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.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

Daniel Mach, *Pro Hac Vice*
Heather L. Weaver, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W., Ste. 600
Washington, D.C. 20005
202/675-2330
fax: 202/546-0738
dmach@dcaclu.org
hweaver@aclu.org

Sam Grover, *Pro Hac Vice*
Ryan Jayne, *Pro Hac Vice*
FREEDOM FROM RELIGION FOUNDATION
P.O. Box 750
Madison, WI 53701
608/256-8900
fax: 608/204-0422
sgrover@ffrf.org
rjayne@ffrf.org

Attorneys for the plaintiffs

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INTRODUCTION[1]

Each December for nearly half a century, the Performing Arts Department of Concord High School ("the High School")—a public high school operated by Concord Community Schools ("the School Corporation")—has planned, produced, and staged several performances of a large event called the "Christmas Spectacular." The show, which takes place at the High School, features performances by various school-sponsored choral, instrumental, and dance groups. While teachers in charge of these musical groups vary their selection of holiday songs to be performed from year to year, one element of the Christmas Spectacular has remained largely unchanged over the years: school officials always ensure that each show closes with a 20-minute depiction of a nativity scene and a telling of the biblical story of the birth of Jesus Christ. At issue in this case are three versions of this religious performance: the version presented for forty-five years, until this litigation was initiated; the version that the School Corporation intended to present and would have presented but for the issuance of this Court's preliminary injunction; and the version that was actually presented in 2015. This Court has already determined the second version to run afoul of the Establishment Clause of the First Amendment to the U.S. Constitution; by extension, the first version—which featured a faculty member reading from the New Testament and did not include even token references to other winter holidays—is also unconstitutional. And the version that was actually presented in 2015 differs from the version preliminarily enjoined by this Court in only a single cosmetic respect: rather than relying on students to portray the various biblical figures present in the story of the birth of Jesus, the School Corporation substituted life-size figurines.

[1] Many of the issues—both factual and legal—were previously litigated by the parties in conjunction with the plaintiffs' preliminary injunction motion. As a result, portions of this brief are taken, largely verbatim, from previous filings.

While public schools may recognize and celebrate the secular aspects of winter holidays, they may not endorse or promote religious beliefs. Nor may they use school functions to coercively subject students to religious messages and proselytizing. But that is precisely what the School Corporation has done and will do again in December 2016. The plaintiffs—a student who participates in the Performing Arts Department, three parents of students who have attended and will attend the event in order to support their children, and a non-profit membership organization devoted to maintaining the separation of church and state—are entitled to a permanent injunction barring all three versions of the event. They are also entitled to nominal damages as set out below.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. Concord High School's "Christmas Spectacular"

The School Corporation operates several public schools, including the High School, in and around Elkhart, Indiana. (Dep. of Scott Spradling ["Spradling Dep."] [ECF No. 35-1], at 8; *see also generally* Concord Community Schools, at http://www.concord.k12.in.us (last visited Apr. 7, 2016)).[2]

A. Background to the "Christmas Spectacular"

For the past 45 years, toward the beginning of each winter trimester the High School's Performing Arts Department has produced a "Christmas Spectacular." (Spradling Dep. at 13; Aff. of John Doe ["John Doe Aff."] [ECF No. 13-2], ¶ 4; Aff. of Jack Doe ["Jack Doe Aff."] [ECF No. 13-3], ¶ 3). The Christmas Spectacular is staged by the High School's Performing Arts Department and features performances both by students enrolled in elective, for-credit performing arts classes that meet during the school day (co-curricular groups) and those who

[2] Scott Spradling is the Director of Music for the School Corporation. (Spradling Dep. at 5). He was deposed as the School Corporation's designate pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. (*Id.* at 6 & Exh. 1).

participate in groups that meet after school hours (extra-curricular groups). (Spradling Dep. at 10; Jack Doe Aff., ¶¶ 3-5). Co-curricular groups include several bands and choirs, a dance team, and the High School's orchestra; extra-curricular groups include a small chamber ensemble and, in the past, have included a second dance team. (Spradling Dep. at 10-11). Approximately 600 of the High School's 1,700 students participate in the Performing Arts Department each year, and every group within the Performing Arts Department performs during the Christmas Spectacular. (*Id.* at 11-12). Attendance and performance at the Christmas Spectacular, as well as rehearsals for the show, are mandatory for students enrolled in these classes. (Jack Doe Aff., ¶ 7).

In planning for the Christmas Spectacular, faculty-members within the Performing Arts Department meet in or around August of each year in order to establish a theme for that year's show. (Spradling Dep. at 26). Past themes have included, for instance, "Joy to the World" (2014), "It's a Wonderful Life" (2011), and "Believe" (2010). (*Id.* at 24-25 & Exhs. 2, 3 & 6).[3] Most of the pieces to be performed during the Christmas Spectacular are selected by the faculty-members that lead each group, based "loosely" on the established theme for that year. (*Id.* at 23, 27; Jack Doe Aff. ¶ 17). However, the pieces to be performed during the religious performance that serves as the finale for the Christmas Spectacular each year—discussed at length below—are not selected by individual faculty-members but by the Director of Music for the School Corporation. (Spradling Dep. at 22-23). These songs have remained largely consistent over the years, although occasionally one or two songs might be rotated in or out of the program. (*Id.*).

[3] Exhibits 2 through 6 of Mr. Spradling's deposition are the programs for the Christmas Spectacular event from 2010 through 2014. (Spradling Dep. at 25). The parties have also stipulated to the programs from the 2005 through 2009 versions of the event. (ECF No. 36 at 1; ECF No. 36-3 through 36-7). The programs each year reflect every song that was performed and the group that performed each song. (Spradling Dep. at 21, 25-26).

Rehearsals for the Christmas Spectacular begin in October or November (depending on the group) (*id.* at 28-29; Jack Doe Aff., ¶ 8), and largely occur at the High School during the period when each group normally meets, including during co-curricular periods that are a part of the school day (Spradling Dep. at 52-53; Jack Doe Aff., ¶ 8). In addition to these rehearsals, "run throughs"—in which the entire Christmas Spectacular is rehearsed from beginning to end—occur after school. (Spradling Dep. at 53-54; Jack Doe Aff., ¶ 8). All rehearsals are led by various faculty members in the Performing Arts Department of the High School. (Jack Doe Aff., ¶ 8).

