UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ROGER LAMUNION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:18-CV-1019 JD
	)	
FULTON COUNTY, INDIANA,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Roger LaMunion lives in Argos, Indiana, in Marshall County, but sometimes travels to neighboring Fulton County to run errands or visit friends. Those trips sometimes take him by the Fulton County courthouse, where, during the holiday season, he sees a nativity scene and some other figurines displayed on the courthouse lawn. He objects to that display, which he believes violates the First Amendment's Establishment Clause. Thus, in 2018, he sued Fulton County, seeking declaratory and injunctive relief against the display. He did not seek preliminary injunctive relief when he filed his complaint, or during the next holiday season. Recently, however, almost two years after filing his complaint, he moved for a preliminary injunction prohibiting the county from erecting the display this year. The display is typically erected around Thanksgiving, and under the parties' agreed briefing schedule, the motion became ripe about a week before then. The county opposes the motion, arguing that the motion is untimely and fails on the merits too.

"A preliminary injunction is an extraordinary remedy." *Tully v. Okeson*, 977 F.3d 608, 612 (7th Cir. 2020). To obtain that relief, a movant bears the burden of showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits. *Id.* at 612–13; *Turnell v.*

CentiMark Corp., 796 F.3d 656, 662 (7th Cir. 2015). A movant's likelihood of success "must be 'strong.'" *Tully*, 977 F.3d at 613 (quoting *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020). If a movant makes that threshold showing, "the court proceeds to consider the balance of harms between the parties and the effect of granting or denying a preliminary injunction on the 'public interest.'" *Id.*

When it comes to Establishment Clause claims, "one thing is certain: Between the challenged practices and the judicial decisions, just about everyone will wind up offended." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring). Courts bear the duty of resolving those claims when they arise. *See Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1053 (7th Cir. 2018). But treading that ground while respecting the competing, earnest viewpoints of the litigants and among the public requires care and deliberation. That is not possible in the timeframe the plaintiff presented this motion. This case has been pending for almost two years, the parties have had months to research the issues, craft their arguments, and brief their motion, and counsel are subject-matter experts in this area to begin with. The timing of the holiday season is no surprise, either. Yet the plaintiff now asks the Court to not only rule on his motion for an injunction, but adjudicate the case in its entirety, in the span of a few days.[1] That is plainly unreasonable, and neither equity nor the public interest warrant such a hasty resolution under these circumstances.

[1] The plaintiff seeks an injunction against "erecting" the nativity scene, which will occur around Thanksgiving. To the extent that also implies a request to take down the display if it has already been erected, the Court would not enter such a preliminary injunction. It is one thing to bar the county from erecting a display, but ordering the county to dismantle a nativity scene in the midst of the holiday season, after the case has been pending for almost two years, would evince a hostility toward religion such that the public interest factor would weigh conclusively against a preliminary injunction.

First Amendment violations are inherently irreparable, but they do not all cause harm to the same degree. This case does not involve captive audiences, vulnerable populations, or religious coercion. The plaintiff alleges that he experiences subjective offense when he glances upon the display when he travels from another town to run errands. The plaintiff's viewpoint deserves respect, but even assuming his alleged injury would confer standing and support a permanent injunction should he prevail, that is not the sort of harm that requires a federal court to adjudicate an Establishment Clause claim on a moment's notice. Tellingly, the plaintiff did not move for injunctive relief during the previous holiday seasons while this case has been pending, either.

The public at large also has an interest in the enforcement of the Establishment Clause. *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986). But it likewise has an interest in avoiding the appearance of hostility towards religion. *Am. Legion*, 139 S. Ct. at 2084–85, 2087, 2090. The government also has a legitimate interest in acknowledging its citizenry's traditions and celebrations, even religious ones. *See Lynch v. Donnelly*, 465 U.S. 668, 674(1984) ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."). Enjoining the display before the claim has been resolved and the Court has been able to fully evaluate the parties' respective arguments, or barring a governmental practice that may ultimately be found to be lawful,[2] could thus harm the

[2] The plaintiff argues that the county faces no harm at all since enforcing the Establishment Clause is always in the public interest. That argument assumes, though, that the plaintiff has a 100 percent certainty of prevailing on the merits. The weighing-of-equities step includes considering the harm to the opposing party if it were enjoined from engaging in conduct later determined to be lawful. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008) ("During the balancing phase of the preliminary injunction analysis, the goal of the court is to choose the course of action that minimizes the costs of being mistaken.").

county's and the public's interests. The equitable factors thus do not weigh strongly in favor of an injunction.

The legal issues, meanwhile, are nuanced and difficult, and the likelihood of success is debatable. As a threshold matter, the plaintiff's standing to sue is itself subject to dispute. The plaintiff relies on "offended observer" standing in its purest form. He does not allege that he has suffered any tangible injury or that he has modified his behavior in order to avoid seeing the display. Nor does he allege that he comes into contact with the display while interacting with the government or discharging his duties as a citizen—he is not a citizen of Fulton County and does not claim to have any business at the courthouse. He alleges only that, when his choice of travel happens to take him by the courthouse while the display is in place, he feels offended at its sight. Even then, Mr. LaMunion may not be claiming "offense" in the sense that concept is typically applied in these cases. He does not claim to experience any personal offense, such as by feeling excluded or slighted or stigmatized; he claims only that he believes the display violates the Constitution and that it is offensive for a government not to abide by the Constitution.

