No. 20-1881

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REBECCA WOODRING,
Plaintiff-Appellee

v.

JACKSON COUNTY, INDIANA,
Defendant-Appellant.

On Appeal from a Final Judgment of the United States District Court
for the Southern District of Indiana, New Albany Division
Case No: 4:18-cv-00243
The Honorable Tanya Walton Pratt

REPLY BRIEF FOR DEFENDANT-APPELLANT
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INTRODUCTION AND SUMMARY OF ARGUMENT

In this Establishment Clause action, plaintiff-appellee Rebecca Woodring challenges Jackson County's nearly two-decade-old tradition of including a nativity scene in an annual holiday display on the old County Courthouse grounds. Despite Woodring's protestations, she cannot change the undeniable fact that she only saw the challenged Display[1] **once** before she filed this lawsuit, and it was **not** in the course of doing business at the old Courthouse or exercising any of the "citizen" "everyday life" functions that she now speculates would bring about unwelcomed contact in the future. Instead, Woodring only saw the Display when, after hearing on the news that an atheist group had taken offense to it, she intentionally visited it herself, for the specific purpose of becoming offended and becoming the plaintiff in this lawsuit. This Court has never recognized this type of manufactured, "offended" observer standing, and should not do so here. For the reasons that follow, Woodring's challenge fails for both lack of standing and lack of merit.

[1] The "Display" refers to the entire set of light-up, wire-framed holiday symbols and figurines erected each holiday season as part of the Brownstown community's Hometown Christmas event. The nativity scene, which includes a wire-framed crèche, is one element of the Display, along with many other secular elements.

1. The County demonstrated in its initial brief that Woodring lacks standing to bring this action because her alleged injury from the Display is simply an ideological offense at religious symbols on public property. Woodring's answer brief both magnifies the jurisdictional defects and narrows the scope of the standing issue in this appeal. For instance, Woodring does not dispute the County's assertion that she has suffered no legally cognizable injury, through altered conduct or otherwise. She concedes that she never even knew about the Christmas display until she learned about it in the news. And, for all of the purported business that she will now suddenly have to conduct in the vicinity of the Display in the future, she admits that the first and only time she actually encountered the Display was not during the course of any such business, but rather when she intentionally drove past the courthouse grounds specifically to observe it so that she could be offended by it and become the plaintiff in this lawsuit.

Despite these concessions, Woodring maintains that she has standing on the theory that she is forced into direct and unwelcome contact with the display during her everyday life. In support, Woodring cites *Doe v. County of Montgomery, Illinois*, 41 F.3d 1156 (7th Cir. 1994), which she contends carves out an exception for offended observers accessing public services or driving to

work. Woodring's reliance on *County of Montgomery* is misplaced. That case did not involve plaintiffs, who, like Woodring, manufactured injuries based on hypothetical future scenarios. Indeed, this Court has never endorsed such a capacious theory of "drive-by" offended observer standing. On the contrary, this Court has consistently refused to find standing in Establishment Clause cases when the asserted injuries—even if they actually occur—are based on generalized objections to allegedly unconstitutional government conduct. This Court should not permit a "heckler's veto" to manufacture an Article III controversy where none existed for nearly 20 years.

2. In an effort to expand the narrow scope of the jurisdictional issue, Woodring asks this Court to find that she had standing because she is supposedly a County taxpayer and because the County pays for the electricity to light up the Christmas Display. However, Woodring submitted no evidence to substantiate her bald assertion that she pays taxes to the County, nor did she show that the County spent *any* **tax revenue**, let alone more than a minuscule amount, to pay for the electricity. For those reasons, Woodring's taxpayer standing argument fails.

3. Woodring's effort to defend the merits of the district court's decision fares no better. Even setting apart for argument's sake the Supreme Court's

recent watershed decision in *American Legion*, this Circuit's controlling cases in Establishment Clause challenges to nativity displays are *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989). In both cases, the relevant considerations were not the crèche's religious symbolism or sectarian message but the context of the crèche in the entire display, and more importantly, in the context of the holiday season. As the County demonstrated, the Display's nativity scene is indistinguishable from the crèches in *Lynch* and *Village of Mundelein*, because it is just one component in a unified exhibit of holiday symbols and figurines.