The actual performances of the Christmas Spectacular take place in the High School's auditorium. (Spradling Dep. at 48; John Doe Aff., ¶ 8; Jack Doe Aff., ¶ 9; Supp. Aff. of John Roe [ECF No. 52-4] ["Roe Supp. Aff."], ¶ 5). Each year, five performances are staged: four public performances over the course of one weekend (two on Saturday and two on Sunday), and one school-day performance on the preceding Friday. (Spradling Dep. at 48-50; Jack Doe Aff., ¶ 9). The school-day performance is attended by elementary-school students from other schools operated by the School Corporation, who are bussed to the High School to attend the event. (Spradling Dep. at 50-51). The public performances, as opposed to the school-day performance, are open to students, faculty, family-members, and members of the community at large, and are typically attended by thousands of persons each year. (*Id.* at 49-50; John Doe Aff., ¶ 8; Jack Doe Aff., ¶ 9; Roe Supp. Aff., ¶ 5). Revenue from ticket sales goes to the Performing Arts Department. (Spradling Dep. at 49).

B. The "Christmas Spectacular" Performances and their Religious Elements

During the "Christmas Spectacular" itself, several musical numbers are performed. (John Doe Aff., ¶ 9; Jack Doe Aff., ¶ 10). While some of the precise songs chosen differ each year,

these songs generally celebrate Christmas and the winter season. (John Doe Aff., ¶ 9; Jack Doe Aff., ¶ 10; *see also* Spradling Dep. Exhs. 2 through 6 [programs]). For instance, the following songs (among others) were presented during the 2014 Christmas Spectacular: "Here Comes Santa Claus"; "Last Christmas"; "Christmas Time is Here"; a mash-up of "Walking in a Winter Wonderland" and "Don't Worry, Be Happy"; and "Let It Snow." (Spradling Dep. Exh. 6; *see also* 2014 Christmas Spectacular Performance ["2014 Video"] [ECF No. 13-1] [video]). During the 2015 Christmas Spectacular, the following songs (among others) were presented: "Almost Christmas"; "Text Me Merry Christmas"; "Jingle, Jangle Bells"; and "Parade of the Wooden Soldiers." (Spradling Dep. Exh. 7; *see also* 2015 Christmas Spectacular Performance ["2015 Video"] [ECF No. 52-1] [video]). Since the inception of the "Christmas Spectacular," however, the final performance of the show has always been religious in nature, although the 2015 version of this religious performance was modified slightly from previous years. (Spradling Dep. at 14-15, 30-31).[4]

1. The "Living Nativity" Before 2015

Prior to 2015, every performance of the Christmas Spectacular ended with an approximately 20-minute recitation of the biblical story of the birth of Jesus Christ, including a living nativity scene and a scriptural reading from the New Testament. (Spradling Dep. at 14-19; John Doe Aff., ¶ 10; Jack Doe Aff., ¶ 11; Roe Supp. Aff., ¶ 7). During this segment, students at the High School portrayed the Virgin Mary, Joseph, the Three Wise Men, shepherds, and angels, and a doll was used to portray the Baby Jesus. (Spradling Dep. at 16; John Doe Aff., ¶ 10; Jack Doe Aff., ¶ 11; Roe Supp. Aff., ¶ 7). Portraying these biblical figures, the students gathered on

[4] Videos of both the 2014 Christmas Spectacular and the 2015 Christmas Spectacular have been manually filed with the Court. (ECF Nos. 14 & 53). Where specific segments of these videos are relied upon, they are cited by the time-stamp on the video where they appear. In order to view the video of the 2015 Christmas Spectacular, on the opening screen it is necessary to click either on "The Magic of the Season" (for the show before intermission) or "The Spirit of the Season" (for the show after intermission).

stage with a stable set piece, which included a manger and the Star of Bethlehem:

(John Doe Aff., ¶ 10; Jack Doe Aff., ¶ 11; Roe Supp. Aff., ¶ 7; *see also* John Doe Aff., ¶ 12 & Attachment One [photographs available through the School Corporation's website]).

While students of the High School portrayed the various characters present in the story of the birth of Jesus, a faculty-member (acting as narrator) recited the story verbatim as it appears in the New Testament (reading Luke 2:6-14 and Matthew 2:1-11). (Spradling Dep. at 18-19; John Doe Aff., ¶ 11; Jack Doe Aff., ¶ 12; Roe Supp. Aff., ¶ 8; *see also* ECF No. 36-1 [Pre-2015 Script]). At the same time, other students performed various religious hymns—either singing or instrumentally—such as "Christ in the Manger," "Silent Night," and "Hark! The Herald Angels Sing." (Spradling Dep. at 20-21; John Doe Aff., ¶ 11; Jack Doe Aff., ¶ 12; Roe Supp. Aff., ¶ 8). These hymns were performed by the High School's various musical groups, which were placed throughout the auditorium, including to the side of the stage and in the aisles of the auditorium:

(John Doe Aff., ¶ 11; Jack Doe Aff., ¶ 12; *see also* John Doe Aff., ¶ 12 & Attachment One [photographs available through the School Corporation's website]). All of the High School's choirs, as well as one of its concert bands and one of its string orchestras, performed during the living nativity. (Spradling Dep. at 21-22 & Exh. 6). A video of the 2014 Christmas Spectacular is before the Court. (*See* 2014 Christmas Spectacular Video ["2014 Video"] [ECF No. 13-1]).

Until 2015, the "living nativity" presented during the "Christmas Spectacular" appeared fundamentally the same each year, although the specific religious hymns performed during the nativity changed slightly over the years as the School Corporation identified religious music or arrangements that it preferred. (Spradling Dep. at 15-16, 20).[5] And, for forty-five years a

[5] For instance, a comparison of the 2014 program and the 2015 program indicates that the identity of one of the religious hymns was changed from "Hush, My Babe" to "Jesus, Jesus, Rest Your Head." (Spradling Dep. Exhs. 6 & 7). This change merely represented the natural rotation of songs. (*Id.* at 40-41).

faculty-member has recited the story of the birth of Jesus as it appears in the New Testament from a script. (*Id.* at 18-19).

