UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

REBECCA WOODRING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:18-cv-00243-TWP-DML**
	)	
JACKSON COUNTY, INDIANA	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT
JACKSON COUNTY'S MOTION TO DISMISS

Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: hmihet@lc.org
rgannam@lc.org
dschmid@lc.org
court@lc.org

Attorneys for Defendant Jackson County, Indiana

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INTRODUCTION

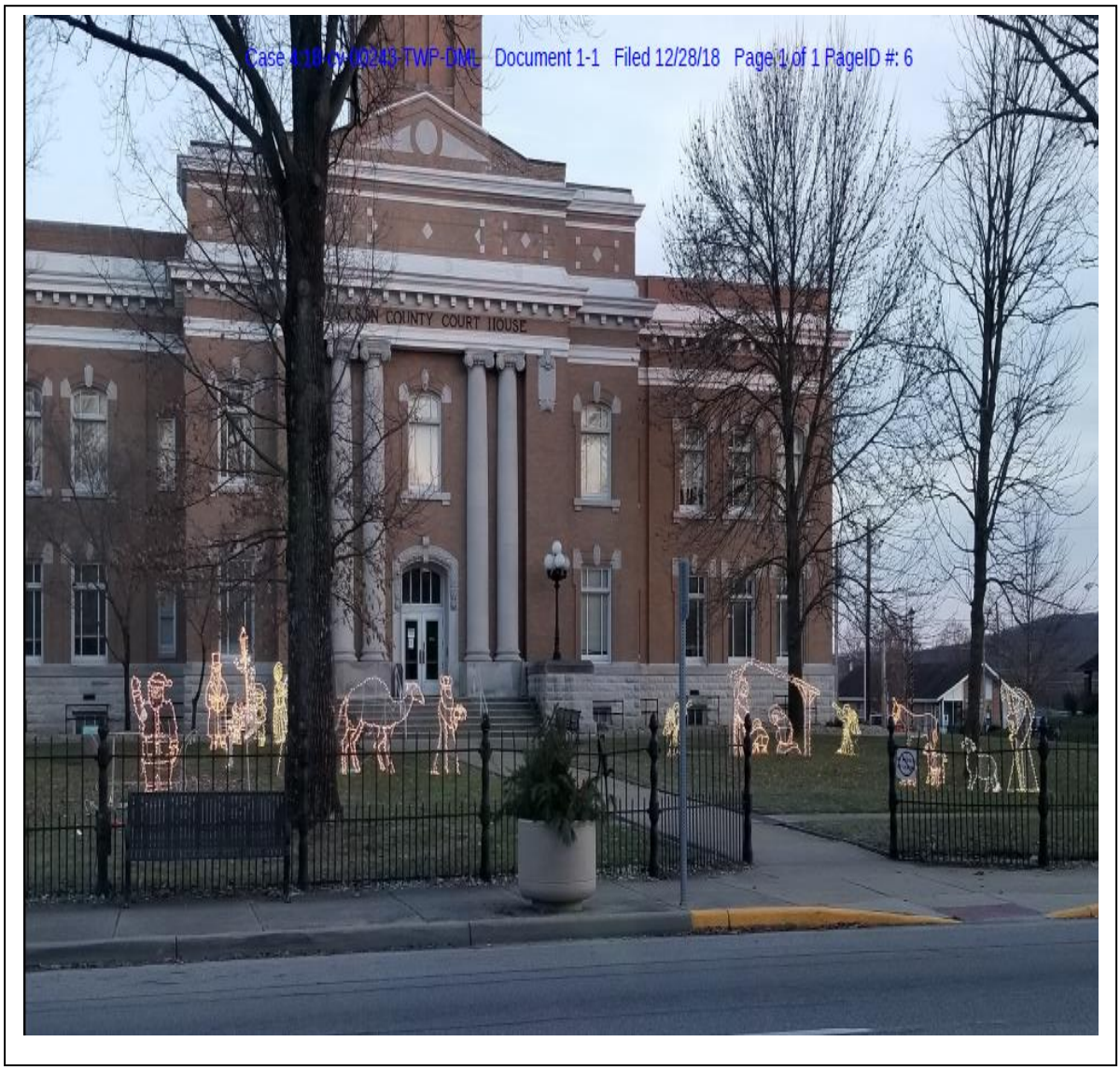
Against the decades-long avalanche of binding and unequivocal precedent from the Supreme Court and the Seventh Circuit upholding the practice of governments recognizing the broad array of their citizenry's celebration of Christmas by including religious and non-religious symbols on government property during the winter holiday, Plaintiff attempts to resurrect a long-buried notion that this practice violates the Establishment Clause. Indeed, Plaintiff's Complaint is a tribute to the minimal requirements of notice pleading, but while the "threshold may be low . . . [t]he court need not conjure up unpled allegations or contrive elaborately arcane scripts in order to carry the blushing bride through the portal." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). In this matter, Plaintiff expressly alleges facts that affirmatively show her "claims are without merit." *Targenza v. Great Am. Comc'ns Co.*, 12 F.3d 717, 718 (7th Cir. 1993). Indeed, Plaintiff's Complaint shows that the County has placed a display on the County Courthouse that includes **one** religious symbol (a Nativity scene) and **two** secular symbols (Santa Claus and carolers). Those allegations demonstrate that the County's challenged Christmas display passes constitutional muster under any formulation of the Establishment Clause tests articulated by the federal courts. Thus, this Court "need neither reinvent the wheel nor tarry long over [Plaintiff's] claims to the contrary." *Gooley*, 851 F.3d at 514. The tarrying has been done by countless courts, including the Supreme Court and Seventh Circuit, universally settling on the proposition that government displays including both religious and non-religious components that recognize the secular and religious aspects of a federally-recognized holiday withstand the assault of those opposed to any reference to religion in the public sphere. Plaintiff's Complaint fails to state a claim upon which relief may be granted and therefore must be dismissed with prejudice.

