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

FREEDOM FROM RELIGION FOUNDATION, JOHN DOE, and JACK DOE,	)	
Plaintiffs,	)	
v.	)	No. 3:15-cv-00463-JD-CAN
CONCORD COMMUNITY SCHOOLS,	)	
Defendant.	)	

AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Each winter for the past several decades, the Performing Arts Department of Concord High School ("the High School")—which is operated by Concord Community Schools ("the School Corporation")—has planned and produced a "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 remains the same: school officials always ensure that each show closes with a 20-minute live depiction of a nativity scene and a recitation of biblical scripture narrating the birth of Jesus Christ. By staging a live nativity scene and biblical reading as part of a school-sponsored event, the School Corporation is violating the Establishment Clause of the First Amendment to the U.S. Constitution. 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.

Although the annual live nativity scene and biblical reading are plainly unconstitutional, the School Corporation plans to include them again in this year's Christmas Spectacular, which is slated to be staged from December 11th through December 13th and for which rehearsals have already begun. The plaintiffs—a student who participates in the Performing Arts Department, his father who will attend the event in order to support his child, and a non-profit membership organization devoted to maintaining the separation of church and state—are entitled to a preliminary injunction to prevent the ongoing violation of their constitutional rights.

STATEMENT OF FACTS[1]

I. Concord High School's "Christmas Spectacular"

Concord Community Schools ("the School Corporation") is a school corporation that operates several public schools, including Concord High School ("the High School"), in Elkhart County, Indiana. (*See generally* Concord Community Schools, at http://www.concord.k12.in.us (last visited Oct. 22, 2015)).

A. Background to the "Christmas Spectacular"

For several decades, toward the beginning of each winter trimester the High School's Performing Arts Department has produced a "Christmas Spectacular." (Aff. of John Doe ["John Doe"] [Exh. 2], ¶ 4; Aff. of Jack Doe ["Jack Doe"] [Exh. 3], ¶ 3). The Christmas Spectacular is planned by the faculty of the High School's Performing Arts Department and features performances by students enrolled in elective, for-credit performing arts classes. (Jack Doe, ¶¶ 3-5). According to the School Corporation's webpage, the Performing Arts Department "involves approximately half of the school's 1,500 students at the high school. Students are involved in marching band, 3 concert bands, 2 jazz bands, pep band, string orchestra, symphony

[1] The plaintiffs have, of course, not yet engaged in discovery. They reserve their right to supplement these facts with evidence adduced prior to or at the preliminary injunction hearing.

orchestra, 6 choirs, piano, and dance." (*See* Concord Performing Arts, at http://www.concord music.info (last visited Oct. 22, 2015)). Attendance and performance at the Christmas Spectacular, as well as rehearsals for the show, are mandatory for students enrolled in these classes. (Jack Doe, ¶ 7).

The pieces to be performed during the Christmas Spectacular are selected by the faculty-members of each class. (*Id.*, ¶ 17). Faculty members also during the High School's annual staging of the nativity scene and biblical reading that are at issue in this case. (*Id.*). Rehearsals typically occur both during and after school and on the premises of the High School, and begin the first part of October. (*Id.*, ¶ 8). Rehearsals for this year's show have thus already begun. (*Id.*). Additionally, "run throughs"—in which the entire Christmas Spectacular is rehearsed from beginning to end—occur both during and after school. (*Id.*). These rehearsals are also led by various faculty members in the Performing Arts Department of the High School. (*Id.*).

The actual performances of the Christmas Spectacular take place in the High School's auditorium. (John Doe, ¶ 8; Jack Doe, ¶ 9). 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 that is attended by elementary-school students throughout the School Corporation. (Jack Doe, ¶ 9). 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. (John Doe, ¶ 8; Jack Doe, ¶ 9). This year, the public performances are scheduled to occur on December 12th and December 13th, and the school-day performance is scheduled to occur on December 11th. (John Doe, ¶ 8; Jack Doe, ¶ 9).

During the event, several musical numbers are performed. (John Doe, ¶ 9; Jack Doe, ¶

10). While some of the precise songs chosen differ each year, these songs generally celebrate Christmas and the winter season. (John Doe, ¶ 9; Jack Doe, ¶ 10). 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." (John Doe, ¶ 9; Jack Doe, ¶ 10; *see also* Exhibit 1 [video]).