2. The 2015 "Living Nativity" Before the Preliminary Injunction

Following the initiation of this litigation but before the issuance of the preliminary injunction, the School Corporation initially made only two small changes to the religious programming presented during the 2015 Christmas Spectacular. (Spradling Dep. at 30-31). The *only* change initially made to the "living nativity" itself was that no one would recite from the New Testament. (*Id.* at 31). However, as with past performances, the School Corporation still intended to rely on students to portray biblical figures; the "living nativity" would still be the only performance staged by numerous groups within the Performing Arts Department; and the "living nativity" would still be the centerpiece of the 20-minute-long grand finale of the show. (*Id.* at 30-31). On top of this, the School Corporation added, as is pertinent here, two performances to its program: one instrumental piece ("Ani Ma'amin") intended to represent Hanukkah; and one foreign-language song ("Harambee") intended to represent Kwanzaa. (*Id.* at 31-36 & Exh. 7).[6]

"Ani Ma'amin" is, as indicted, a strictly instrumental piece and would be performed only by the Chamber Strings, one of the orchestras within the Performing Arts Department of the High School. (*Id.* at 32). During this performance, the only students on stage would be the musicians who participate in the Chamber Strings, although the School Corporation intended to use nearby video screens to show images associated with Hanukkah (such as a menorah). (*Id.* at 33). Although "Ani Ma'amin" no doubt represents the Jewish faith, it pertains not to Hanukkah

[6] The School Corporation also performed during its 2015 program the song "One Amazing Night," which was not performed in 2014 but has been performed in previous years. (Spradling Dep. at 37-38 & Exh. 7). Although the School Corporation's designate indicated that the song is not specific to any religion (*id.* at 37-38), it appears that in reality it quite explicitly concerns the birth of Jesus (*see* 2015 Christmas Spectacular Video [ECF No. 52-1] at 1:22:48).

specifically but rather to the thirteen principles of Jewish law. *See* Rabbi Steven H. Resnikoff, Jewish Law: Duties of the Intellect, 1 Univ. St. Thomas L.J. 386, 391-92 (2003). "Harambee," on the other hand, would be performed by the High School's Symphonic Choir and is not strictly instrumental although it is also not performed in English. (Spradling Dep. at 36).

The Hanukkah, Kwanzaa, and "living nativity" performances would each be prefaced by an oral announcement describing the significance of the musical pieces to each respective holiday. (*Id.* at 32, 36). At the time of the Rule 30(b)(6) deposition in this case, the scripts pertaining to Hanukkah and Kwanzaa existed only in draft form, and the plaintiffs have been prohibited from ascertaining the identity of the scripts' authors due to an objection based on attorney-client privilege. (*Id.* at 33-34, 36-37). Since the time of this deposition, however, the scripts have been finalized. (*See* ECF No. 36-2 [2015 Script]). The School Corporation's narrative before "Ani Ma'amin" and "Harambee" each consisted of two or three sentences providing very basic information concerning Hanukkah and Kwanzaa, followed by one sentence describing each song. (*Id.* at 1). In 2015, the narratives lasted 35 and 38 seconds, respectively, during the performance. (*See* 2015 Christmas Spectacular Video ["2015 Video"] [ECF No. 52-1] at 1:13:30 & 1:18:17). The narrative concerning Christmas, by contrast, was incorporated into the nine-song set (it followed "One Amazing Night" and preceded the remaining eight) and provided significantly greater detail:

> Our country's Christmas season originated and is based on the Christian celebration of the birth of Jesus Christ. The Bible tells the story that Jesus was born to poor parents in a small town; angels announced his birth and he received many visitors, from shepherds to kings, in the barn where he was born. He worked as a carpenter and for three years as a traveling preacher. He had no family and never traveled far from his birthplace. The Bible recites that in his early 30s, Jesus was tried and executed. His life, particularly his birth and death, now serve as the basis of the celebration of two major holidays widely recognized by many throughout the United States and the world.

(ECF No. 36-2 at 2; *see also* 2015 Video at 1:26:35). At the Rule 30(b)(6) deposition in this case, the School Corporation's designate testified that he intended that the changes to the 2015 version of the Christmas Spectacular would be permanent. (Spradling Dep. at 48). However, on December 2, 2015, this Court issued its Opinion, Order, and Preliminary Injunction, in which it enjoined the School Corporation "from organizing, rehearsing, presenting, or intentionally allowing to be presented, any portrayal of a nativity scene that is composed of live performers as part of its 2015 Christmas Spectacular shows." (ECF No. 40 at 23).

3. The 2015 Nativity After the Preliminary Injunction

In response to the preliminary injunction, the School Corporation made only one change to its intended 2015 performance: rather than rely on students to portray biblical figures on stage during the performance, it instead used life-size figurines or mannequins. (Supp. Aff. of John Doe ["John Doe Supp. Aff."] [ECF No. 52-2], ¶ 6; Roe Supp. Aff., ¶ 10; *see also* 2015 Video at 1:39:17). The following is taken from the video of the performance:

(2015 Video at 1:39:17). These figurines were donated to the School Corporation by a local florist. (Dfts.' Answers to Pltfs.' Interrogs. [ECF No. 52-7] ["Interrog. Responses"], Interrog. No. 1; *see also* Dfts.' Responses to Pltfs.' Request for Production of Documents, Response No. 4 [ECF No. 52-8 at 7]). Other than this singular change, the School Corporation presented the religious aspects of the "Christmas Spectacular" precisely as it intended to prior to the issuance of the preliminary injunction. (*Compare* Spradling Dep. at 32-37 *with* 2015 Video at 1:13:00 through 1:46:40; *see also* John Doe Supp. Aff., ¶¶ 6-7; Roe Supp. Aff., ¶¶ 10-11). In the event that this Court's preliminary injunction is made permanent and this performance is not separately enjoined, the School Corporation does not anticipate making significant changes to the religious portion of the program in future years. (Interrog. Responses, Interrog. No. 2).

II. The Plaintiffs and Their Objections, and the School Corporation's Response

Jack Doe is the pseudonym of a minor student of the High School who is actively involved in the Performing Arts Department. (John Doe Aff., ¶ 3; Jack Doe Aff., ¶ 2). He performed during both the 2014 Christmas Spectacular and the 2015 Christmas Spectacular, and he will do so again during the 2016 Christmas Spectacular. (John Doe Aff., ¶ 5; Jack Doe Aff., ¶¶ 6-7; Supp. Aff. of Jack Doe [ECF No. 52-3] ["Jack Doe Supp Aff."], ¶¶ 5, 10-11). In addition to performing in other elements of the Christmas Spectacular, Jack Doe has been and will be required to perform one or more of the religious hymns that are part of the live nativity scene and the portrayal of the story of the birth of Jesus Christ. (Jack Doe Aff., ¶ 12; Jack Doe Supp. Aff, ¶¶ 5, 10-11). He thus participated in the nativity portion of the event seven times in 2014 and another seven times in 2015 (five performances and two rehearsals each year). (Jack Doe Supp. Aff, ¶ 10). Jack Doe loves performing and greatly values his participation in the performing arts and in the non-religious aspects of the Christmas Spectacular, an event for which he spends

months rehearsing. (Jack Doe Aff., ¶¶ 4, 8).

