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

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

DEFENDANT'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Procedural History

The sole issue remaining to be decided by this Court is a very narrow one. Plaintiffs originally challenged the Defendant's "Christmas Spectacular" on First Amendment grounds by complaining about the fact that faculty members read to the audience certain biblical passages during the performance and the fact the program contained a live nativity scene. They raised this challenge even though the Christmas aspect of the program was only a small portion of the entire 90 minute program.

In response to that challenge, the School modified the program in several ways. First, it eliminated biblical readings from the program entirely. Second, it added songs and readings to the program addressing other faith traditions, and made other modifications as well. In response to these changes, Plaintiffs pressed forward with their challenge to the program's living nativity scene.

This Court issued a preliminary injunction prohibiting the live nativity scene in the 2015 Christmas Spectacular. Explaining its decision to eliminate the live nativity, this Court wrote:

> [A] reasonable observer would interpret the message being conveyed by the nativity scene in light of its connection to the educational purposes it may appear to serve. *Bauchman*, 132 F.3d at 555; *see generally Allegheny*, 492 U.S. at 635 (noting that viewers' understanding of the purpose of the display may affect whether they perceive a message of endorsement). In that respect, while other performances include visual effects such as choreography or dancing, which have a clear connection to the performance aspect of the show, the nativity scene primarily features students standing still on stage. The students portraying the nativity scene are not singing, playing instruments, dancing, or otherwise practicing the skills that are typically thought of as part of a performing arts department. While there is still some performance aspect to the nativity scene, a reasonable observer could perceive that the nativity scene is actually on stage for the religious message it conveys instead of as an outlet for the performing talents of the students or for the pedagogical value of its performance. *Moreover, the use of student performers to depict this distinctly religious scene further increases the likelihood that it will be seen as an endorsement of religion.* Brown*, 27 F.3d at 1380 (noting that "active participation in 'ritual' poses a greater risk of violating the Establishment Clause than does merely reading, discussing or thinking about religious texts"); see also Elmbrook,* 687 F.3d at 851 (noting that "the case law has evinced special concern with the receptivity of schoolchildren to endorsed religious messages"). While that factor is not dispositive, as discussed above, it still informs the context and circumstances of the display from which an observer would interpret its meaning.

(Dkt. 40, pp. 15-16; emphasis supplied.) Consistent with this Order, the School eliminated the living nativity scene from the 2015 program. In recognition this Court's reliance on *Brown* and the possible impressions a live nativity scene might have on students attending the performance and the student performers, the 2015 program simply used mannequins instead of live performers in order to reduce any unintended effect of religious endorsement by the School.

Despite all of these changes, Plaintiffs are still unsatisfied. Plaintiffs argue that this static depiction of a nativity scene, even without student performers, still violates the Establishment Clause. Plaintiffs re-argue almost all of the points from their preliminary injunction briefing in support of their request.

Defendant contends that the multiple changes to the Christmas Spectacular made in response to this lawsuit defeat Plaintiffs' remaining First Amendment challenge, and the School should be allowed to continue with the Christmas Spectacular in future years as the program is currently designed.[1]

II. Statement of Material Facts Not in Dispute[2]

A. Plaintiffs

The Freedom From Religion Foundation ("FFRF") is an association "devoted to … separation of church and state." (D. # 1; Complaint, ¶ 6). This FFRF devotion includes challenging all aspects of what it believes are excessive government entanglements with religion. The scope of these challenges and the arguments made therein demonstrate that the FFRF sees no room for religion of any kind in government or public schools. *See e.g.* F*reedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010) (unsuccessful Establishment Clause challenge to the recitation of the Pledge of Allegiance based on the inclusion of the words "Under God") and *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011) (unsuccessful Establishment Clause challenge to the statute creating the "National Day of Prayer"). The Does generally share FFRF's goals and support its position in this lawsuit.

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[1] There has been no final determination by this Court about the legality of the living nativity scene as this Court's previous decision was an order granting a preliminary injunction. Defendant has not yet determined whether it will challenge that decision through an appeal once a final judgment is entered, and it hereby preserves all of the arguments made during the preliminary injunction phase of this case. However, for purposes of this summary judgment proceeding, Defendant does not re-argue that issue and will instead focus on the only claim not yet decided by this Court—whether the 2015 Christmas Spectacular as performed without a live nativity scene—was permissible under the Establishment Clause.