B. The Live Nativity Scene and Recitation of the Story of the Birth of Jesus Christ

Every performance of the Christmas Spectacular ends with an approximately 20-minute recitation of the story of the birth of Jesus Christ, including a live Nativity Scene and a scriptural reading from the New Testament. (John Doe, ¶ 10; Jack Doe, ¶ 11). During this segment, students at the High School portray the Virgin Mary, Joseph, the Three Wise Men, shepherds, and angels. (John Doe, ¶ 10; Jack Doe, ¶ 11). Portraying these biblical figures, the students gather on stage with a stable set piece, which includes a manger and the Star of Bethlehem:

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

While students of the High School portray the various characters present in the story of the birth of Jesus, a faculty-member (acting as narrator) recites the story verbatim as it appears in the New Testament (reading Luke 2:6-14 and Matthew 2:1-11). (John Doe, ¶ 11; Jack Doe, ¶ 12). At the same time, other students perform various religious hymns—either singing or instrumentally—such as "Christ in the Manger," "Silent Night," and "Hark! The Herald Angels Sing." (John Doe, ¶ 11; Jack Doe, ¶ 12). These hymns are performed by the High School's various bands and choirs, which are placed throughout the auditorium, including to the side of the stage and in the aisles of the auditorium:

(John Doe, ¶ 11; Jack Doe, ¶ 12; *see also* John Doe, ¶ 12 & Attachment One [photographs available through the School Corporation's website]). A video of the 2014 Christmas

Spectacular is being manually filed as Exhibit 1. This video is also available at https://www.youtube.com/watch?v=6ni2anXa_H4&feature=youtu.be (last visited Oct. 8, 2015).

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

A. The Plaintiffs and Their Objections

Jack Doe is the pseudonym of a minor student of the High School who is actively involved in the Performing Arts Department. (John Doe, ¶ 3; Jack Doe, ¶ 2). He performed during the 2014 Christmas Spectacular and will do so again during the 2015 Christmas Spectacular: his attendance and participation during these events is mandatory by virtue of his participation in the Performing Arts Department. (John Doe, ¶ 5; Jack Doe, ¶¶ 6-7). In addition to performing in other elements of the Christmas Spectacular, Jack Doe will be required to perform one or more of the religious hymns that are part of the live nativity scene and the scriptural reading portraying the story of the birth of Jesus Christ. (Jack Doe, ¶ 12). John Doe (also a pseudonym) is the father of Jack Doe, and attended the 2014 Christmas Spectacular—and will attend the 2015 Christmas Spectacular—in order to support his son. (John Doe, ¶¶ 2, 6). John Doe and Jack Doe both strongly object to the lengthy portion of the Christmas Spectacular consisting of the live nativity scene, biblical reading, and telling of the story of the birth of Jesus. (John Doe, ¶ 13; Jack Doe, ¶ 14). These activities impose on students and the audience specific religious doctrine that do not comport with the Does' beliefs. (John Doe, ¶ 13; Jack Doe, ¶ 14).

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, ¶ 2; Aff. of Annie Laurie Gaylor ["Gaylor"] [Exh. 4], ¶ 3). FFRF, like John and Jack Doe, strongly objects to the portion of the Christmas Spectacular consisting of the live nativity scene and the telling of the story of the birth of Jesus.

(Gaylor, ¶ 6). It believes that the performances sends 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. (*Id.*). 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. (*Id.*, ¶ 4 & Attachment One). In response, the Superintendent of the School Corporation defended the practice, refusing to bring it to an end. (John Doe, ¶ 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, ¶ 7). 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.*).

PRELIMINARY INJUNCTION STANDARD

The standard in the Seventh Circuit for the granting of a preliminary injunction is clear. In order to determine whether a preliminary injunction should be granted, the Court must weigh several factors:

> (1) whether the plaintiffs have established a prima facie case, thus demonstrating at least a reasonable likelihood of success at trial;
>
> (2) whether the plaintiffs' remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue;

(3) whether the threatened injury to the plaintiffs outweighs the threatened harm the grant of the injunction may inflict on the defendant; and

(4) whether, by the grant of the preliminary injunction, the public interest would be disserved.

See, e.g., *Baja Contractor, Inc. v. City of Chicago*, 830 F.2d 667, 675 (7th Cir. 1987). The heart of this test, however, is "a comparison of the likelihood, and the gravity of two types of error: erroneously granting a preliminary injunction, and erroneously denying it." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 590 (7th Cir. 1984).