That theory creates tension with the Supreme Court's decision in *Valley Forge*, which held that a belief that the Constitution is being violated is not a cognizable injury:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge Christian College v. Am. United for Separation of Church & State, 454 U.S. 464, 485–86 (1982). Though circuit courts have accepted offended-observer standing in varying degrees for Establishment Clause claims, the plaintiff presents a very narrow version of that

theory, and one that it is at least at the fringes of this circuit's caselaw. *See St. Charles*, 794 F.2d at 268 ("The fact that the plaintiffs do not like a cross to be displayed on public property—even that they are deeply offended by such a display—does not confer standing . . . . To be made indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit.").[3]

The legal landscape as to the merits of the claim is also unsettled. *See Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1325 (11th Cir. 2020). The Supreme Court's recent decision in *American Legion* rejected an Establishment Clause claim against a memorial in the form of a Latin cross, holding that "established, religiously expressive monuments, symbols, and practices" are entitled to "a strong presumption of constitutionality." 139 S. Ct. at 2085. *American Legion* strengthens the county's positions, but it is debatable by how much, as it creates multiple legal and factual questions. For one, how longstanding must a display be to be considered "established"? The cross in *American Legion* was almost a century old, but the display here is at least several decades old, which could plausibly be characterized as "established." Does it matter, though, that this is a seasonal display that is already taken down each year? And if the display is not subject to *American Legion's* strong presumption of

[3] *See also Freedom From Religion Found. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (noting that some Seventh Circuit decisions have accepted offended-observer standing by persons "who are obliged to view religious displays in order to access public services, or reach their jobs"); *Books v. Elkhart Cty., Inc.*, 401 F.3d 857, 861 (7th Cir. 2005) (holding that a plaintiff has standing if he "must come into direct and unwelcome contact with the religious display *to participate fully as a citizen and to fulfill legal obligations*" (emphasis added, alterations omitted)); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) ("The psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant."); *see also Woodring v. Jackson Cty., Ind.*, 458 F. Supp. 3d 1029, 1038 (S.D. Ind. 2020) (suggesting that Seventh Circuit caselaw "does not foreclose" this narrow theory, but finding standing on other grounds not present here).

constitutionality, does the Court apply the *Lemon* test, despite a majority of Justices disavowing that test, or should the Court instead look to the history and tradition of the practice in question?

Even assuming *American Legion* has no effect here, the plaintiff contends that the display's constitutionality would depend on a fact-intensive, totality-of-the-circumstances inquiry from the viewpoint of a reasonable observer. But the Court has only a couple snapshots of the display to consider. It is difficult from those few pictures to understand the context of the display and the way it would appear to a reasonable observer. The display appears to be setback from the walkway by perhaps 100 feet (which may distinguish this case from *Woodring*, where the display straddled a walkway to the courthouse's entrance), but most of the pictures appear to be taken closer to or directly in front of the display. It is thus difficult to discern on this preliminary record how a reasonable observer would perceive the display.

None of that is to say that the plaintiff will not prevail. Another district court permanently enjoined a nativity display with some similarities to this one, so the plaintiff has at least a chance of success. *Woodring*, 458 F. Supp. 3d 1029.[4] Perhaps, upon a plenary review of the arguments and evidence in this case, this Court will reach the same decision. For the reasons just explained, though, that result is by no means a foregone conclusion, and the Court doubts whether, on this record, the plaintiff has met his burden of showing a strong likelihood of success. This analysis also involves complex issues, novel arguments, and evolving precedents. Resolving those difficult issues, while also giving due respect to the public's interest and the sincere and deeply held convictions on both sides, requires a degree of care and deliberation simply not possible in the mere days the plaintiff has given the Court to rule. Under the circumstances of this case and

[4] The Court notes, however, that the Seventh Circuit recently stayed that injunction in part, allowing the county to erect the display in the same form as it presented the display last year. *Woodring v. Jackson Cty., Ind.*, No. 20-1881, order at dkt. 57 (7th Cir. Nov. 17, 2020).

this motion, such an avoidable emergency does not warrant that sort of rush to judgment. The plaintiff asks this Court to pass judgment on a fifty-plus year old display in the span of a few days. Given the age of this case, neither the pandemic nor any short-lived misunderstanding as to the location of last year's display justify such a delay. Thus, even assuming the plaintiff has established at least the minimum likelihood of success, the Court could not find that a preliminary injunction is warranted when weighing the preliminary injunction factors as a whole.

Accordingly, the Court denies the motion for a preliminary injunction. [DE 38].

SO ORDERED.

ENTERED: November 25, 2020

/s/ JON E. DEGUILIO
Chief Judge
United States District Court