John Doe is the father of Jack Doe, and attended the 2014 Christmas Spectacular and 2015 Christmas Spectacular—and will attend the 2016 Christmas Spectacular—in order to support his son. (John Doe Aff., ¶¶ 2, 6; John Doe Supp. Aff., ¶¶ 7, 10). John Roe is also the father of a student who performed during the 2014 Christmas Spectacular and the 2015 Christmas Spectacular (including during the nativity program)—and who will do so again during the 2016 Christmas Spectacular. (Roe Supp. Aff., ¶ 3). Mr. Roe has therefore attended the event since 2014 and will do so again in 2016 in order to support his child. (*Id.*). John Noe has not attended the Christmas Spectacular since 2012 but has afamily-members who will be actively involved in the Performing Arts Department of the High School in 2016. (Supp. Aff. of John Noe [ECF No. 52-5] ["Noe Supp. Aff."], ¶¶ 3-4). He therefore intends to attend the Christmas Spectacular in 2016 and in future years. (*Id.*, ¶ 3).

All of the individual plaintiffs feel marginalized by the High School's presentation of a nativity scene and its celebration of the religious aspects of Christmas in each of the three versions of the Christmas Spectacular. (Jack Doe Supp. Aff, ¶ 7; John Doe Supp. Aff., ¶ 8; Roe Supp. Aff., ¶ 12; Noe Supp. Aff., ¶ 10). These presentations impose on the plaintiffs—as well as on students and other members of the audience—specific religious doctrines that do not comport with their religious beliefs. (Jack Doe Supp. Aff, ¶ 7; John Doe Supp. Aff., ¶ 8; Roe Supp. Aff., ¶ 12; Noe Supp. Aff., ¶ 10). With these elements, they believe that the Christmas Spectacular sends the message that students at the High School (and their families) who practice and share the Christian faith are favored by the High School, while persons such as the plaintiffs are relegated to outsider status. (Jack Doe Supp. Aff, ¶ 7; John Doe Supp. Aff., ¶ 8; Roe Supp. Aff., ¶ 12; Noe Supp. Aff., ¶ 10). John Doe and John Roe also feel that the decision to include a

nativity scene and religious story in this event interferes with their rights as parents to direct their children's religious upbringing. (John Doe Supp. Aff., ¶ 8; Roe Supp. Aff., ¶ 12). At the same time, the individual plaintiffs do not feel like they can avoid this portion of the Christmas Spectacular. (Jack Doe Supp. Aff, ¶¶ 8-9; John Doe Supp. Aff., ¶ 9; Roe Supp. Aff., ¶ 13; Noe Supp. Aff, ¶ 11).

John Doe is also a member of the Freedom From Religion Foundation ("FFRF"), a non-profit membership organization dedicated to defending the constitutional principle of the separation between state and church. (John Doe Aff., ¶ 2; John Doe Supp. Aff., ¶ 3; Aff. of Annie Laurie Gaylor [ECF No. 13-4] ["Gaylor Aff."], ¶ 3). FFRF, like the individual plaintiffs, feels that the portion of the Christmas Spectacular consisting of a nativity scene in any of the aforementioned forms greatly marginalizes itself, its members, and others who do not adhere to the Christian faith. (*Id.*, ¶ 6; Supp. Aff. of Annie Laurie Gaylor ["Gaylor Supp Aff."] [ECF No. 52-6], ¶ 4). It believes that the performances send the message that students, family members, and members of the community who practice the preferred Christian faith are favored by the School District, while those who do not are outsiders and second-class citizens. (Gaylor Supp. Aff, ¶ 4). After receiving a complaint about the Christmas Spectacular from one of its members, FFRF sent a letter in August 2015 to the Superintendent of the School Corporation expressing FFRF's concern about the constitutionality of school officials incorporating the nativity scene and the story of the birth of Jesus into the Christmas Spectacular. (Gaylor Aff., ¶ 4 & Attachment One). In response, the Superintendent of the School Corporation defended the practice, refusing to bring it to an end. (John Doe Aff., ¶ 15 & Attachment Two).

As a result of the devotional portion of the Christmas Spectacular, FFRF has been forced to expend resources in order to investigate the School Corporation's actions and to advocate on

behalf of its mission and on behalf of FFRF's members. (Gaylor Supp. Aff., ¶ 5). The resources that FFRF has expended and will continue to expend concerning the Christmas Spectacular have necessarily been diverted from other projects about which FFRF is concerned, and FFRF will continue to expend these resources in future years. (*Id.*).

STANDARD OF REVIEW

> The standard for the granting of summary judgment in the Seventh Circuit is clear:
>
> [S]ummary judgment is warranted only if there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law.
>
> The initial burden of production rests upon the moving party to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Once the moving party satisfies this burden, the nonmovant must set forth specific facts showing that there is a genuine issue for trial. . . . If no genuine issue of material fact exists, the sole quest is whether the moving party is entitled to judgment as a matter of law.

Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978 (7th Cir. 1996) (internal citations and quotations omitted).

ARGUMENT

At issue in this litigation is the constitutionality of three variations on an overtly religious performance staged by a public high school: the version of the Christmas Spectacular that was presented for 45 years until this litigation was filed; the modified version of the Christmas Spectacular that the School Corporation would have presented in 2015 but for this Court's preliminary injunction; and the final version that was actually presented during the 2015 Christmas Spectacular. All three variations violate the Establishment Clause of the First Amendment to the United States Constitution and must be enjoined, and the plaintiffs are

entitled to nominal damages as set forth below.[7]

I. Background to Establishment Clause analysis

The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. This provision, among other things, "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the U.S. Supreme Court established a three-part test to determine whether governmental action runs afoul of the Establishment Clause: in order to pass constitutional muster, (1) the action must have a secular purpose, (2) the action must have a principal or primary effect that neither advances nor inhibits religion, and (3) the action must not foster excessive governmental entanglement with religion. *Id.* at 612-13; *see also, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 218 (1997).

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[7] As indicated, the religious performance staged by the School Corporation as a part of the Christmas Spectacular was materially identical for nearly half a century until this litigation was initiated. Nonetheless, during his deposition the School Corporation's designate indicated that he anticipated that the since-enjoined changes to the 2015 program would be permanent. (Spradling Dep. at 48). Notwithstanding this testimony, the plaintiffs' challenge to the pre-2015 program is not moot: "[v]oluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could reasonably be expected to recur." *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation and alteration omitted). This has been described as a "heavy burden," *id.*, that is clearly not met here: not only were these changes made in the heat of litigation but they were made after the Superintendent of the School Corporation vigorously defended the pre-2015 version of the event at a public school board meeting. This Court has jurisdiction to resolve the plaintiffs' claim for injunctive relief as it relates to the pre-2015 version of the Christmas Spectacular.