Argument

The plaintiffs are likely to succeed on the merits of their claim that the live nativity scene and telling of the story of the birth of Jesus violates the Establishment Clause. All other requirements for the issuance of a preliminary injunction are also met, and one should therefore issue.

The plaintiffs are likely to succeed on the merits of their claim that the live nativity scene and scriptural reading violates the Establishment Clause

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, (a) the action must have a secular purpose, (b) the action must have a principal or primary effect that neither advances nor inhibits religion, and (c) 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 (1997).

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. Regardless of the Establishment Clause test applied, the live nativity scene and scriptural reading at issue in this case is unconstitutional

This is not a close case. The Seventh Circuit, holding unconstitutional high school graduation ceremonies held in a church, has recently reiterated "well-established doctrine prohibiting school administrators from bringing church to the schoolhouse." *Elmbrook*, 687 F.3d at 850-51 (citing *People of State of Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211-12 (1948)). The endorsement test provides a second, independent standard that governmental practices must satisfy to pass constitutional muster. Regardless of the test applied, the performance of a live nativity scene—complete with a scriptural reading from the New Testament and integrated with solemnly performed religious hymns—is unconstitutional.

A. The objectionable portion of the Christmas Spectacular is unconstitutionally coercive

Both of the Supreme Court's leading coercion cases—*Lee* and *Santa Fe*—addressed school districts' attempts to introduce its students to religious exercises. The Seventh Circuit's most recent pronouncement on the issue—*Elmbrook*—did the same. The case at bar 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, an observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval," 530 U.S. at 308: 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," *id.* 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.").

Thus, 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, of course, 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 live nativity scene and telling of the story of the birth of Jesus—complete with a scriptural reading from the New Testament. The religious import of this event cannot be denied, and, in light of the Supreme Court's reasoning in *Lee* and *Santa Fe*, the coercion here is self-evident. While the Superintendent has previously claimed that attendance at the Christmas Spectacular is voluntary (John Doe, ¶ 15 & Attachment Two), whether or not this is true—and

there is reason to believe that it is not—it is irrelevant. The Court in *Santa Fe*—in dealing with high school football games, attendance at which was of course 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. 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 performing arts groups (and who spends

months rehearsing for the Christmas Spectacular), the choice offered by the School Corporation is an untenable—and unconstitutional—one.[2]

Indeed, long before *Santa Fe* and *Lee*, the Supreme Court invalidated two school district's practice of beginning each school day with a reading from the Bible. *See School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-27 (1963); *see also, e.g.*, *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1168-71 (7th Cir. 1993) (school district's policy of permitting the distribution of Bibles to students at school violated the Establishment Clause). There is no useful distinction between a scriptural reading and a religious performance *containing* a scriptural reading. This is particularly so given the scope of the endeavor in the present case: even more so than a simple scriptural reading (which would itself be prohibited under *Schempp*), the live nativity scene and telling of the story of the birth of Jesus is here presented in such a manner so as to *celebrate* the story.

Coercion is self-evident, and the School Corporation's performance runs afoul of the Establishment Clause.

B. The nativity scene and biblical reading unconstitutionally conveys a message of religious endorsement

Because the live nativity scene and recitation of the story of the birth of Jesus violates the coercion test established in *Lee* and *Santa Fe*, there is no need for this Court to proceed further. If it chooses to do so, however, the Seventh Circuit's decision in *Elmbrook* likewise makes clear that this portion of the Christmas Spectacular violates the endorsement test.

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[2] As indicated, there is reason to doubt that Jack Doe even has the ability to opt out of the Christmas Spectacular. By virtue of his participation in the Performing Arts Department, Jack Doe has been required to sign a contract outlining the expectations of students and underscoring the mandatory nature of both performances and rehearsals. (Jack Doe, ¶ 7). This contract identifies the dates of various performances and after-school rehearsals throughout the year, including the Christmas Spectacular and rehearsals for the Christmas Spectacular, and indicates that participating students must attend those performances and rehearsals unless there is an emergency such as a death in the family. (Jack Doe, ¶ 7).