[2] Like the Plaintiffs, Defendant relies heavily on previous filings made in this case and has incorporated verbatim several portions into this brief from those filings. (Plf. Br., n.1, Dkt. 54.) Further, Defendant is also aware of this Court's deep familiarity with both the facts and the law involved in this case. Therefore, it has attempted to provide a truncated brief, with a shortened factual statement and more limited citation of authorities, in support of summary judgment.

B. The School

Indiana law provides that the Concord School Board of Trustees is the ultimate decision-maker for the School (I.C. § 20-23-4-26, I.C. § 20-26-5-4, I.C. § 20-26-3-1 through 6), and the School Board exercises this authority through a series of policies for the School and its employees. The School's policies and procedures may be viewed at http://www.neola.com/concord-in. (Spradling Aff'd., ¶ 3).

One of the policies enacted by the School Board is Board Policy 2240, entitled "Controversial Issues". This policy contains an "opt-out" provision that allows parents who object to a portion of the educational curriculum to opt their students out of that portion of a class without penalty:

> The Board recognizes that a course of study or certain instructional materials may contain content and/or activities that some parents find objectionable. If after careful, personal review of the program lessons and/or materials, a parent files a complaint in accordance with Board Policy 9130 regarding either the content or activities that conflict with his/her religious beliefs or value system, the school will honor a written request for his/her child to be excused from a particular class for specified reasons. The student, however, will not be excused from participating in the course and will be provided alternate learning activities during times of such parent-requested absences.

(Spradling Aff'd., ¶ 3; Exhibit "A").[3]

Unlike many schools that focus on extracurricular athletics, Concord has historically had a very strong performing arts program. As noted in the Complaint, "the Performing Arts Department 'involves approximately half of the School's 1,500 students at the high school. Students are involved in marching band, 3 concert bands, 2 jazz bands, pep band, string orchestra, symphony orchestra, 6 choirs, piano, and dance.'" (D. # 1; Complaint, ¶ 12; *quoting*

[3] Defendant has not presented any new evidence in support of its summary judgment, other than referring to the video of the 2015 version of the program. That recording is already before the Court as part of the manual filing made by Plaintiffs. *See* Dkt. 52-1. All other citations to Defendant's evidence refer to documents that are already before the Court through the preliminary injunction briefing.

http://www.concordmusic.info; Spradling Aff'd., ¶ 4). The Performing Arts Department includes other performance based courses, including classes or programs in dance, theater and stagecraft. (Spradling Aff'd., ¶ 4; Exhibit "B"). As part of its educational program, the Concord High School Performing Arts Department presents a variety of programs throughout the school year that allow high school students to experience performing in front of live audiences. (Spradling Aff'd., ¶ 5; Exhibits "C-1" through "C-6").

C. The Christmas Spectacular.

As noted above, one aspect of the Performing Arts Department's program is the annual "Christmas Spectacular." The Christmas Spectacular is designed as a holiday program that has three purposes:

- To act as the culmination of the fall semester's music instruction by presenting a multi-pronged musical performance incorporating all aspects of the High School's music offerings, including band, orchestra, and choral components as well as to incorporate other aspects of the Performing Arts Department such as dance, theatre, and stagecraft;
- To provide music students with challenging and instructive live music performance opportunities in front of a large audience; and,
- To provide educational instruction to both music students, the general student population, and the general population as a whole regarding the traditional underpinnings of the holidays (such as Chanukah, Kwanza, and Christmas) celebrated during the season.

Despite the changes to the program as required by this Court, student participation in the Spectacular is still paramount as the program's purpose is educational. Ensembles that typically perform include two string orchestras, a symphony orchestra, a concert band, two jazz bands, five choirs, and small chamber groups. It also includes various dance teams, students from the drama program, and stage technicians. The Performing Arts Department presents five sold-out

holiday concerts which involve over 600 students as either performers or technical support. (Spradling Aff'd., ¶ 8).

Because of the size and complexity of the program, planning for the Spectacular usually begins in August. Rehearsals historically begin in October with more intensive preparation developing in late October largely depending on when the Marching Band season concludes. Because of the success of the Marching Band, selection of the music and program design have been pushed back into early November. *Id.*, ¶ 10.

Preparation for the event includes selecting music that will challenge and educate the students in music performance and pedagogy. The music selections help students learn about holiday music through historical and cultural context. The performance of the music is also intended to provide an enjoyable listening experience. (Spradling Aff'd., ¶ 11).