FACTUAL ALLEGATIONS OF PLAINTIFF'S COMPLAINT

Plaintiff alleges that the Jackson County Courthouse (the "Courthouse") is located in Brownsville, Indiana, and that it faces Main Street, which she claims is the primary street in Brownstown. (Dkt. 1, Complaint, "Compl." ¶8). She alleges that the Courthouse contains government offices, and that it is surrounded by a large lawn with a sidewalk leading to the Courthouse entrance. (*Id.* ¶¶9-10). Aside from a flag pole, Plaintiff alleges that little else is displayed on the Courthouse lawn. (*Id.* ¶11).

Plaintiff alleges that, for many years, the County has displayed various symbols on the lawn of the County Courthouse during the month of December. (*Id.* ¶¶1, 12). The Complaint alleges that part of the display includes a "Nativity scene," which includes figures of animals outlined in white lights that are illuminated during the day and evening hours, a manger with the baby Jesus and Joseph and Mary, two angels, and the Magi bearing gifts with animals. (*Id.* ¶¶12-14). In addition to what Plaintiff refers to as the Nativity scene, **the Complaint alleges that the County also places figures of Santa Claus and carolers on the same Courthouse lawn**, in proximity to the other elements on display. (*Id.* ¶¶16-17).

Plaintiff attaches to her Complaint a photo of the entire display the County places outside the County Courthouse during December. That photo is reproduced here to show the entire display in its context, and as alleged in Plaintiff's Complaint:



(*Id.* ¶19 and dkt. 1-1, Compl. Ex. 1).

As readily observable in Plaintiff's photo of the display, **the figures of Santa Claus and the carolers are identical in type and size to the other elements in the display, and are also outlined in white lights**, like the other elements. (*Id.*) As also readily observable, Santa Claus and the carolers are **immediately next** to the "Magi bearing gifts with animals" which the Complaint alleges is part of the unconstitutional religious display. (*Id.*; *see also*, Compl. at ¶ 13).

Plaintiff alleges that the County's display – which includes both religious and non-religious symbols – lacks a secular purpose, has the principle effect of advancing religion, and that it constitutes the County's endorsement of the Christian faith. (*Id.* ¶20). She claims that the County's display is a violation of the Establishment Clause to the First Amendment. (*Id.* ¶26).

LEGAL ARGUMENT

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8 … does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusations." *Id.* at 678. Indeed, Rule 8 "requires more than mere labels and conclusions, and **a formulaic recitation of the elements of a cause of action will not do**." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (emphasis added). *See also Ashcroft*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). To establish that their claim has plausibility, plaintiffs are required to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Rule 8 demands "more than a sheer possibility that a defendant acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (internal quotations omitted). "Nor does a complaint suffice if it

tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (emphasis added). Indeed, the Seventh Circuit has "admonish[ed] those plaintiffs who merely parrot the statutory language of the claims they are pleading . . . rather than providing some specific facts to ground those legal claims." *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

After specifically pleading facts that render the challenged display constitutional as a matter of law, Plaintiff does nothing more than present threadbare, conclusory allegations of unconstitutionality, and thus fails to plead any plausible claim. Her Complaint should be dismissed with prejudice.

I. PLAINTIFF CANNOT STATE A CLAIM UNDER THE ESTABLISHMENT CLAUSE BECAUSE THE COUNTY'S DISPLAY IS CONSTITUTIONAL AS A MATTER OF LAW UNDER THE SUPREME COURT'S AND SEVENTH CIRCUIT'S BINDING NATIVITY SCENE PRECEDENT.