The endorsement test focuses not on the actual benefit bestowed to a religious institution, but on how that benefit is *perceived*. "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). 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). Thus, the graduation ceremony in *Elmbrook* 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 recited during the Christmas Spectacular. Unlike in *Elmbrook*, these religious symbols are not just passively present during an event hosted by the School Corporation. Rather, the live nativity scene and telling of the story of the birth of

Jesus are performed at the behest of the School Corporation for an audience of students, family members, and the general public—and, once a year, for an audience of the School Corporation's elementary-school students. A student watching her peers portray Joseph, the Virgin Mary, and the Wise Men while a faculty member literally reads from the Bible and while numerous other students sing religious hymns could only conclude that the School Corporation has taken a firm stance on religion. The First Amendment does not permit it 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, and reading of biblical scripture, transgresses that line.

C. The nativity scene and biblical reading violates the traditional *Lemon* test

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. That question may be avoided in this case as well. However, if the Court chooses to delve into these issues, the live nativity scene and telling of the story of the birth of Jesus violates the first two prongs of that test.

1. First, the nativity scene and biblical reading do not have a primarily secular purpose. *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 County 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.

As the Supreme Court has observed, "the place of the Bible as an instrument of religion cannot be gainsaid." *Schempp*, 374 U.S. at 223-24 (rejecting school district's avow secular purposes for Bible reading as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"). Scripture revealing the birth of Jesus is "undeniably sacred text" in the Christian faith, and no purported secular purpose the district may claim for reading and reenacting, and celebrating, this scripture during a school event "can blind [this Court] to that fact." *See Stone v. Graham*, 449 U.S. 39, 41 (1980) (striking down state law requiring posting of Ten Commandments in public-school classrooms). The "pre–eminent purpose" the High School's promotion of biblical scripture through its live nativity scene and reading of the story of Jesus's birth "is plainly religious in nature." *See id. Cf., e.g.*, *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 495 (2d Cir. 2009) (concluding that religious brochures on the counter of a post office "fail spectacularly under the first inquiry of *Lemon*").

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, complete with a scriptural reading, high school students portraying religious figures, and several

student choirs performing religious hymns, "[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.

The remaining factors for the entry of a preliminary injunction are met

I. Absent immediate relief, the plaintiffs will suffer irreparable harm for which there is no adequate remedy at law

Absent a preliminary injunction the plaintiffs will suffer irreparable harm for which there is no adequate remedy at law. Of course, at this point it is well-established that the denial of constitutional rights is irreparable harm in and of itself. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *see also, e.g.*, *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). Indeed, in the First Amendment context, the Supreme Court has noted specifically that the violation of the First Amendment, for even "minimal periods of time," is "unquestionably . . . irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *See also, e.g.*, *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (applying same principle to Establishment Clause context).

There is no adequate remedy at law that can address this irreparable harm. *See, e.g.*, *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (holding that "money damages are [an] inadequate" remedy for the loss of First Amendment freedoms). Absent an immediate injunction, the plaintiffs will be forced to endure the continuing violation of their constitutional rights. Nothing more need be demonstrated.

II. The balance of harms and the public interest favor an injunction

As with the irreparable harm requirement, courts apply a *per se* rule as to the remaining preliminary injunction factors once a plaintiff demonstrates a likelihood of success on the merits: "[v]indication of constitutional freedoms is in the public interest." *See, e.g.*, *McIntire v. Bethel Sch.*, 804 F.Supp. 1415, 1429 (W.D. Okla. 1992). An injunction will only force compliance with clear requirements of constitutional law. The public has a significant interest in ensuring that local governmental bodies, particularly those charged with educating youth, comply with the First Amendment. Moreover, the School Corporation may not contend that requiring it to comply with constitutional norms is harmful. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiffs'] First Amendment rights . . . then [the] claimed harm is no harm at all").

The injunction should be issued without bond

The issuance of a preliminary injunction will not impose any monetary injuries on the School Corporation. In the absence of such injuries, no bond should be required. *See, e.g.*, *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). To require a bond in the present case would be to condition the exercise of the plaintiffs' constitutional rights on their ability to pay. No bond should be required.

CONCLUSION

For the foregoing reasons, the School Corporation should be preliminarily enjoined from organizing, rehearsing, presenting, or allowing to be presented as part of its Christmas Spectacular the live nativity scene and the biblical reading portraying the story of the birth of Jesus.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on this 22nd day of October, 2015. Parties may access this document through the Court's electronic system. The following persons will be served with this filing by operation of the Court's electronic system:

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