and *County of Allegheny* as

well as their progeny. (ECF No. 56 at 10). The plaintiffs argued on preliminary injunction that "the logic underlying the passive display cases does not translate to the context of a live performance" (ECF No. 35 at 16), although they do not dispute that these cases have *some* applicability here, for they have of course been rendered under the same legal standard (ECF No. 40 at 12). But endorsement analysis asks the Court to determine the effect of a display—passive or active—on the reasonable observer, and clearly the effect of performance dedicated to celebrating a particular religion, no matter its duration, is not directly comparable to a holiday display where numerous secular and religious symbols of wintertime are exhibited side-by-side. This Court previously reached this conclusion when it held that "[t]he sequential nature of a live show may . . . give it a greater tendency to convey a message of endorsement, compared to a display where all of the images appear simultaneously." (ECF No. 40 at 17). After all, prayer to begin the school day is unconstitutional even if the rest of the day is devoted to math and science and history (*see Engel v. Vitale*, 370 U.S. 421 (1962)); the teaching of creationism is unconstitutional even if it occurs only once in a nine-month school year (*see Webster v. New Lenox Sch. Dist. No. 122*, 977 F.2d 1004 (7th Cir. 1990)); and a short, school-sponsored invocation is unconstitutional even if followed by an hours-long sporting event (*see Santa Fe*, 530 U.S. at 306-17) or by a secular celebration of the achievements of a graduating class (*Lee*, 505 U.S. at 590-99). Here, for 24 minutes the School Corporation asks its students, their families and friends, and members of the general public to celebrate the religious aspects of Christmas. This is so regardless of what precedes that celebration. Even if other aspects of the winter holidays were given equal weight—which, as indicated repeatedly, is far from the truth—there can be no doubt that a reasonable observer will view this celebration fundamentally differently than she will view an inanimate holiday display outside a government building.

The School Corporation's assertion that the passive display cases become more pertinent simply because it chose to replace student actors on-stage with mannequins (ECF No. 56 at 10) is entirely off-base. As indicated above, this eleventh-hour change has little, if any, effect on the observer. It also does not magically transform a performance into a passive display. The School Corporation's telling of the story of the birth of Jesus, even if only through song and with the use of life-sized mannequins, is performed exclusively for a captive audience. This is a performance, and the School Corporation's assertion to the contrary is without merit.

* * *

Once more, endorsement analysis focuses not on any one factor but on the totality of the circumstances surrounding religious activity. A simple viewing of the grand finale to the 2015 Christmas Spectacular leads to the inexorable conclusion that the School Corporation has endorsed the religious aspects of Christmas. But even were it necessary for the Court to address the isolated factors that the School Corporation highlights, its arguments are off-base and must be rejected.

C. The 2015 version of the Christmas Spectacular violates *Lemon*'s purpose prong

The plaintiffs also argued previously that the 2015 version of the Christmas Spectacular violates the first prong of the *Lemon* test insofar as it "lacks a primarily secular purpose." (ECF No. 54 at 30-33). The School Corporation does not respond specifically to any of the plaintiffs' arguments, but instead simply mentions twice in passing the purported "secular purpose" of the event, which it insists is to "educate students regarding the various holidays celebrated during December, including Chanukah, Kwanza[a], and Christmas." (ECF No. 56 at 13; *see also id.* at 14). Under *Lemon* a secular purpose must "be genuine, not a sham, and not merely secondary to

a religious objective." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). The School Corporation's articulated purpose does not meet this standard and cannot be taken seriously.