Woodring ignores or disregards much of the County's defense, and instead follows the district court's untenable decision to subject the Display's nativity scene to the *Lemon* test. But the Supreme Court confirmed in *American Legion v. American Humanist Association* that the *Lemon* test does not apply to "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." 139 S. Ct. 2067, 2081–82 & n.16 (2019) (plurality opinion). The Court also affirmed that "established, religiously expressive monuments, symbols, and practices" are accorded "a strong presumption of constitutionality." *Id*. at 2085.

In any event, Woodring's *Lemon* test collapses under its own weight.

Woodring contends that a crèche on government property sends only a religious message because it is inherently religious. Yet then she concedes that a crèche's "inherent religiosity" can "be mitigated by context." Unable to reconcile those contradictory positions, Woodring rests her argument on two flawed premises: that the nativity scene "dominates" the Display's secular elements and that its purpose is and always has been religious. In light of the controlling considerations under established case law, along with the record evidence, neither of those assertions withstands scrutiny. In the broader context of a unified holiday display, the nativity scene's size or religiosity is irrelevant under *Lynch* and *Village of Mundelein*. And Woodring's claim of a decades-old religious purpose behind the nativity scene remains unfounded.

All told, Woodring's effort to defend the district court's decision falls short. She fails to justify the district court's erroneous misapplication of settled law. And she resorts to mischaracterizing the facts to fill in her lack of evidentiary support. In its proper context, the Display is factually indistinguishable from the ones in *Lynch* and *Village of Mundelein* and sufficiently analogous as a passive display to the memorial cross in *American Legion* and the Ten Commandments monument in *Van Orden v. Perry*, 545 U.S. 677 (2005). The same

reasons the challenged displays were upheld in those cases equally apply here, and the outcome should be the same. This Court should reverse.

ARGUMENT

I. Woodring Lacks Standing to Bring This Action.

A. The district court should have dismissed the suit for lack of a justiciable controversy because Woodring has suffered no legally cognizable injury.

The County previously explained (Cnty. Br. 17–20) that Woodring's abstract offense at the Display is not a cognizable injury sufficient to obtain Article III standing. Woodring agrees (Resp. Br. 18) *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), holds that merely alleging an Establishment Clause violation is insufficient to confer standing. She concedes (*id*. at 19) that a plaintiff does not suffer an injury-in-fact unless she is directly affected by the challenged government action. And she does not dispute that her only alleged injury is an ideological objection to the nativity scene's presence on the courthouse grounds.

That should be the beginning and the end of the standing analysis, because under this Court's unchanging line of precedents, she failed to allege a distinct and palpable injury from the Display. *See, e.g.*, *Am. Civil Liberties Union*

of Ill. v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986) ("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."); *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 … is not sufficient to confer standing on a litigant."); *Harris v. City of Zion, Lake Cty., Ill.*, 927 F.2d 1401, 1405 (7th Cir. 1991) ("That the plaintiffs may be offended by the defendants' conduct is not enough to confer standing."); *Clay v. Ft. Wayne Cmty. Sch.*, 76 F.3d 873, 879 (7th Cir. 1996) ("Indignation is not an injury-in-fact sufficient to confer standing."); *Freedom From Religion Found., Inc. v. Lew*, 773 F.3d 815, 819 (7th Cir. 2014) ("[A] plaintiff cannot establish standing based solely on being offended by the government's alleged violation of the Establishment Clause."); *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 660 (7th Cir. 2015) ("Neither psychological harm 'produced by observation of conduct with which one disagrees' nor offense at the behavior of government and a desire to have public officials comply with one's view of the law constitutes a cognizable injury.") (quoting *Valley Forge*, 454 U.S. at 485).