In addition to the music portion of the program, it is also important for the Christmas Spectacular to highlight other aspects of the Performing Arts Department's program, including dance and theatre. Artistic vision is a high priority in developing the program so that the students and the audience can experience a holiday event that is aesthetically invigorating. (Spradling Aff'd., ¶ 12). As a part of the program students learn to create costumes, stage props, and stage lighting. They also build or procure large Christmas trees, giant reindeer, thirty (30) to forty (40) pre-lit Christmas trees, plastic snow, snow machines and set construction are all designed and assembled. The front of the stage and the balcony are adorned by these students with garland, lights, and ornaments. (Spradling Aff'd., ¶ 13).

C. **The 2015 Christmas Spectacular Program.**

Keeping in mind both the educational purpose and Plaintiffs' concerns about the program, the 2015 Christmas Spectacular contained a wider variety of song selections and

included songs commemorating Hanukah and Kwanzaa. The majority of the remaining songs were primarily secular and celebrated the holiday season. (Spradling Aff'd., ¶ 16; Exhibit "D"). The songs (both vocal and instrumental) are chosen to challenge choir and instrumental students and provide opportunities for special solos, small group performances, and performance pieces.[4]

The 2015 Christmas Spectacular ran about ninety (90) minutes with a fifteen (15) minute intermission. The first portion of the program, titled "The Magic of the Season" lasted approximately sixty (60) minutes. The post-intermission portion of the program entitled the "Spirit of the Season" lasted approximately thirty (30) minutes and included a brief historical narration and music from each of the three major holidays celebrated during the season, Chanukah, Kwanza, and Christmas. (Spradling Aff'd., ¶ 18; Exhibit "D").

The Christmas portion of the "Spirit of the Season" lasted approximately nineteen (19) minutes and contained a medley of traditional Christmas Carols. Consistent with this Court's order, no drama student actors participated in the last twelve (12) minutes of the program. Instead, the nativity scene was portrayed using mannequins. (Spradling Aff'd., ¶ 19; Exhibit "D"). Thus the challenged portion of the program makes up only about 13% of the overall Christmas Spectacular program.[5]

Outside of a brief historical perspective of the holiday told in narrative form by a student before each of the three holiday performances, Chanukah, Kwanza, and Christmas, there is no

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[4]Several of the pieces incorporate musical numbers with performances by other elements of the Performing Arts Program. For example, the dance program is incorporated in the "Santa's Workshop" piece which is performed by the Concord Dance Team, and the "Parade of Wooden Soldiers" incorporates the entire dance team. The stage design, the lighting, and the costume manufacture are all designed to incorporate the theatre and stagecraft programs with students creating the costumes, the sets, and the lighting as well as actually portraying various characters. (Spradling Aff'd., ¶ 17; Exhibit "D").

[5] Moreover, when the other five ninety-minute music/theatre performances throughout the remainder of the year are included, the challenged portion of the School's overall performing arts program totals only 2%, effectively "*de minimis* religious references." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015).

further oral reading, and specifically no reading from any religious texts of any kind. (Spradling Aff'd., ¶ 20).

III. Discussion

A. The modified *Lemon* test should be applied here.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. The Establishment Clause was made applicable to schools such as Concord through the application of the Fourteenth Amendment. *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012)(*en banc*)(*citing Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947)).

As both sides noted in their preliminary injunction briefing, the Supreme Court has offered at least three different tests to use for Establishment Clause cases. Nevertheless, the Seventh Circuit holds that in this circuit the three-pronged test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Elmbrook*, 687 F.3d at 849.

This Court, in granting Plaintiffs' request for a preliminary injunction, also utilized the *Lemon* test. Therefore, Defendant will present most of its arguments using a *Lemon* analysis.[6] Under the *Lemon* test a challenged activity violates the Establishment Clause if it: (1) lacks a

[6] In their motion for summary judgment, Plaintiffs have again argued that the coercion test should apply here. Because Defendant has accepted for purposes of summary judgment this Court's decision to apply *Lemon*, Defendant has not revisited this argument. However, Defendant previously presented evidence and argument about a School Board policy that specifically provides a means for students to opt out of certain programs and performances, such as the Christmas Spectacular, based upon personal objections to the content of those programs. (Dkt. 26, pp. 13-17.) Should this Court depart from its previous ruling and apply one of the other tests, and in particular a coercion test, Defendant contends that the existence of the opt out should result in a ruling in its favor.

legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612–13.[7]

The Seventh Circuit in *Elmbrook* utilized a slightly modified version of the *Lemon* test which, applying the "primary effect" prong, focused on whether the challenged practice has "the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984)(O'Connor, J., concurring). This endorsement approach requires the Court to "assess[ ] the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion." *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 304 (7th Cir. 2000) (parenthetical supplied) ("*Books I*"). Or to put it slightly differently, "whether an objective, reasonable observer, 'aware of the history and context of the community and forum in which the religious display appears,' would fairly understand the display to be a government endorsement of religion." *Books v. Elkhart County, Indiana*, 401 F.3d 857, 867 (7th Cir. 2005) ("*Books II*"). This modified test from *Elmbrook* is the test this Court applied in deciding the preliminary injunction request. (Dkt. 40, p. 11.)

[7] Over time the "entanglement" prong has been subsumed within the "effect" prong, at least in the school context: "[T]he Court has 'recast *Lemon's* entanglement inquiry [in the public school context] as simply one criterion relevant to determining a statute's effect.' *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion) (*citing Agostini v. Felton*, 521 U.S. 203, 232–33 (1997))." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 587 (6th Cir. 2015).

B. Because the School replaced live student actors with mannequins, it de-emphasized the significance of the nativity scene. This Court should re-examine its 'totality of the circumstances' analysis in light of this fact and conclude that the 2015 program, as actually performed, satisfied the First Amendment.

1. The "passive display" cases cited by Defendant in opposition to the preliminary injunction support Defendant's request for summary judgment now.

As this Court explained in its previous order:

> [T]he School relies primarily on cases addressing passive displays containing religious symbols, where the courts evaluate the effect of the religious aspects of the display in light of their context in the display as a whole. The School thus argues that, when viewed in the context of the Christmas Spectacular as a whole, the living nativity scene would not convey an endorsement of religion. In response, the Plaintiffs argue in part the cases involving passive displays are wholly inapplicable to this case, which involves a live performance. ... [T]he bright line the Plaintiffs attempt to draw between observation and performance is untenable.

(Dkt. 40, pp. 12-13.) Thus, this Court correctly recognized that cases involving passive displays—cases which often involve the reading of religious texts or the performance of religiously themed choral music—inform the analysis to be performed here. *Id.*, p. 14 ("[T]he Court disagrees with the Plaintiffs that the nativity scene in question necessarily endorses religion because it is performed instead of merely observed and that the Court need not consider the context in which that performance takes place.") This conclusion that passive display cases apply here, of course, is strengthened by the fact that the 2015 nativity scene used mannequins rather than live performers.

2. This Court's previous order finding a violation of the Establishment Clause based upon the presence of a live nativity scene must be re-examined because the 2015 program eliminated that element of the program.

In reaching its decision to enjoin future performances of a live nativity scene in the Christmas Spectacular, this Court explained that:

> The use of student performers to depict this distinctly religious scene further increases the likelihood that it will be seen as an endorsement of religion. *Brown*, 27 F.3d at 1380 (noting that "active participation in 'ritual' poses a greater risk of violating the Establishment Clause than does merely reading, discussing or thinking about religious texts")[.]

Because of the elimination of the live nativity scene, the concerns espoused through this Court's reliance on *Brown* regarding the "active participation in 'ritual'" disappear.

Thus, the 2015 program must be evaluated anew given this significant change. That is, this Court's preliminary injunction decision analyzed all of the relevant facts to determine the constitutional issue presented. A similar approach should be used again to evaluate the 2015 program because the endorsement inquiry, as this Court recognized, is a "highly fact-specific test" that requires a court to ascertain whether "a reasonable observer of the display in its particular context [would] perceive a message of governmental endorsement or sponsorship of religion." *Allegheny*, 492 U.S. at 593. *See also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). The Second Circuit in *Elewski v. City of Syracuse*, 123 F.3d 51 (2nd Cir. 1997) noted that "[t]hus, if a [religious symbol's] context—like the context of the crèche in *Lynch* or that of the menorah in *Allegheny*—neutralizes the message of governmental endorsement, then the [religious symbol] passes muster under the Establishment Clause." *Elewski*, 123 F.3d at 54. The context is important because "it is not the simple exposure to religious symbols that is constitutionally impermissible; rather, it is the message conveyed, particularly to impressionable youngsters, by linkage of such symbols to their public school." *Spacco v. Bridgewater School Dept.*, 722 F.Supp. 834, n. 1 (D.Mass. 1989) (*citing Larkin v. Grendel's Den. Inc.*, 103 S.Ct. 505 (1982), and *Allegheny*, 492 U.S. 573)).