Regardless, this issue appears to pertain to the precise form of relief and does not alter the constitutional issues that this Court must resolve, for the plaintiffs have also sought nominal damages based on their exposure to this version of the event.

In addition to this so-called *Lemon* test, "[t]he Supreme Court has . . . advanced two other approaches by which an Establishment Clause violation can be detected." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*), *cert. denied*, 134 S. Ct. 2283 (2014). One approach—termed the "endorsement test"—has its roots in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), and was subsequently adopted by the entire Court in *County of Allegheny*, 492 U.S. at 592-93. Under this test, courts

> ask[] whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. When [a court] find[s] that a reasonable person could perceive that a government action conveys the message that religion or a particular religious belief is *favored* or *preferred*, the Establishment Clause has been violated.

Freedom From Religion Foundation v. City of Marshfield, 203 F.3d 487, 493 (7th Cir. 2000) (internal quotation and citation omitted) (emphasis in original). The Seventh Circuit has observed that the endorsement test is "a legitimate part of *Lemon*'s second prong." *Elmbrook*, 687 F.3d at 850. The final approach to Establishment Clause jurisprudence is the "coercion test" derived from the Court's decisions in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). Although it is not clear where this test "belongs in relation to the *Lemon* test," the test itself "seeks to determine whether the state has applied coercive pressure on an individual to support or participate in religion." *Elmbrook*, 687 F.3d at 850. Applying this final test, the Supreme Court has emphasized that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *Lee*, 505 U.S. at 592, and the federal courts have thus "been particularly vigilant in monitoring compliance with the Establishment Clause" in the public-school context, *see Edwards v Aguillard*, 482 U.S. 578, 583 (1987).

II. Each of the three versions of the Christmas Spectacular at issue in this case violates the Establishment Clause

This Court has already determined that the 2015 version of the Christmas Spectacular that the School Corporation intended to stage prior to the issuance of the preliminary injunction is unconstitutional. By extension, it cannot be disputed that the pre-2015 version of the Christmas Spectacular—which included a reading from the New Testament and did not include even token references to Hanukkah or Kwanzaa—is also unconstitutional. Although out of necessity the manner in which all three programs violate the Establishment Clause is detailed immediately below, the only issue truly remaining in this case is whether the 2015 Christmas Spectacular, as it was actually presented, cured the constitutional violation. It most assuredly did not.

A. The School Corporation's religious performances violate the endorsement test

All three versions of the religious performance violate the endorsement test. This test focuses not on any actual benefit bestowed to a religious institution, but on how that benefit would be *perceived* by a reasonable, objective observer. "Every government practice must be judged in its unique circumstances to determine" if there has been an endorsement. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). *See also, e.g.*, *Santa Fe*, 530 U.S. at 308 ("In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.") (internal quotation and citation omitted).

Employing this test, "Establishment Clause jurisprudence has long guarded against government conduct that has the effect of promoting religious teachings in school settings, and

the case law has evinced special concern with the receptivity of schoolchildren to endorsed religious messages." *Elmbrook*, 687 F.3d at 851.

> Displaying religious iconography and distributing religious literature in a classroom setting raises constitutional objections because the practice may do more than provide public school students with *knowledge* of Christian tenets, an obviously permissible aim of a broader curriculum. The concern is that religious displays in the classroom tend to promote religious beliefs, and students might feel pressure to adopt them.

Id. at 851 (internal citation omitted). In *Elmbrook* the Seventh Circuit—sitting *en banc*—addressed the constitutionality of a high school graduation ceremony conducted in a church setting, and thus before a backdrop of religious symbolism. This practice was deemed an unconstitutional endorsement of religious doctrine insofar as "high school students and their younger siblings were exposed to . . . ceremonies that put a spiritual capstone on an otherwise-secular education." *Id.* at 852. The Latin cross visible during graduation was "a symbol that invites veneration by adherents" and "acts as a short cut from mind to mind for adherents who draw strength from it and for those who do not ascribe to Christian beliefs." *Id.* (internal citation omitted). The "sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state. That is, the activity conveyed a message of endorsement." *Id.* at 853.

The nativity, of course, is a symbol every bit as iconic to the Christian faith as is the Latin cross—as is the story conveyed by that symbol and told during the Christmas Spectacular (either through a scriptural reading in the pre-2015 version of the event or through song in the modified versions). Unlike in *Elmbrook*, these religious symbols are not just passively present during an event hosted by the School Corporation. Rather, the story of the birth of Jesus is performed at the behest of the School Corporation, by students who participate (oftentimes for credit) in one or more of the High School's various performing arts groups, and for an audience consisting of

thousands of students, family members, and members of the general public (and, once a year, for an audience of the School Corporation's elementary-school students). In other words, unlike in *Elmbrook*, here the School Corporation directs its students to *engage* with the religious message of the nativity performance and *intends* the performance—and the religious significance of the nativity—to captivate. This is underscored by the unique status that the performance holds (and has always held) among the songs that are performed during the Christmas Spectacular. As indicated, it is presented as the grand finale to the show, a twenty-minute enactment that stands alone not only by its duration but also by the sheer fact that it represents the only performance in which multiple musical groups participate. As this Court concluded in issuing a preliminary injunction in favor of the plaintiffs, "when the School places such disproportionate emphasis . . . on the Christmas holiday, and in particular the religious aspect of that holiday through the live depiction of the nativity scene, it adds to the perception that the School is actually endorsing that religion." (ECF No. 40 at 18). There is no reason for the Court to revisit its earlier holding on summary judgment that the first two versions of the Christmas Spectacular at issue in this case are unconstitutional.