1. Woodring's new offended observer standing theory fails as a matter of law.

Given the lack of any meaningful dispute about this Court's general rule against offended observer standing in Establishment Clause cases, Woodring

attempts to blur the line between direct harm from a religious object and mere psychological offense by fashioning a new formulation to the standing inquiry. Citing *Doe v. County of Montgomery, Illinois*, *supra*, Woodring contends (Resp. Br. 19) this Court "clearly held" that persons have standing when they "are forced to confront a religious display to which they object 'when they were exposed to the monument during their normal routines or in the course of their usual driving or walking routes,'" *id*. at 19–20 (quoting 41 F.3d at 1161). Setting aside the undisputed fact that this is certainly **not** how Woodring herself was exposed to the Display, her reading of the law is incorrect. The Court was merely distinguishing *Freedom From Religion Foundation, Inc. v. Zielke*, *supra*, where one plaintiff claimed she had standing "simply as a result of her close proximity to the allegedly unconstitutional display" in a local park. 845 F.2d at 1468. The Court in *Zielke* had found that the plaintiff lacked standing because she "did not demonstrate that she live[d] anywhere near [the park], that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park." *Id*. at 1469. In other words, *County of Montgomery* simply noted that the *Zielke* plaintiff failed to establish standing because she could not prove the veracity of her alleged "proximity to the offending conduct." *Id*.

The consequence of Woodring's misreading of *County of Montgomery* is not merely a less-than-accurate recitation of the facts. Instead, she predicates her entire legal argument on a series of false premises. After all, this Court unequivocally reaffirmed in *County of Montgomery* that a plaintiff "who fails to identify any personal injury suffered as a consequence of the alleged constitutional error, 'other than the psychological consequence presumably produced by observation of conduct with which one disagrees,' has no standing under Article III." 41 F.3d at 1159 (quoting *Valley Forge*, *supra*, 454 U.S. at 485).

And to the extent that Woodring attempts (Resp. Br. 19) to analogize her injuries with those of the plaintiffs in *County of Montgomery*, the County previously refuted (Cnty. Br. 23–25) that argument in detail. Woodring is not like the plaintiffs in *County of Montgomery*, who alleged "direct and unwelcome exposure to a religious message" while exercising civic rights such as attending county board meetings or fulfilling legal duties such as mandatory jury duty. 41 F.3d at 1159.[2] By contrast, Woodring speculates (Resp. Br. 20) that "she is forced to confront" the Display during "her everyday life." That argument is

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[2] Likewise, in *Books v. City of Elkhart, Indiana*, the plaintiffs alleged, among other things, that a Ten Commandments monument "discriminates against atheists," 79 F. Supp. 2d 979, 985 (N.D. Ind. 1999), *rev'd*, 235 F.3d 292 (7th Cir. 2000) ("*Books I*") and also "forced [them] to view a religious object." *Books I*, 235 F.3d at 301. Woodring does not allege feeling marginalized or coerced.

baseless. Woodring was not "forced" to "confront" the Display at all before she filed this suit. **She never noticed it at all in the two decades prior**, and the only time she saw it prior to filing suit was when she chose to purposefully view it for the specific purpose of becoming offended so she could sue. (Woodring 96, D.38-2; SA82.) Specifically, Woodring read in the news in December 2018 that no one in the community was willing to challenge the Display (which she had not yet seen herself in the previous two decades), so she decided to go and view it for herself because she would have no problem challenging it. (*Id*. at 97:19–98:15; SA83–84.) To speculate **now** that she may at some point in the future pass by the nativity scene for a matter at the prosecutor's office across the street is not enough. Nor is it enough to speculate that she may see the nativity scene during a business delivery, particularly since these types of speculated future activities never materialized in any unwanted exposure to the Display prior to filing this suit. Such assertions are too vague to sufficiently analogize *County of Montgomery*'s fact-limited exception.

