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REPLY TO FLORIDA

December 11, 2019

Bret Towne, Superintendent
Edmond Public Schools
1001 W. Danforth Rd.,
Edmond, OK 73003-4801
bret.towne@edmondschools.net

Re: Live Nativity scene at Chisholm Elementary School

Dear Superintendent Towne:

Liberty Counsel is a national nonprofit litigation, education and public policy organization, with an emphasis on religious liberties. I write on behalf of Liberty Counsel to provide a counterpoint to the October 11, 2019 letter from the Freedom From Religion Foundation (“FFRF”), which opined that the Chisholm Elementary School Christmas program may not include a live Nativity scene in the performance. FFRF’s letter fails to accurately describe what the Seventh Circuit Court of Appeals actually did and said, in its proudly cited eponymous case, *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038 (7th Cir. 2018).

The Seventh Circuit simply did not make the sweeping ruling claimed by FFRF. FFRF has once again selectively related what actually happened in a suit, in order to frighten a school district into compliance. While Establishment Clause concerns are heightened with elementary students, a live Nativity scene as part of a balanced Christmas program is not an automatic Establishment Clause violation. As the Seventh Circuit stated in FFRF’s own case:

Let us first start with the most inherently religious aspect of the show: the nativity scene. **We are not prepared to say that a nativity scene in a school performance automatically constitutes an Establishment Clause violation.** See *Doe v. Wilson Cnty. Sch. Sys.*, 564 F.Supp.2d 766, 800–01 (M.D. Tenn. 2008) (finding a two-minute nativity scene in a 22-minute program acceptable because it “presented in a prudent, unbiased, and objective manner” “the traditional historical, cultural, and religious meaning of the holiday in America”). Each show must be assessed within its own context.

Freedom From Religion Found., Inc. v. Concord Cmty. Sch., 885 F.3d 1038, 1046 (7th Cir. 2018) (emphasis added).

The Court continued:

Yet the broader secular context—on top of the inclusion of two other holidays—matters here because a reasonable audience member, sitting through the 90-minute [2015] Spectacular, would not understand the production to be ratifying a religious message. See *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 555–56 (10th Cir. 1997) (a high school choir’s performance of Christian devotional songs at churches did not constitute endorsement of religion where the choir also performed secular songs in non-religious settings); see also *Books II*, 401 F.3d at 868–69 (a display containing the Ten Commandments along with secular texts and educational explanations would not reasonably be perceived as an endorsement of religion).

Id. at 1047.

The Court concluded: “[t]he district court found that the Christmas Spectacular program Concord actually presented in 2015—a program in which cultural, pedagogical, and entertainment value took center stage—did not violate the Establishment Clause. We AFFIRM this judgment.” *Id.* at 1053.

Judge Easterbrook wrote an excellent concurrence in this result, despite his (correct) disagreement with the numerous unworkable “tests” relied upon by the majority to get there. He summarized the true meaning of the Establishment Clause:

The majority’s opinion applies recent decisions of this circuit and various “tests” announced (often by less than a majority) in some decisions of the Supreme Court. This makes it hard to quarrel with the result. But as I think many of those decisions incorrect, I do not join the opinion.

It is not sound, as a matter of history or constitutional text, to say that a unit of state or local government “establishes” a religion through an artistic performance that favorably depicts one or more aspects of that religion’s theology or iconography. The Concord Community Schools would not violate the Constitution by performing Bach’s Mass in B Minor or Handel’s Messiah, although both are deeply religious works and run far longer than the nativity portion of the “Christmas Spectacular.” **Performing a work of art does not establish that work, or its composer, as the state song or the state composer; no more does it establish a state religion.** The Supreme Court’s decisions permitting legislatures to open their sessions with prayer show this. See, e.g., *Greece v. Galloway*, — U.S. —, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014).

It takes taxation or compulsory worship to establish a religion; some form of coercion is essential. This is the view of scholars who have investigated what the phrase “establishment of religion” meant in the Eighteenth Century, when these words were adopted. See generally Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (2d ed. 1994); Philip

Hamburger, *Separation of Church and State* 89–107 (2002); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). **Nothing about the Christmas Spectacular affects anyone’s taxes or coerces any form of religious belief, expression, or attendance.**

Freedom From Religion Found., Inc. v. Concord Cmty. Sch., 885 F.3d 1038, 1053 (7th Cir. 2018) (Easterbrook, J., concurring in the judgment) (emphasis added).

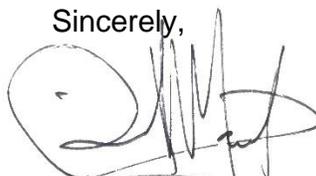
Outside the school performance context, the FFRF is aware of the strong legal position enjoyed by Christmas displays which incorporate religious and secular elements. See *Freedom from Religion Foundation, Inc. v. City of Warren, Mich.*, 873 F. Supp. 2d 850 (E.D. Mich. 2012), *aff’d*, 707 F.3d 686 (6th Cir. 2013). In *City of Warren*, the FFRF sought to have a city’s Nativity Scene declared unconstitutional, or in the alternative, demanded that its 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 most recent controlling Nativity Scene case in the Sixth Circuit Court of Appeals.

FFRF’s Sixth Circuit and Seventh Circuit cases on Christmas issues have fallen flat. In light of the longstanding Tenth Circuit decision in *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), a public school Christmas performance that has a balanced program “in which cultural, pedagogical, and entertainment value” take center stage has little to fear, should FFRF decide to continue tilting at the Christmas windmill.

Liberty Counsel therefore stands ready, along with our affiliated attorneys in Oklahoma, to provide assistance at no charge to Edmond Public Schools, if the District desires to resume a live Nativity in a school Christmas program. If a representation agreement is reached and the District follows Liberty Counsel’s advice, Liberty Counsel would defend the District at no charge.

I trust this letter provides better context for evaluating FFRF’s claims.

Sincerely,



Richard L. Mast†

CC

Via E-mail Only

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Lee Ann Kuhlman, President

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

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