Nor has the School Corporation cured the constitutional violation by simply substituting life-sized mannequins for the students that it previously utilized to portray Joseph, the Virgin Mary, the Wise Men, and the other figures present in the story of the birth of Jesus. This is so for three reasons. First, there is simply no support for the proposition that the constitutionality of a religious display or performance turns on a governmental entity's decision to employ live bodies. If it were otherwise, the vast majority of religious display jurisprudence—which typically concerns lifeless exhibits—would be suddenly cast into doubt. *See, e.g.*, *Cnty. of Allegheny*, 429 U.S. at 579-80; *Books v. Elkhart Cnty.* ("*Books II*"), 401 F.3d 857, 858-59 (7th

Cir. 2005); *Books v. City of Elkhart* ("*Books I*"), 235 F.3d 292, 296 (7th Cir. 2000); *City of Marshfield*, 203 F.3d at 489. To be sure, in its preliminary injunction decision this Court noted that "the use of student performers . . . further increases the likelihood that it will be seen as an endorsement of religion." (ECF No. 40 at 16 [citing, *inter alia*, *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 (9th Cir. 1994)]). But *Brown*, which concerned an Establishment Clause challenge to the use of texts and role-play activities that allegedly promoted witchcraft, makes relevant "active participation" in a challenged activity only to the extent that such participation might distinguish the activity from the study of a religious text serving a secular purpose. *See* 27 F.3d at 1379-81; *see also, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (noting that religious texts "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like") (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). The use of mannequins rather than students to portray biblical figures does not magically transform the Christmas Spectacular into a secular lesson.

Second, the School Corporation's apparent reliance on this Court's reference to the "use of student performers" takes an exceedingly narrow view of what it means to be a performer. For one, the students who portrayed the biblical figures on-stage in past years (and would have in 2015 but for the preliminary injunction) were not the only performers during this portion of the Christmas Spectacular: the story of the birth of Jesus is presented also by the hundreds of students who participate in one of the High School's musical groups that fill the auditorium and provide the musical backdrop to the nativity. And, on top of this, the "active participation" referenced by the Ninth Circuit in *Brown*, 27 F.3d at 1380, clearly includes not only actual performers but also a captivated audience. After all, in the very next sentence the court noted that its "view was borne out in *Lee v. Weisman*," *see id.*, a case in which a graduation prayer was

deemed to represent "required participation in a religious exercise" even though those present could spend the time "meditat[ing] on [their] own religion[] or let[ting their] mind[s] wander," 505 U.S. at 594. The School Corporation's use of mannequins does not save its religious performance for this reason as well.

And third, the endorsement inquiry does not prevent this Court from examining the history and tradition of a religious performance; to the contrary, it *requires* this Court to assume that an observer is "aware of the history and context of the community and forum in which the religious display occurs," *Books II*, 401 F.3d at 867. (*See also* ECF No. 40 at 18 ["[A] reasonable observer is presumed to be aware of the history of an event, too, which further supports the Plaintiffs' position and diminishes the effect of the changes to this year's show."] [citations omitted]). Thus, in *Santa Fe* the Court placed substantial weight on "the evolution of the [prayer] policy," noting that this history "indicate[d] that the [school] intended to preserve the practice of prayer before football games" even if it gave "prayer" different titles along the way. *See* 530 U.S. at 309. In this vein, the proverbial "reasonable person" observing the 2015 Christmas Spectacular (or the same performance in future years) will be eminently familiar with the half-century tradition of that event—a tradition wherein the nativity has been displayed during a scriptural reading as the climax of the event. This person will recognize that the eleventh-hour decision to rely on mannequins rather than students represents an exceedingly minor alteration made in direct response to this Court's injunction. To a reasonable observer acquainted with the High School's 45-year tradition of promoting the biblical story of Jesus's birth, this latest nativity enactment is business as usual and will appear to be an attempt to preserve the performance's religious significance.

* * *

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

B. The School Corporation's religious performances are unconstitutionally coercive

In issuing a preliminary injunction, this Court determined the Establishment Clause's endorsement test to be "most applicable here" and therefore did not reach the issue of whether the religious aspects of the Christmas Spectacular are unconstitutionally coercive as well. (ECF No. 40 at 11). The Court may of course choose to take the same tack on summary judgment. If it chooses to go beyond the endorsement test, however, it is clear that the performance is also unconstitutional under the coercion test.

Both of the Supreme Court's leading coercion cases— *Santa Fe Independent School District v. Doe* and *Lee v. Weisman*, both *supra*—addressed school districts' attempts to introduce their students to religious exercises for exceedingly brief periods of time during an otherwise secular event. The Seventh Circuit's most recent pronouncement on the issue—*Elmbrook*—also concerned religious exercise incorporated into school events. The present case may not be meaningfully distinguished from this authority. In *Lee*, the Court held unconstitutional a school district's policy of including prayer in its graduation ceremonies. Said the Court:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence

> during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the . . . prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. . . . To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

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

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

> Although *Lee* and *Santa Fe* focus on the problem of coerced religious *activity,* it is a mistake to view the coercion at issue in those cases as divorced from the problem of government endorsement of religion in the classroom generally. In fact, they are two sides of the same coin: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." And governmental efforts at shaping religious views may prove effective over time. The fact that graduation attendees need not do anything but participate in the graduation ceremony and take advantage of religious offerings if they so choose does not rescue the practice.
>
> Further, there is an aspect of coercion here. It is axiomatic that "[n]either a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will." The first principle is violated when the government directs students to attend a pervasively Christian, proselytizing environment. Once the school district creates a captive audience, the coercive potential of endorsement can operate. When a student who holds minority (or no) religious beliefs observes classmates at a graduation event taking advantage of Elmbrook Church's offerings or meditating on its symbols (or posing for pictures in front of them) or speaking with its staff members, "[t]he law of imitation operates," and may create subtle pressure to honor the day in a similar manner. The only way for graduation attendees to avoid the dynamic is to leave the ceremony. That is a choice, *Lee v. Weisman* teaches, the Establishment Clause does not force students to make.

Id. at 855-56 (internal citations omitted) (emphasis in original). The bottom line is that "constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom or at events it hosts." *Id.* at 856 (internal citations omitted). But that is exactly what the School Corporation has done here. Each year, the High School stages five performances of a "Christmas Spectacular," which concludes with a 20-minute telling of the story of the birth of Jesus—in its initial version also with a scriptural reading from the New Testament and in all versions with a visual depiction of the nativity. The religious import of this performance cannot be denied, and, in light of the Supreme Court's reasoning in *Lee* and *Santa Fe*, the coercion here is self-evident.

In its response to the plaintiffs' preliminary injunction request, the School Corporation has attempted to find relevance in its assertion that attendance at the Christmas Spectacular is

voluntary. (ECF No. 26 at 16-17). Whether or not this is true as a technical matter—and Jack Doe, for one, was required to sign a contract indicating that he would attend the performances—it is not pertinent. This Court held as much in its preliminary injunction decision (ECF No. 40 at 11 n.4), and this holding rests on solid ground. After all, the Supreme Court in *Santa Fe*—in dealing with high school football games, attendance at which was of course technically voluntary—held as follows:

> The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. . . . To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme. . . . High school home football games are traditional gathering of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.
>
> Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For the government may no more use social pressure to enforce orthodoxy than it may use more direct means. As in *Lee*, what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. The constitutional command will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game.