What is more, Woodring baldly claims (Resp. Br. 10) that she "does not plan to alter her behavior to avoid seeing the display as there really is no way to travel to or through Brownstown without seeing the front lawn of the Courthouse." This is demonstrably false. The County submitted evidence (Bevers

Decl. Ex. A-4; D.38-1; SA62) showing *alternate* routes through Brownstown, including to the judicial center, that cause *no delay or detour* but still enable a driver to bypass the front lawn of the courthouse. Woodring has no response.

In any event, *County of Montgomery* does not stand for a broader proposition that a passerby has standing to challenge a passive display that she may or may not see when she drives past it. Indeed, such a rule would allow a plaintiff who suffers only this kind of harm—a belief that religious symbols and displays on government property violate the Constitution—to bootstrap herself into federal court simply by making sure to look at the display. *Cf. Books v. Elkhart Cty., Ind.*, 401 F.3d 857, 871 (7th Cir. 2005) ("*Books II*") (Easterbrook, J., dissenting) (noting that "the conclusion … that seeing an unwelcome object equals injury in fact is impossible to reconcile with *Valley Forge*, for it treats observation *simpliciter* as the injury"). And that rule would ignore Woodring's single allegation: offense at what she believes is an Establishment Clause violation.

In the end, Woodring "[is] covered by the rule of *Valley Forge* and *St. Charles* that offense at the behavior of the government, and a desire to have public officials comply with (plaintiff['s] view of) the Constitution, differs from a legal injury." *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803,

807 (7th Cir. 2011). Because Woodring has not pointed to "an injury other than [her] belief that the [display] violate[s] the Constitution, *Valley Forge*, 454 U.S. at 487 n. 23, she lacks Article III standing.

2. Contrary to Woodring's assertion, a plaintiff does not have standing simply because the Supreme Court did not address jurisdiction in *American Legion*.

As a backstop to the district court's flawed legal injury-in-fact analysis, Woodring contends (Resp. Br. 20–21) that the Supreme Court's decision in *American Legion*, 139 S. Ct. at 2084, supports her "drive-by-standing" rule. In Woodring's limited view, she has standing to challenge the Display because seven Justices did not *sua sponte* question the plaintiffs' standing to challenge the Bladensburg cross. That is fallacy. "When a court resolves a case on the merits without discussing its jurisdiction to act, it does not establish a precedent requiring similar treatment of other cases once the jurisdictional problem has come to light." *Jezierski v. Mukasey*, 543 F.3d 886, 888 (7th Cir. 2008) (Posner, J.); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (noting that the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*"); *cf. Freedom From Religion Found., Inc. v. Lew*, *supra*, 773 F.3d at 825 ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision,

the decision does not stand for the proposition that no defect existed.") (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011)).

3. The undisputed record shows Woodring manufactured standing because she failed to allege a concrete personal injury.

Woodring barely contests the County's assertion that she failed to allege a concrete injury as a consequence of the Display and that she manufactured standing based only on hypothetical future harms. *See Pollack v. U.S. Dep't Of Justice*, 577 F.3d 736, 743 n. 2 (7th Cir. 2009) ("[A] plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards."). In a passing two-sentence footnote,[3] Woodring contends (Resp. Br. 21) that her risk of future injury is not speculative because "she has clearly indicated that she intends to continue by or within sight of the Courthouse front lawn and that she objects to being forced to see the objected-to-display." That is not enough. "The injury suffered by the plaintiff *must be* both *real* and *immediate*, not conjectural or hypothetical." *Johnson v. U.S. Office of Pers.*

[3] "A party may waive an argument by presenting it only in an undeveloped footnote." *Evergreen Sq. of Cudahy v. Wisconsin Hous. & Econ. Dev. Auth.*, 848 F.3d 822, 829 (7th Cir. 2017).

Mgmt., 783 F.3d 655, 660 (7th Cir. 2015) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (internal quotation marks omitted) (emphasis added). Woodring simply has not alleged that the Display will cause her any actual future injury beyond her affront at the nativity scene's presence on the courthouse grounds.