For 45 years the Christmas Spectacular was presented without any reference to other holidays—and, indeed, with a lengthy reading from the New Testament. Only after being sued did the School Corporation make any alterations to the program, but even in so doing (as has been repeatedly emphasized) it ensured that Christmas was very much presented in a dominant fashion. As noted previously, case law is abundantly clear that a governmental entity's historical involvement in religious activity is extremely pertinent to determining whether an asserted secular purpose is genuine. (*See* ECF No. 54 at 31-32 [citing *McCreary Cnty.*, 545 U.S. at 866, and *Books*, 235 F.3d at 303]). The School Corporation's only response to this argument is a cursory assertion "that history is not a shackle that prevents a reasonable observer from weighing bona fide and significant changes to performances made in order to satisfy Establishment Clause concerns." (ECF No. 56 at 15). It makes this assertion, without citing any authority, only in referencing endorsement analysis, but regardless the argument fails. Case law previously cited, and not addressed by the School Corporation, makes clear that the historical involvement in religious activity allows the Court to view eleventh-hour assertions of a secular purpose—made in the heat of litigation—with skepticism.

Moreover, there are additional facts that cast significant doubt on the educational rationale advanced by the School Corporation. For instance, Mr. Spradling—the only individual involved in making changes to the program for 2015 whose identity was not assertedly protected by the attorney-client privilege (ECF No. 35-1 at 13)—had virtually no understanding of either Hanukkah or Kwanzaa. (ECF No. 35-1 at 9-10). This, of course, manifested itself in the fact that the song chosen to represent Hanukkah does not actually concern Hanukkah at all. (ECF

No. 54 at 12-13). Additionally, the narratives developed (again, by persons whose identities were assertedly protected by the attorney-client privilege) to represent the holidays other than Christmas were cursory at best: they each contained simply a two or three sentence description of the holiday with virtually no detail. Given the School Corporation's asserted educational purpose, one might have expected at the very least that the School Corporation would mention, for instance, the miracle by which Judaism teaches that a day's worth of oil lasted for eight days during an invasion of the Second Temple in Jerusalem. *See* Chabad.org, *Chanukah (Hanukkah): The Story of Chanukah*, at http://www.chabad.org/holidays/chanukah/article_cdo/aid/102978/jewish/The-Story-of-Chanukah.htm (last visited June 6, 2016). This is particularly so given that the narrative devoted to Christmas contains significant detail concerning the story of the birth, life, and death of Jesus. And certainly the songs chosen to represent Hanukkah and Kwanzaa do not serve to further educate theater-goers: the former is strictly instrumental and the other is not in English. This, again, is in contrast to the School Corporation's Christmas celebration, which uses familiar and easily understood songs to tell the story of Jesus's birth, even if the School Corporation chose in 2015 to no longer recite directly from the New Testament. *Cf. Books v. Elkhart County*, 401 F.3d 857, 865-66 (7th Cir. 2005) (determining, under the circumstances presented by that case, that a Ten Commandments display served an educational purpose when it contained text describing its historical relevance "in only the most general and conclusory terms" when "the explanatory text accompanying the other documents and images [in the display] is also quite cursory").

Of course, the plaintiffs acknowledge that it is not their place to micromanage the School Corporation's educational programming. Nonetheless, these facts are clear evidence that the Christmas Spectacular is *not* educational programming and was never intended to be. A simple

viewing of the event reveals it for what it is: a lengthy celebration of the religious aspects of Christmas. The School Corporation's cursory purpose-based arguments do not change this rudimentary fact, and the performance is unconstitutional under *Lemon*'s first prong as well.

CONCLUSION

The School Corporation's summary-judgment brief misses the point. It claims that the plaintiffs see "no room for religion of any kind in government or public schools." Not so. The plaintiffs' objection is to government-sponsored religion in our schools because it violates long-cherished constitutional principles recognizing that it is not the government's job to impose faith or influence which religion its citizens follow. It is only when the government remains neutral on religion that we are all free to worship, or not, as we wish. For these reasons, as well as those stated previously, the plaintiffs are entitled to judgment as a matter of law. Each of the three versions of the Christmas Spectacular must be enjoined, and the plaintiffs are entitled to their previously described nominal damages as well.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on this 10th day of June, 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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