The changes in the 2015 program, and particularly the removal of the live nativity scene, tip the constitutional balance in favor of the School. Key differences between the 2015 program

and those in previous years include the fact that the 2015 Christmas Spectacular does not contain "a faculty-member (acting as narrator) recit[ing] the story [of the birth of Jesus] as it appears in the Christian Bible (Luke 2:6-14 and Matthew 2:1-11)." (D. # 1; Complaint, ¶ 18). Indeed, there is no faculty reading or narration at all. (Spradling Aff'd., ¶ 20). A second key difference is that the 2015 "Spirit of the Season" portion of the Christmas Spectacular recognizes the three major holidays in December—Chanukah, Kwanza, and Christmas—with a brief historical perspective through narration by a student and music and symbols from each tradition. (Spradling Aff'd., ¶ 20).

As this Court previously concluded, the manner in which the nativity scene is displayed is important to the determination of whether it "supports and promotes the Christian praise to God that is the crèche's religious message." *Allegheny County*, 492 U.S. at 600. A nativity scene may be displayed as one item among many secular symbols of Christmas and will meet constitutional muster. *See Lynch*, 465 U.S. at 685–686. However, isolating a nativity scene in such a way as to show government solidarity with the Christian faith violates the Establishment Clause. *See Allegheny County*, 492 U.S. at 598–599.

As this Court re-balances all of these facts in light of the living nativity's removal, it should consider *Doe v. Wilson Cnty. Sch. Sys.*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) where the Court found no First Amendment violation even though elementary school students *did* participate in a living nativity as part of a year-end holiday program:

> In this case, in the main secular portion of the Christmas program, students assumed roles with costumes and special clothing, including members of the chorus, the reader, soloist, ballerinas, toy doll, toy soldier, Santa Clause, jack-in-the-box, teddy bear, reindeer, Rudolph, and a mouse. It was much more of an extravaganza with more student participation and fanfare than the rather meager, stark nativity scene placed at the very end. The nativity scene included at the end of the Christmas program was an example of the religious heritage of the holiday and was very limited in duration as compared to the balance of the program.

> Unlike in the secular presentation, there were no words spoken by the students or narrated by others in the ending portion of the program. The Court concludes that 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.
>
> Christmas is a national religious holiday, celebrated on December 25. To Christians, the holiday commemorates the birth of a man named Jesus, who was also called Christ, from which the holiday derives its name. The Biblical account of Jesus' birth is that he was born in a crib or manger to mother Mary and father Joseph. This is represented by the nativity scene. This is a recorded historical event, but the birth of Jesus also is the center of the religious faith of Christians.
>
> Each scene of the secular portion of the Christmas program included props, animal and storybook characters, customs or designated dress, songs, narratives, or spoken parts. Those in the audience clapped and took pictures of the participating students as they sang and acted out their parts. The brief nativity scene lasted only two minutes, less than 10% of the program, with no acting, speaking or narrative. *Considering the Christmas program as a whole, it was a secular performance with a bit of religious symbolism at the very end to reflect the historic, cultural and religious significance of the Christmas holiday. Taken as a whole, the inclusion of the nativity scene as a part of the program did not offend the Constitution.*

Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 799-801 (M.D.Tenn. 2008)(emphasis supplied).[8] Thus, the visual depiction of the "Living Nativity" falls into a fairly standard and frequently repeated legal analysis as noted above, and it depends on the context of the placement and the surrounding activities as well as the purpose of the display.

In the present case the express secular purpose of the nativity scene, and the program as a whole, is to educate students regarding the various holidays celebrated during December, including Chanukah, Kwanza, and Christmas. Moreover, the 2015 program must be viewed

[8] It is important to note that the *Wilson County* case found no endorsement with a "Living Nativity" in a kindergarten classroom, finding it did not constitute an unreasonable risk of government endorsement of religion to a kindergarten student. *Id.*, 564 F. Supp.2d at 784. With high school students, as we have in the present case, there is not the same concern that exists "for elementary school children, who are less informed, more impressionable and more subject to peer pressure than average adults." *Id.* Thus, "this Court will take into account that the present case involves high school students taking an AP course when applying the 'reasonable observer' test" in an Establishment Clause context. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1039 (9th Cir. 2010). Surely if a Living Nativity does not pose the risk of endorsing religion to a kindergartener under this heightened standard, then a nativity scene using mannequins does not pose a problem in the high school context.

within the context of the performing arts program as a whole, utilizing all components of the performing arts department including choral music, band and orchestra instrumental music, dance and drama performances, and lighting and stagecraft. The Supreme Court has held that "the Court is normally deferential to a State's articulation of a secular purpose, [but] it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)(parenthetical supplied).