Plaintiff's Complaint fails to state a claim upon which relief can be granted because binding precedent from the Supreme Court and the Seventh Circuit dictates that displays containing both religious and secular aspects, including those that contain a Nativity scene around Christmas time, do not violate the Establishment Clause. As these cases dictate, a challenged display must be viewed in its entire context, including all aspects – both religious and non-religious. When taken in context, those displays containing only Nativity scenes have been held to violate the Constitution in some cases, while displays containing a Nativity scene coupled with other, non-religious symbols of the Christmas holiday pass constitutional muster as a matter of law.

Plaintiff's allegations, on their face, fail to allege any violation of the Establishment Clause. Indeed, Plaintiff's own allegations admit that, while the County's display includes a Nativity scene, it also includes other, non-religious figures and symbols. The display thus passes the Supreme Court's and Seventh Circuit's Nativity scene/Establishment Clause display cases, and Plaintiff's Complaint should therefore be dismissed with prejudice.

A. This Court Must Review The Context Of The County's Display As A Whole.

When analyzing the County's challenged display, this Court must consider the overall context of the display – **as a whole**, rather than the isolated view Plaintiff attempts to take in her Complaint. Indeed, there is no question that a display must be reviewed "**in the context of th[e] government's holiday celebration as a whole**." *Cnty. of Allegheny v. ACLU Greater Pitt. Chapter*, 492 U.S. 573, 595 (1989) (emphasis added); *id.* ("That inquiry, of necessity, turns upon the context in which the contested object appears."); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("the focus of our inquiry must be on the crèche in the context of the Christmas season."); *id.* at 680 (the inquiry depends upon "the proper context of the Christian Holiday season"). *See also Mather v. Vill. of Mundelein*, 864 F.2d 1291, 1293 (7th Cir. 1989) ("The point of *Lynch*, however, is that the **context**—the context of the ensemble, and more important the context of the secular holiday the government observes—**is the controlling consideration**." (emphasis added)).

While the above authorities deal exclusively with the proper inquiry in the Christmas-display setting, a host of binding precedent dealing with other displays containing religious components confirms that in all things, context is key. *See, e.g.*, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 868-69 (2005) (constitutionality of a display containing religious symbols focuses on the context in which it is displayed); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 843 (7th Cir. 2012) ("When confronted with an Establishment Clause challenge, the Supreme Court requires us to examine the context in which government interacts with a religious organization."); *Books v. Elkhart Cnty.*, 401 F.3d 857, 863 (7th Cir. 2005) (holding that court must "examine the content, design, placement, and context of the [challenged] display"); *Doe v. Small*, 964 F.2d 611, 622 (7th Cir. 1992) (considering the context of a challenged display containing religious aspect to determine its constitutionality); *Harris v. City of Zion*, 927 F.2d 1401, 1412 n.11 (7th Cir. 1991)

("*County of Allegheny* makes clear that the constitutionality of a religious display will often depend upon its context."); *id.* at 1412 ("the context surrounding the challenged image is crucial"); *Doe v. Vill. of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (constitutionality of government's inclusion of religious component in display depends upon context).

In fact, the Supreme Court has unequivocally held that a court's failure to look at the entire context of a challenged display is plainly and clearly erroneous. *Lynch*, 465 U.S. at 680 ("The District Court plainly erred by focusing almost exclusively on the crèche."); *id.* at 681 (the district court's focus solely on the religious nature of one aspect of an otherwise inclusive display is "clearly erroneous").

Thus, this Court is required to examine the entire context of the display outside the County Courthouse, and is precluded as a matter of law from examining solely the religious components of the display, as Plaintiff entreats. The proper inquiry in this matter is the County's combined display of items recognizing religious aspects of Christmas (*e.g.*, Nativity scene) and items recognizing non-religious aspects of Christmas (*e.g.*, Santa, carolers), together as a whole.

B. When The County's Display Is Viewed As A Whole, Plaintiff's Complaint Plainly Fails To State A Claim Under The Establishment Clause.

The Supreme Court and Seventh Circuit have established and followed a constitutional framework when it comes to religious-only displays versus religious-and-secular displays. Displays containing both religious and non-religious components have been held constitutional as a matter of law, while displays containing only religious aspects have been held to violate the Establishment Clause in some contexts. As Plaintiff's Complaint plainly alleges, the challenged display here contains both religious and non-religious components, and therefore does not violate the Establishment Clause.

1. Displays Containing Religious And Non-Religious Components Are Constitutional As A Matter Of Binding Law.

In *Lynch*, the Supreme Court encountered the precise question Plaintiff's lawsuit raises here. Indeed, the Supreme Court's first sentence reads: "We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a crèche, or Nativity scene, in its annual Christmas display." *Lynch*, 465 U.S. at 670. The High Court's answer: No. *Id.* at 685.