530 U.S. at 311-12 (internal quotations and citations to *Lee* omitted). *See also Embrook*, 687 F.3d at 876; *cf. Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (rejecting the argument that students' ability to refuse to cite a prayer renders that exercise constitutional). No less than the

football games at issue in *Santa Fe*, the Christmas Spectacular is a large, recognized event. Hundreds of students perform during the event, and it very much represents a coming together of the school and the community for the purposes of celebrating the winter season. Particularly for students like Jack Doe, who is a performer and who greatly values his membership in one of the High School's musical groups (and who spends months rehearsing for the Christmas Spectacular), any choice offered by the School Corporation to refuse to attend the event is an untenable—and unconstitutional—one.

As indicated, the coercive nature of the School Corporation's religious performances is self-evident here, and these performances (in any of their forms) run afoul of the Establishment Clause for this reason as well.

C. The School Corporation's performances lack a primarily secular purpose and their primary effect is to advance religion, and they therefore violate the traditional *Lemon* test as well

Because of its conclusions that the graduation ceremony at issue in *Elmbrook* ran afoul of the coercion test and the endorsement test, the Seventh Circuit had no occasion to determine if it also ran afoul of the traditional *Lemon* test. Again, that question need not be reached in this case. However, if the Court chooses to delve into these issues, the religious aspects of the Christmas Spectacular violate the first two prongs of that test.

1. First, the nativity scene and biblical reading do not have a primarily secular purpose. *See Lemon*, 402 U.S. at 612-13. Under this prong of the *Lemon* test, government action will be deemed unconstitutional unless its preeminent purpose is secular. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (holding that the purpose inquiry must examine the "preeminent" or "primary" purpose of the challenged conduct and that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective")

(internal quotation omitted). When governmental action is religious on its face, as it is here, the burden of demonstrating a secular purpose rests on the government. *See Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995). The School Corporation cannot carry this burden.

In its earlier briefing, the School Corporation insisted that the purpose underlying the religious aspects of the Christmas Spectacular is "to educate students and the general public regarding the historical context of the three main holidays celebrated during December." (ECF No. 26 at 22). Of course, this asserted purpose does not begin to justify the version of the event that was staged for 45 years until this litigation was initiated—a version that did not include any elements remotely dedicated to Hanukkah or Kwanzaa and that included a scriptural reading. And this lengthy tradition of celebrating Christmas, and only Christmas, also serves to undermine the School Corporation's stated purpose of its 2015 program (both as it anticipated presenting prior to the issuance of the preliminary injunction and as it was actually presented). After all, "the secular purpose required [by this prong of the *Lemon* test] has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty.*, 545 U.S. at 865 (citations omitted); *see also, e.g.*, *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001) (Courts "generally defer to the purpose offered by the [government] for its action as long as it is not a sham. Beyond assessing the purpose expressly articulated by the [government], we ensure that the stated secular purpose is legitimate by also examining the context and the content of the [performance].") (citing *Books I*, 235 F.3d at 302-04). It is clear from the facts of this case that the School Corporation's eleventh-hour nod to the "historical context of the three main holidays" is nothing more than a "sham."

Although the School Corporation would have this Court ignore entirely the 45-year history of its religious performance, precedent is clear that such a history is extremely probative

of a religious purpose, and the suggestion that it should be ignored "bucks common sense." *McCreary Cnty.*, 545 U.S. at 866; *see also Books I*, 235 F.3d at 303 (describing "this history of . . . involvement" in a religious display as "emphasiz[ing] a religious purpose in [that] display"). As indicated repeatedly, for nearly half a century the "living nativity" has been staged at the Christmas Spectacular—complete with a scriptural reading of the story of the birth of Jesus—without performances devoted to other religions. Even now, it remains the undeniable climax of that event. Indeed, even the additional (brief) performances devoted to other holidays only serve to emphasize the School Corporation's dedication to Christianity. The differences between these performances are stark: (a) the nativity performance is far longer in duration and serves as the grand finale of show; (b) the nativity performance is the only performance that includes multiple songs performed by multiple groups; (c) persons viewing the story of the birth of Jesus are provided with the visual of an actual nativity scene on stage whereas a viewer of the other performances would only see images flashed across a video screen; and (d) "Ani Ma'amin" is strictly instrumental and "Harambee" is performed in a foreign language whereas the nativity story is performed in English. The manner in which the School Corporation elevates Christmas—and its religious aspects—is even underscored by the narratives that it developed, in the heat of litigation, to introduce the three holidays: on the one hand, the narratives introducing Hanukkah and Kwanzaa contain a couple sentences indicating generally *how* each holiday is celebrated, followed by a sentence simply identifying the piece to be performed (ECF No. 36-2 at 1); on the other hand, the narrative introducing Christmas contains an abbreviated description of the life of Jesus Christ, absolutely no mention of the songs that would be performed, and verbiage such as "[o]ur country" and "widely recognized" that serves to underscore the unique importance that the School Corporation attributes to this holiday and to relegate those who do

not appreciate its religious significance, once again, to outsider status (ECF No. 36-2 at 2).

Indeed, while the School Corporation claimed its goal was to "educate students and the general public," when it decided to add brief narratives and performances concerning Hanukkah and Kwanzaa—after this lawsuit was filed—it is clear that the School Corporation had very little understanding of what it was adding. The only information that the School Corporation's Rule 30(b)(6) designate could provide concerning Hanukkah was as follows: "It's a Jewish celebration. I haven't done a lot of research in that area but, I mean, I know it's a very important celebration to the Jewish culture." (Spradling Dep. at 31-32). And his understanding of Kwanzaa was simply that it is "a celebration through the African American culture that dates back to the mid 60's." (*Id.* at 35). The limited understanding of the School Corporation's designate is particularly concerning, given that no person other than Mr. Spradling—and persons who were not identified during his deposition due to an objection based on attorney-client privilege—was involved in the decision to change the program for 2015 (other than some of the individual ensemble directors, who were involved only in selecting musical works for the changed program). (*Id.* at 45-46).