The nativity in this case, as in the *Doe* case, is just one small portion of the overall 2015 program and encompasses just about the same 10% figure.

> The Establishment Clause is not violated because government action "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (*citing McGowan v. Maryland*, 366 U.S. 420, 422 (1961)). In this case, the primary or principal effect of the use of the reading series at issue is not to endorse these religions, but simply to educate the children by improving their reading skills and to develop imagination and creativity. Any religious references are secondary, if not trivial. Therefore, the use of the series withstands scrutiny under this prong of the test.

Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 689 (7th Cir. 1994).

Because the purpose of the 2015 Christmas Spectacular is secular, and it is designed to promote various musical, dance and theatre performances as part of the School's performing arts curriculum and to educate students and the general public regarding the historical context of the three main holidays celebrated during December, the 2015 Christmas Spectacular satisfied the modified *Lemon* test.

3. Plaintiffs' attempt to minimize the impact of the live nativity's removal from the program should be rejected.

In their motion for summary judgment, Plaintiffs offer three reasons why removal of the living nativity and its replacement with a passive display of mannequins is not enough to satisfy their First Amendment concerns.

First, Plaintiffs incorrectly allege that "there is 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." (Plf. Brief p. 19). This Court held otherwise when, relying on *Brown*, it concluded that having live student actors performing in a nativity scene was the sort of "active participation in ritual" that suggested the School's endorsement of religion. (Dkt. 40, p. 14.)

Second, Plaintiffs suggest that *Brown's* "active participation" analysis refers to the audience as well as the student performers. (Dkt. 54, p. 24 ("the 'active participation' referenced by the Ninth Circuit in *Brown* [] clearly includes not only actual performers but also a captivated audience.")) However, this argument is nothing more than a restatement of Plaintiffs' earlier claim—already rejected by this Court—that performance before an audience is itself a reason to reject a holiday performance as an impermissible endorsement of religion. (Dkt. 40, p. 14.)

Finally, Plaintiffs return to their argument that the endorsement "does not prevent this Court from examining the history and tradition of a religious performance" and that application of the reasonable observer standard requires consideration of that history. While it is true that the observer is assumed to have the historical knowledge about past performances, 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. Those sorts of changes, of course, are exactly what were instituted here, and this Court should evaluate those changes without being unduly restrained by the program's history.

Finally, it is important to note that this Court's analysis is not just some mathematical calculation, comparing the size and frequency of symbols. Such a rote approach was rejected in cases such as *Am. Civil Liberties Union of New Jersey ex rel. Lander v. Schundler*, 168 F.3d 92 (3rd Cir. 1999) which noted that "any suggestion that these factors are dispositive for

Establishment Clause purposes is belied by the Supreme Court's holding in *Allegheny County* that the display of a large menorah and one secular symbol, a Christmas tree, in front of the City–County Building in Pittsburgh was constitutional." *Schundler*, 168 F.3d 92, 104-05. As the Court so elegantly put it, such a mathematical approach leads to the absurd result of analyzing "how many candy canes offset one Jesus?" *Id.*

IV. Conclusion

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

FROST BROWN TODD LLC

By: */s/Anthony W. Overholt*
Thomas E. Wheeler, II, #13800-49
Anthony W. Overholt, #16481-49

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of May, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

Daniel I. Mach
Heather L. Weaver
American Civil Liberties Union
915 15th Street, NW, 6th Floor
Washington, DC 20005

Gavin M. Rose
ACLU of Indiana
1031 E. Washington Street
Indianapolis, IN 46202

Ryan D. Jayne
Samuel T. Grover
Freedom From Religion Foundation
10 N. Henry Street
Madison, WI 53701

Timothy S. Shelly
121 W. Franklin Street, Suite 400
Elkhart, IN 46516

/s/Anthony W. Overholt
Thomas E. Wheeler, II

FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

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