In *Lynch*, the challenged holiday display included both religious and non-religious aspects. *Lynch*, 465 U.S. at 671. There, as here, the challenged display included a Nativity scene, a Santa Claus, and Christmas carolers. *Id.* In addition, the display included reindeer, a Christmas tree, and a few other lighted displays. *Id.* As Plaintiff would have this Court do here, the district court focused exclusively on the religious nature of the crèche, and "inferred from the religious nature of the crèche that the City had no secular purpose for the display." *Id.* at 680. The Supreme Court held, however, that such a narrow focus is improper and clearly erroneous. *Id.* at 680. Indeed, it said, "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause," but the Plaintiff's desired "absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Id.* at 677, 680. Thus, because the challenged display – when viewed in its entire context – contained both religious and non-religious symbols, the Supreme Court held there was no Establishment Clause violation.

In *County of Allegheny*, the Supreme Court faced yet another challenge to a government display of religious and secular symbols in its display at Christmas time. *Cnty. of Allegheny*, 492 U.S. at 614. There, the government included a menorah (a Jewish holiday symbol), a Christmas tree, and a sign saluting liberty. *Id.* Thus, identically to the question presented here, the Supreme

Court faced the question of whether a display containing one religious symbol (*e.g.*, a Jewish menorah) and two secular symbols (*e.g.*, Christmas tree and liberty sign) in the same overall holiday display violated the Establishment Clause. *Id.* at 616 ("the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths."). Yet again, the Supreme Court answered that question with a resounding no. *Id.* at 616-17. Indeed, based on *Lynch*'s teaching that inclusion of both religious and non-religious aspects in a display withstands constitutional assault, the *County of Allegheny* Court held that the "combination of the tree and menorah communicates . . . a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative (religious) tradition." *Id.* at 617-18.

Likewise, the Seventh Circuit, in *Mather*, faced a similar challenge to a government's display of religious and non-religious aspects of a display at Christmas time. *Mather*, 864 F.2d at 1292. There, the Village of Mundelein placed a display on the lawn of its seat of government (Village Hall), and that display included a religious symbol (*e.g.*, Nativity scene) and other non-religious symbols (*e.g.*, Christmas tree, Santa Claus, carolers, snowman, wreaths, and lights). *Id.* The plaintiff challenged that display, claiming that the inclusion of religious symbols in the display violated the Establishment Clause. *Id.* The Seventh Circuit resoundingly disagreed, *id.*, and held that when "the crèche is placed in the context of other seasonal symbols," it "shows[s] support for the holiday season rather than the religious aspect alone." *Id.* Indeed, "[d]etails that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality." *Id.* Rather, the question is whether the religious component – viewed in the context of the entire holiday display – is coupled with non-religious aspects. *Id.* The Village's

display included both religious and non-religious components and was thus upheld by the Seventh Circuit. *Id.*

2. Displays Containing Only Religious Components Have Been Held To Violate The Establishment Clause In Some Contexts.

The Supreme Court and Seventh Circuit have also encountered several displays in which the only component was religious. *See Cnty. of Allegheny*, 492 U.S. at 598-612; *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987). Contrary to the above-discussed displays, these stand-alone religious displays have not withstood constitutional attack. But, it was the religious-only nature of these displays that brought their constitutional demise.

In *County of Allegheny*, the second display challenged by the plaintiffs involved a Nativity scene/crèche that sat alone on the Grand Staircase of the County Courthouse with no other accompanying aspects. *Cnty. of Allegheny*, 492 U.S. at 598. There were no non-religious symbols coupled with that display —it stood alone. *Id.* The Supreme Court, viewing the display in its entire context as *Lynch* requires, held that the stand-alone crèche violated the Establishment Clause. *Id.* at 603. In so holding, the Court specifically noted that "**nothing in the context of display detracts from the crèche's religious meaning**," and that "the crèche **stands alone**: it is **the single element** of the display on the Grand Staircase." *Id.* at 598 (emphasis added). It was the stand-alone nature of the crèche that created the constitutional violation. *Id.* at 602-03.

In *Jewish Congress*, the Seventh Circuit likewise faced a stand-alone Nativity display that lacked any other non-religious aspects. 827 F.2d at 121-22. The Nativity scene was placed in the center lobby of City Hall, prominently displayed on a three-foot platform, and was topped with a banner that read "On Earth Peace—Good Will Toward Men." *Id.* at 122. In other parts of City Hall, the City placed other decorations, but they were not displayed at the same location or next to the crèche. *Id.* The Seventh Circuit compared the display to that in *Lynch*, and held that Chicago's

lack of other, non-religious components to the Nativity scene display made it unconstitutional. *Id.* at 125 ("The Court in *Lynch* found it highly significant that the crèche in that case was only one element in a larger display that consisted in large part of secularized symbols and decorations. **This case is different**." (emphasis added)). Indeed, the court noted that the Nativity display was "self-contained, rather than one aspect of a larger display." *Id.* Thus, "unlike *Lynch*, the secularized decorations in the vicinity of the nativity scene were not clearly part of the same display." *Id.* at 125-26. Because it was by itself without any non-religious symbols, the Seventh Circuit held that it violated the Establishment Clause. *Id.*

3. The Constitutionality Of The Challenged Display Is A Matter Of Law Properly Resolvable By This Court On A Motion To Dismiss.