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

2. And finally, the principal effect of the live nativity scene is religious in nature. Under this second prong of the *Lemon* test, courts ask, "irrespective of the . . . stated purpose, whether accepting th[e] monument for display . . . has the primary effect of conveying a message

that the [government] is advancing or inhibiting religion." *O'Bannon*, 259 F.3d at 772. As described in greater detail above, the Seventh Circuit has treated this prong of *Lemon* as similar to the endorsement test. *See Elmbrook*, 687 F.3d at 849-50; *O'Bannon*, 259 F.3d at 772. For the reasons previously described, the School Corporation's conduct violates this standard. The bottom line is that, when viewing a twenty-minute performance of the story of the birth of Jesus, in any of the versions that the School Corporation has attempted, "[a] reasonable person will think religion" and "[n]othing in the context of the [performance] mitigates the religious message conveyed." *O'Bannon*, 259 F.3d at 773.

III. In addition to injunctive and declaratory relief, the plaintiffs are entitled to nominal damages

The plaintiffs are therefore entitled to injunctive relief enjoining the School Corporation from staging the challenged program in any of its three forms. In addition to this relief, the plaintiffs have also sought an award of nominal damages. The U.S. Supreme Court has detailed the interests supporting an award of nominal damages upon the violation of a constitutional right:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978) (internal footnote omitted). Thus, "nominal damages are not compensation for loss or injury, but rather recognition of a violation of rights." *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003) (internal quotation and citation omitted). Although the plaintiffs do not concede that they have suffered no actual damage, here they only seek their nominal damages. Such an award—which requires no further factual development—is

frequently made through summary judgment. *See, e.g.*, *Doe v. Parish of St. Tammany*, No. 07-3574, 2008 WL 1774165, at *6 (E.D. La. Apr. 16, 2008); *Brannian v. City of San Diego*, 364 F. Supp. 2d 1187, 1197 (S.D. Cal. 2005); *Maldonado v. O'Leary*, No. 85-C-4823, 1988 WL 4952, at *3 (N.D. Ill. Jan. 20, 1988).

It is generally recognized that, in most circumstances, nominal damages are set at one dollar. *See Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) ("one dollar is recognized as an appropriate value for nominal damages"). Nonetheless, this is not a hard and fast rule, for "[t]he amount of nominal damages that may be awarded is not limited to $1. The nature of nominal damages compels, however, that the amount be minimal." *Roman v. U-Haul Int'l*, 233 F.3d 655, 671 (1st Cir. 2000). At the same time, when repetitive constitutional violations occur courts may award nominal damages for each violation. For example, in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), the Eighth Circuit concluded that the district court had not abused its discretion in awarding $1,500 in nominal damages (apparently representing $1.44 for each day that an inmate was refused a religiously mandated kosher diet over a fifteen-month period). *Id.* at 908. Similar decisions abound. *See, e.g.*, *Heidorn v. BDD Mktg. & Mgmt. Co., LLC*, No. C-13-00229-JCS, 2013 WL 6571629, at *17, *19 (N.D. Cal. Aug. 19, 2013), *report and recommendation adopted*, No. 13-CV-00229-YGR, 2013 WL 6571168 (N.D. Cal. Oct. 9, 2013) (awarding nominal damages of one dollar for each of twenty-two phone calls made despite the plaintiff's listing on a "Do Not Call List"); *Ledo Pizza Sys., Inc. v. Ledo Restaurant, Inc.*, No. DKC-06-3177, 2012 WL 1247103, at *5 (D. Md. Apr. 12, 2012), *amended on other grounds by* 2012 WL 4324881 (D. Md. Sept. 18, 2012) (awarding nominal damages of one dollar for each of five breaches of contract); *Layman Lessons, Inc. v. City of Millersville*, 636 F. Supp. 2d 620, 655 (M.D. Tenn. 2008) (awarding two dollars in nominal damages for separate violations of the plaintiff's

substantive due process rights and its rights under the Religious Land Use and Institutionalized Persons Act); *Brannian*, 364 F. Supp. 2d at 1197 (awarding nominal damages of one dollar for each of two violations of the First Amendment).

In the present case, John Noe has never attended the Christmas Spectacular—although it is undisputed that he will do so in 2016—and is therefore not entitled to nominal damages. However, each of the other plaintiffs has attended (or, in the case of Jack Doe, been required to rehearse) the unconstitutional aspects of the Christmas Spectacular.[8] They are thus entitled to nominal damages as follows:

	2014 Nominal Damages	2015 Nominal Damages	Total
FFRF	$1.00 (one performance)	$1.00 (one performance)	$2.00
John Doe	$1.00 (one performance)	$1.00 (one performance)	$2.00
Jack Doe	$7.00 (five performances and two rehearsals)	$7.00 (five performances and two rehearsals)	$14.00
John Roe	$1.00 (one performance)	$1.00 (one performance)	$2.00

Moreover, in the event that the religious performance that the School Corporation intends to stage during the 2016 Christmas Spectacular goes forward as planned, all plaintiffs (including

[8] FFRF has standing as a plaintiff both insofar as at least one of its members is injured by the School Corporation's religious performances (*see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)) and insofar as it has been required to expend limited organizational resources to advocate against the unconstitutional performances (*see Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). Although courts have held that a membership organization may not rely on associational standing to seek compensatory damages on behalf of its members, "[t]here may be an exception to the rule . . . where an association seeks only nominal damages." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 212 (D.N.J. 2003) (outlining the state of the law on this issue). Because FFRF may clearly seek nominal damages based on the direct *Havens* injury that it has suffered, the Court need not delve into these issues here.

Mr. Noe) will be entitled to additional nominal damages. By seeking summary judgment in the above-described amounts, the plaintiffs do not waive their right to seek or obtain further nominal damages as appropriate.

CONCLUSION

For the foregoing reasons, the plaintiffs are entitled to summary judgment on all issues in this case. The School Corporation must be enjoined from, as a part of its Christmas Spectacular, presenting the story of the birth of Jesus. This must include, at the very least, an injunction prohibiting the presentation of any of the three versions of the event at issue in this litigation. Additionally, the plaintiffs are entitled to their nominal damages in the aforementioned amounts.

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

Sam Grover, *Pro Hac Vice*
Ryan Jayne, *Pro Hac Vice*
FREEDOM FROM RELIGION FOUNDATION
P.O. Box 750
Madison, WI 53701
608/256-8900
fax: 608/204-0422
sgrover@ffrf.org
rjayne@ffrf.org

Daniel Mach, *Pro Hac Vice*
Heather L. Weaver, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W., Ste. 600
Washington, D.C. 20005
202/675-2330
fax: 202/546-0738
dmach@dcaclu.org
hweaver@aclu.org

Attorneys for the plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on this 29th day of April, 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:

Thomas E. Wheeler, II
<twheeler@fbtlaw.com>

Anthony Overholt
<aoverholt@fbtlaw.com>

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