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REPLY TO FLORIDA

December 21, 2018

VIA EMAIL ONLY

Mr. Drew B. Markel
Mr. Bob Gillaspy
Mr. Matt Reedy
Jackson County Commissioners
220 E. Walnut Street,
Brownstown, IN 47220

RE: Jackson County Christmas lights display

Dear Commissioners:

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and public policy organization with an emphasis on First Amendment civil liberties. With offices in Florida, Virginia, and Washington D.C., and hundreds of affiliated attorneys across the nation, including Indiana, we specialize in *pro bono* constitutional litigation. We stand in defense of traditional American holidays such as Christmas.

Liberty Counsel has reviewed correspondence sent by the Freedom From Religion Foundation ("FFRF") demanding that Jackson County ("County") remove a lighted Nativity scene from the Jackson County Courthouse Christmas light display. Contrary to FFRF, Liberty Counsel believes there is no reason for the County to remove the Nativity from the light display. This letter sets forth Liberty Counsel's understanding of the facts, and Liberty Counsel's offer of *pro bono* assistance to Jackson County in defense of holiday symbols, should litigation arise.

The Supreme Court has recognized that municipalities may maintain Christmas displays **that include both religious and secular symbols**, and thereby engage in permissible "government speech." See *Lynch v. Donnelly*, 465 U.S. 668 (1984), at 681-82 (city's inclusion of Nativity scene in a holiday display including secular decorations did not violate the Establishment Clause because the purpose of including the Nativity scene was to celebrate the Christmas holiday and depict its origins), as well as *Cty. of Allegheny v.*

Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989) *abrogated by Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014).

In its December 13, 2018 letter, FFRF paints a less-than-full picture of the law pertaining to government Christmas displays. A government Christmas display which includes a Nativity scene is permissible, as long as there are other secular symbols of Christmas present. The picture FFRF included with its letter shows only the Nativity scene, despite the presence of secular holiday symbols on the lawn: a lighted Santa Claus/sleigh/reindeer to the left of the Nativity scene; and lighted Christmas carolers to the right.

FFRF well knows that the presence of secular symbols is a critical fact determining whether it will succeed in challenging a particular Christmas display, or whether the display will be upheld. *See Freedom from Religion Foundation, Inc. v. City of Warren, Mich.*, 873 F. Supp. 2d 850 (E.D. Mich. 2012), *aff'd*, 707 F.3d 686 (6th Cir. 2013). In *City of Warren*, the FFRF sought to have a city's Nativity scene (crèche) declared unconstitutional, or in the alternative, demanded that FFRF's own offensive sign stating "religion is but myth and superstition" be included next to the Nativity scene. *Id.* The District Court rejected FFRF's claims, and its rejection was affirmed by the Sixth Circuit Court of Appeals.¹ *City of Warren* is the controlling Nativity scene case in the Sixth Circuit Court of Appeals, which has jurisdiction over Ohio, as well as Kentucky, Michigan, and Tennessee.

The Seventh Circuit Court of Appeals, which has jurisdiction over Indiana, Illinois and Wisconsin, has also noted that the "recent decisions of the Supreme Court have looked favorably upon the constitutionality of government displays of purely religious symbols—a creche and a menorah—when those symbols were part of a larger display." *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 778 (7th Cir. 2001). *See also Gonzales v. N. Twp. of Lake Cty., Ind.*, 4 F.3d 1412, 1422 (7th Cir. 1993) ("display of government owned crèche in a setting among secular holiday decorations does not violate Establishment Clause"); *Mather v. Village of Mundelein*, 864 F.2d 1291, 1292 (7th Cir.1989) (Village's addition of secular symbols to its own existing display of a crèche on public property sufficient to avoid appearance of impropriety).

Numerous other cases have upheld the display of Nativity scenes on government property. *See also Elewski v. City of Syracuse*, 123 F.3d 51, 54–55 (2d Cir.1997); *ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 104–08 (3d Cir.1999) (Alito, J.); *ACLU v. City of Florissant*, 186 F.3d 1095, 1098 (8th Cir.1999); as well as *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir.1990).

"Government speech" consisting of religious and secular Christmas holiday symbols is defensible. The County is entitled to speak its own message, and thus need not accept for display at the courthouse (should they be proffered) items such as hateful FFRF banners or other items which have no longstanding connection to the Christmas holiday, like pentagrams or satanic symbols proffered by other atheist groups.

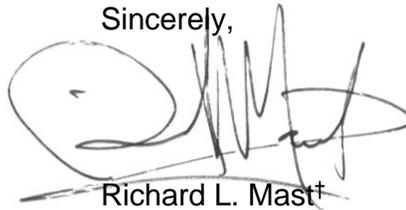
¹ *Freedom from Religion Found., Inc. v. City of Warren, Mich.*, 707 F.3d 686 (6th Cir. 2013).

The Christmas light collection on the lawn – including the Nativity scene - is legally defensible. The County should continue to display it. There are existing secular symbols of Christmas within the collection on courthouse property, sufficient to notify the reasonable observer aware of the full context of the light collection, and not jumping to conclusions based on one tightly shot photograph. The light collection's purpose, effect and intent is not to "endorse" Christianity; but is simply to celebrate Christmas.

Liberty Counsel has successfully defended government entities against baseless claims of First Amendment violations by the FFRF and others. If the County takes action in accordance with Liberty Counsel's advice, and the Commission retains Liberty Counsel, we are prepared to defend the County at no charge to the taxpayers if litigation ensues.

Should you or others wish to discuss further after reviewing the above cases with counsel, or wish to know more about Liberty Counsel's experience in these matters, please do not hesitate to contact us at 407-875-1776 or via email at Liberty@lc.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Mast", written over a horizontal line.

Richard L. Mast†

CC:

VIA EMAIL

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