While Plaintiff may predictably proffer that the resolution of these issues is inappropriate at the motion to dismiss stage, Seventh Circuit precedent dictates that these issues are not those of fact – but law. *See Jewish Congress*, 827 F.2d at 123; *Mather*, 864 F.2d at 1292. Indeed,

> whether the nativity scene should be viewed as self-contained or as part of a larger holiday display; whether the crèche depicts a historical event or is a religious symbol, whether the crèche has symbolic meaning; and whether the crèche communicates a message of government endorsement . . . **involve conclusions of law rather than facts**.

Jewish Congress, 827 F.2d at 123 (emphasis added); *Mather*, 864 F.2d at 1292 (holding that the court's determination of issues surrounding the constitutionality of a display, and whether it is similar enough such that it must be upheld under *Lynch*, are "**question[s] of law**, so we owe no deference to the district court's resolution" (emphasis added)).

Thus, because the seminal questions concerning the constitutionality of the County's display are those of law and can be resolved by looking solely to the facts alleged in Plaintiff's Complaint, this Court may properly resolve these issues on a motion to dismiss. *See, e.g.*, *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 309 (7th Cir. 1981) (court may resolve controversy on a

motion to dismiss where, as here, the "supporting briefs evidenced only questions of law"); *Bane v. Ferguson*, 890 F.2d 11, 13 (7th Cir. 1989) (district court may resolve questions of law on a motion to dismiss for failure to state a claim). As such, this Court need not unlock the doors to discovery for Plaintiff in a matter that involves solely questions of law under binding Seventh Circuit precedent.

4. The County's Display, Viewed In Its Entire Context, Contains Both Religious And Non-Religious Components And Therefore Does Not Violate The Establishment Clause.

Accepting all of the allegations of Plaintiff's Complaint as true, as this Court must, Plaintiff still fails to state a claim under the Establishment Clause. As Plaintiff's Complaint makes indisputable, the County's display outside the County Courthouse contains both religious and non-religious components. (Compl. ¶¶12-13) (alleging that the County displays a Nativity scene on the Courthouse lawn); (*id.* ¶16) (alleging that the County's holiday display outside the County Courthouse includes "a figure of Santa and figures of carolers"); (*See also* Dkt. 1-1, Ex. 1) (showing that the Nativity scene, figure of the Santa Claus, and the figures of the carolers are all virtually identical types of displays, outlined in white and lit with similar lights, are all approximately identical in size, and are all displayed together and next to each other on the same lawn outside the Courthouse as a combined display).

a. The County's Holiday Display Is Virtually Identical To Those Upheld By The Supreme Court And Seventh Circuit.

The County's display is virtually identical to the display the Supreme Court found constitutional in *County of Allegheny*. There, the plaintiff challenged a display containing **one** religious symbol (a menorah) and **two** secular symbols (Christmas tree and liberty sign). 492 U.S. at 598. Here, the County's display likewise includes **one** religious symbol (a Nativity scene) and **two** secular symbols (Santa and carolers). (Compl. ¶¶12-13, 16, and Ex. 1). If the Supreme Court

found no Establishment Clause violation in a display with the same ratio of religious-to-secular components in *Allegheny*, then the County's display, too, must pass constitutional muster as a matter of law.

Likewise, similar to the Nativity scenes upheld in *Lynch* and *Mather*, the County's challenged display here includes identical secular symbols with its Nativity scene. In *Lynch*, the challenged display included *inter alia* a Nativity scene, Santa Claus, carolers, and lights. 465 U.S. at 671. In *Mather*, the challenged display included *inter alia* a Nativity scene, Santa Claus, carolers, and lights. 864 F.2d at 1292. Both displays were upheld by the Supreme Court and Seventh Circuit, respectively. *Lynch*, 465 U.S. at 683; *Mather*, 865 F.2d at 1293. Here, the County's challenged holiday display includes a Nativity scene, Santa Claus, carolers, and lights. (Compl. ¶¶12-13, 16 and Ex. 1). It therefore also passes constitutional muster as a matter of binding law.

b. The Context Of The Entire Display Eliminates Establishment Clause Concerns.

As discussed *supra* Section I.A, this Court is required to view the challenged display as a whole and take its various components in the context of the whole display. *Mather*, 864 F.2d at 1292 ("the context of the ensemble, and more important the context of the secular holiday the government observes—is the controlling question"). Taking the County's display in context, including the entire ensemble of characters in the display at a time when the federal government recognizes Christmas as a federal holiday, eviscerates any notion that the challenged display is a violation of the Establishment Clause.

The Seventh Circuit's discussion in *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990) is particularly instructive on the issue of context. There, the Seventh Circuit recognized the binding precedent from the Supreme Court to mandate the conclusion "that government may display a religious symbol (a menorah in *Allegheny County*, a crèche in *Lynch*) without endorsing

religion when the context demonstrates that the government is not taking a stance." 917 F.2d at 1478. In discussing the Nativity scene precedents, the Seventh Circuit recognized that in these cases:

> **[t]wo contexts mattered: first the season**, for in each case the government was displaying the symbols appropriate to the time of the year; **second, the immediately surrounding symbols**, for in each case the government was displaying an assortment of symbols appropriate to all aspects of the holidays.

Id. (emphasis added).

Indeed, "Christmas and Hanukkah are secular as well as religious holidays; **to use appropriate symbols to all aspects of the display is not to endorse a particular religion**. If Christmas may be a secular holiday, **the state may recognize whose birthday is being celebrated**." *Id.* (emphasis added).

Here, there is no question that under the allegations of Plaintiff's own Complaint, the context of both the season and the surrounding symbols matter. *Vill. of Crestwood*, 917 F.2d at 1478. First, Plaintiff's Complaint plainly alleges that the challenged display is only placed on the Courthouse lawn by the County during the Christmas-holiday season "in December," (Compl. ¶¶1, 12), which binding precedent recognizes as the "appropriate time of the year" for the symbols included in the challenged display. *Vill. of Crestwood*, 917 F.2d at 1478. Second, Plaintiff's Complaint plainly alleges that the challenged display includes the religious element of a Nativity Scene, as well as surrounding secular symbols of Santa Claus and carolers. (Compl. ¶¶12-13, 16 and Ex. 1). Those, as the Seventh Circuit said, represent a constitutional "assortment of symbols appropriate to all aspects of the holidays." *Vill. of Crestwood*, 917 F.2d 1478. Thus, when viewed in the appropriate context of the season and the surrounding symbols, Plaintiff's Complaint plainly fails to state a claim for violation of the Establishment Clause as a matter of binding and settled law. The Complaint should be dismissed.

II. PLAINTIFF CANNOT STATE A CLAIM UNDER ANY OTHER FORMULATION OF THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

Despite the abundant precedent acknowledging the constitutionality of a government display containing both religious and non-religious aspects at the Christmas-holiday season, Plaintiff's Complaint seems to focus on the oft-cited *Lemon* Test, derived from the Supreme Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (*See* Compl. ¶20 (reciting the elements of *Lemon* and claiming the display violates each prong)).

Importantly, Plaintiff's allegations here represent nothing more than "a formulaic recitation of the elements of a cause of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2000), and "legal conclusions and conclusory allegations [that] are not entitled to the presumption of truth." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

Second, the *Lemon* Test is on life-support at best, and only questionably viable even in the Supreme Court's general Establishment Clause jurisprudence.[1]

Third, in the specific context of "passive" displays such as the one at issue in this case, the Supreme Court has expressly rejected the *Lemon* Test as "**not useful**." *Van Orden v. Perry*, 545 U.S. 677, 687 (2005).

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[1] The fate and continued validity of the *Lemon* Test has been questioned many times. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (questioning the "fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence" and refusing to apply it to a government's passive display containing religious symbols); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."); *id.* (refusing to accept the continuing validity of the *Lemon* test). *See also Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (noting that the Supreme Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases," and arguing for a reformulation of the entire analysis).

Fourth, even if the *Lemon* Test were viable and applicable to passive government displays, Plaintiff's Complaint still fails to state a claim under its three prongs. The so-called *Lemon* Test requires satisfaction of three elements: "First, the state must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster excessive government entanglement with religion." *Lemon,* 403 U.S. at 612-13. The County's challenged display satisfies each of these prongs.

A. The County Has A Secular Purpose In Erecting The Challenged Display.

The *Lynch* Court found that including a religious component to the government display obviously had a secular purpose – several, in fact. *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). The Court held that "tak[ing] note of a significant historical religious event long celebrated in the Western World," and "depict[ing] the historical origins of this traditional event long recognized as a National Holiday" are secular purposes. *Id.* at 680. Indeed, the Court succinctly rejected any notion that inclusion of the crèche must, of necessity, lack a secular purpose:

> The narrow question is whether there is a secular purpose for Pawtucket's display of the crèche. The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. **These are legitimate secular purposes**.

Id. at 681 (emphasis added). In fact, the Supreme Court held that the district court's failure to recognize this truth was "clearly erroneous." *Id.*

Numerous other cases binding on this Court acknowledge the secular purpose of including religious aspects in a larger display to recognize their historical importance. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 691 n.11 (2005) (recognizing the historical role of the Ten Commandments as part of broader government display did not lack a secular purpose); *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 127 (7th Cir. 1987) (taking "official note of Christmas by permitting the nativity scene to be displayed in City Hall is **not an illegitimate purpose** under *Lemon*"

(emphasis added)); *id.* ("Christmas is clearly a public holiday, as well as a day of religious significance to Christians, and the Establishment Clause does not preclude the City of Chicago from acting with the intent to take 'official note' of the day."); *id.* ("recognition and accommodation of religious sentiments is not the same as intending to promote a particular point of view in religious matters"); *Freedom from Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1049-50 (7th Cir. 2018) (inclusion of live nativity scene in school play did not have illegitimate secular purpose when it provided cultural education and pedagogical opportunities for school's art students); *Books v. Elkhart Cnty.*, 401 F.3d 857 (7th Cir. 2005) (inclusion of Ten Commandments display as part of larger educational display recognizing the historical significance of the religious text satisfied a secular purpose).

While Plaintiff's Complaint baldly alleges that the County lacks a secular purpose, that allegation is a conclusion of law that this Court need not accept as true. Indeed, the question of purpose is a question of law appropriate for this Court to address on its own. *See, e.g.*, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, (2005) (recognizing the examination of purpose is a question of law that "makes up the daily fare of every appellate court in the country"); *Am. Jewish Congress*, 827 F.2d at 123 (purpose is a question law). Thus, this Court is permitted – even compelled – to determine the purpose behind the County's inclusion of the historical aspects of the religious element of the display at Christmas time. And, under *Lynch*, recognition of both the religious and secular aspects of the federally-recognized Christmas holiday is a legitimate secular purpose as a matter of law. *Lynch*, 465 U.S. at 681. Plaintiff's Complaint therefore fails to state a claim under the Establishment Clause.

B. The County's Challenged Display Does Not Have The Primary Effect Of Advancing Or Inhibiting Religion.

Addressing the second prong of *Lemon*, the Supreme Court held that the inclusion of a Nativity scene as part of a larger display did not have the primary effect of advancing religion. *Lynch*, 465 U.S. at 681. The Court unequivocally rejected the district court's holding that inclusion of the Nativity scene had the primary effect of benefitting religion. *Id.* Indeed,

> to conclude that that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored colleges and universities, and the tax exemptions for church properties sanctioned in.

Id. (internal citation omitted).

But, as the Court said: "We are unable to discern a greater aid to religion deriving from the inclusion of the crèche than these benefits and endorsements previously held not violative of the Establishment Clause." *Id.* at 682. Simply put, inclusion of a religious component in a broader government's display "merely happens to coincide or harmonize with the tenets of some religions." *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, even assuming "that the display advances religion in a sense," "whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; **display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognitions of the origins of the Holiday itself**." *Id.* at 683 (emphasis added). Thus, the Court held that inclusion of the Nativity scene along with the non-religious aspects of the display did not impermissibly advance religion. *Id.*

Likewise, in *County of Allegheny*, the Supreme Court held that "the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative tradition." *Cnty. of Allegheny v. ACLU Greater Pitt. Chapter*, 492 U.S. 573, 617-18 (1989). Indeed, because the challenged display included a religious symbol (a menorah) and two secular symbols (Christmas tree and liberty sign), "**for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season**." *Id.* at 620 (emphasis added). Thus, the inclusion of a religious component "does not have an effect of endorsing religious faith." *Id.*

Numerous other courts have likewise recognized that inclusion of a Nativity scene or religious component in a broader government display does not have the primary effect of advancing religion. *See, e.g., Books v. Elkhart Cnty.*, 401 F.3d 857, 867-68 (7th Cir. 2005) (inclusion of Ten Commandments as part of overall display, which included other non-religious symbols, did not have the impermissible effect of advancing or endorsing religion); *id.* at 868 ("The Establishment Clause is not violated when government teaches about the historical role of religion," including when that occurs by placing a religious symbol in a government display); *but see Gonzalez v. North Tp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir .1993) (holding that government display of a cross, **not displayed with any other non-religious symbols**, had the primary effect of advancing a religious message).

Where display of a Nativity scene has been found to impermissibly advance religion, that symbol stood **alone**. *See* Section I.B.2., *supra*. That is not what we have here, as established by Plaintiff's own Complaint. That Complaint fails to state a claim.

C. The County's Challenged Display Does Not Result In Excessive Entanglement With Religion.

1. Under The *Agostini* Articulation Of The *Lemon* Test, Entanglement Alone Is Insufficient To Establish A Violation Of The Establishment Clause.

Like many of the questions surrounding the continued validity of the *Lemon* test as a whole, *see supra* n.1, the third prong of the *Lemon* test has been questioned. Subsequent to *Lemon*, the Supreme Court has treated the excessive entanglement question as a merely an aspect of the second prong dealing with the primary effect of the government's action. *See Agostini v. Felton*, 521 U.S. 203, 233 (1997) (holding that the entanglement prong of *Lemon* is best treated "as an aspect of the inquiry into the statute's effect"); *see also ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 97 (3d Cir. 1999) (Alito, J.) (noting that, in *Agostini*, the Supreme Court "merge[d] the entanglement prong with the effect prong"). Now-Justice Alito, recognized in *Lander* that, post-*Agostini*, "entanglement, standing alone, will not render an action unconstitutional if the action does not have the overall effect of advancing, endorsing, or disapproving of religion." *Id.*

2. The County's Inclusion Of Religious And Non-Religious Components In Its Display Does Not Constitute Excessive Entanglement With Religion.

"Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini*, 521 U.S. at 233. Taking the allegations of Plaintiff's Complaint as true, which this Court must, the only factual allegation that even hints at excessive entanglement is the allegation that the County received a letter complaining about the display. (Compl. ¶15). But, this allegation fails to establish any excessive entanglement for two reasons: (1) political divisiveness alone is insufficient to establish excessive entanglement, and (2) political divisiveness is not even a relevant consideration outside of the direct subsidy to religion context.

a. Political Divisiveness Alone Does Not Create Excessive Entanglement.

While "political divisiveness" has been proffered by some creative litigants as an element of excessive entanglement, *Agostini*, 521 U.S. at 233, numerous courts have found that allegations of divisiveness alone cannot warrant a finding of excessive entanglement. *See Lynch*, 465 U.S. at 683 ("this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct"); *Agostini*, 521 U.S. at 234 ("Under our current understanding of the Establishment Clause," political divisiveness "[is] insufficient by [it]self to create an excessive entanglement"); *see also Lander*, 168 F.3d at 97-98 (same); *Bd. of Educ. of City of Chicago v. Sanders*, No. 90 C 3063, 1991 WL 442781, *13 (N.D. Ill. May 15, 1991) (same).

Where "apart from this litigation there is no evidence of political friction or divisiveness over the crèche," there can be no finding of excessive entanglement. *Lynch*, 465 U.S. at 684. Here, Plaintiff plainly alleges that the County has "for many years" placed a Christmas display outside the County Courthouse (Compl. ¶1), and that no complaint has been made during those many years until "this year." (*Id.* ¶¶1, 15). Thus, as in *Lynch*, the many years the display has been displayed at the County Courthouse "has been marked by no apparent dissension" and has a "calm history." *Lynch*, 465 U.S. at 684. It follows then that Plaintiff's own allegations eviscerate her claim of excessive entanglement because "**[a] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement**." *Id.* (emphasis added). Plaintiff fails to sufficiently allege excessive entanglement and therefore fails to state a claim as a matter of law.

b. Political Divisiveness Is Irrelevant In The Context of Passive Displays.

As in *Lynch*, "[t]his case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence **no inquiry into potential political divisiveness**

is even called for." *Lynch*, 465 U.S. at 684 (emphasis added); *Mueller v. Allen*, 463 U.S. 388, 403 n. 11 (1983) (divisiveness inquiry "confined to cases where direct financial subsidies are paid"); *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336, 1351 (2d Cir. 1991) ("since this case, like *Lynch*, does not involve a 'direct subsidy' to religious organizations, no inquiry into potential political divisiveness is even called for"); *Bd. of Educ. of City of Chicago v. Sanders*, 1991 WL 442781, at *13 (political divisiveness element "is relevant only when there has been a direct subsidy to a religious institution"). Here, Plaintiff has not alleged that there has been any direct subsidies in this matter to any religious institution, nor could she do so. As such, Plaintiff cannot even allege political divisiveness to establish excessive entanglement with religion. Her Complaint therefore fails to state a claim upon which relief can be granted, and it should be dismissed with prejudice.

CONCLUSION

Because the County's challenged display includes both religious and non-religious symbols to recognize various aspects of a federal holiday, under *Lynch*, *County of Allegheny*, *Mather*, and *Jewish Congress*, Plaintiff's Complaint fails to state a claim as a matter of binding and settled law. Moreover, even if this Court applies the questioned *Lemon* test, Plaintiff's Complaint still fails to state a claim because, as matter of binding and settled law, the challenged display has a secular purpose, it does not impermissibly advance religion, and it fosters no excessive entanglement with religion. The Complaint must therefore be dismissed with prejudice.

Respectfully submitted,

/s/ Daniel J. Schmid
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: hmihet@lc.org
rgannam@lc.org
dschmid@lc.org
court@lc.org

Attorneys for Defendant Jackson County, Indiana

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2019, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated via this Court's ECF/electronic notification system on all counsel of record.

/s/ Daniel J. Schmid
Daniel J. Schmid