B. Woodring failed to show how removing the nativity scene from the Display would redress her alleged injury.

The County previously explained (Cnty. Br. 32–24) how enjoining the nativity scene would not redress Woodring's injuries because she objects to the entire Display, including its indisputably secular elements. Woodring concedes (Resp. Br. 22) that "she would ideally like for all elements of the display … to be removed, including Santa, the sleigh and reindeer and the carolers," but she now adds that she supposedly "objects most to the nativity scene." Woodring cannot have it both ways. Redressability "examines whether the relief sought … will *likely* alleviate the particularized injury alleged by the plaintiff." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 101 (4th Cir. 2011) (emphasis added). Woodring has failed to allege a particularized injury that would be redressed by a favorable decision.

The County recognizes that Woodring seeks an injunction "prohibiting the defendant from displaying the crèche and the Nativity scene." (Compl.; D1.)

But Woodring failed to identify how the nativity scene's removal would remedy her generalized objections to the entire Display or to governmental acknowledgment of religion. *See, e.g.*, *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42 (1976) (holding that plaintiffs challenging tax subsidies for hospitals lacked standing where they could only speculate whether a policy change would "result in [the plaintiffs'] receiving the hospital services they desire"). The personal satisfaction of seeing a blank space next to Santa Claus on the courthouse lawn is not the type of remedy available from a federal court.

Furthermore, the scope of the district court's injunction does not provide the relief Woodring requested in her complaint. "Redressability 'examines the causal connection between the alleged injury and the judicial relief requested' with the 'focus on the requested relief.'" *Cabral v. City of Evansville, Ind.*, 759 F.3d 639, 642 (7th Cir. 2014) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984)). Here, the court's injunction simply enjoins the County "from displaying the crèche as *presently presented*, on the lawn of the historical Courthouse." (Op. 24; SA24 (emphasis added).) The court drafted the injunction with a view to its conclusion that "a sufficient balancing between secular and non-secular elements could bring the display into harmony with the First Amendment." (Op. 22–23; SA22–23.)

Remarkably, Woodring neither objected to the court's conclusion nor the terms of the injunction, even though the injunction does not redress her asserted injury. Woodring made it clear at her deposition that neither rearranging the Display nor adding more, bigger or more prominent secular elements could ever satisfy her objection to the Display. (*See* Woodring 115–116, D.38-2; SA91–92.) Accordingly, even the injunction entered by the district court cannot redress Woodring's beef with Christmas.

C. Woodring's municipal taxpayer standing argument is unsupported by the record and therefore meritless.

Perhaps recognizing the frailty of her constitutional standing argument, Woodring leads her standing argument with taxpayer standing. (Resp. Br. 15) It fares no better.

To be sure, a local taxpayer may challenge municipal **tax** expenditures on an allegedly unconstitutional act, *see Gonzales v. N. Twp. of Lake Cty., Ind.*, 4 F.3d 1412, 1416 (7th Cir. 1993). This Court recently instructed that municipal taxpayer standing has "two threshold requirements." *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 734 (7th Cir. 2020) "First, … the plaintiff must actually be a taxpayer of the municipality that she wishes to sue."

Ibid. (citing *Zielke*, *supra*, 845 F.2d at 1470). "Second, the plaintiff must establish that the municipality has spent **tax** revenues on the allegedly illegal action." *Ibid*. (emphasis added).

Woodring fails to meet both requirements. First, Woodring offered no proof to support her bald assertion that she actually pays taxes to the County herself. Her declaration established, at most, that "her **businesses** generate income" and pay county taxes (D.32-2 ¶4 (emphasis added)), but this lawsuit was brought by Woodring personally, not her businesses. Woodring never provided any county tax receipts or any other evidence whatsoever to support her taxpayer claim, presumably because they would have revealed that any county taxes were paid by third party business entities not before the Court.

Second, and even more fatal, Woodring did not submit any evidence that the County "has spent **tax** revenues on the allegedly illegal action." *Protect Our Parks*, 971 F.3d at 734 (emphasis added). The County's deposition testimony to which Woodring cites establishes **only** that the County pays for the electricity to power the lights of the Display. (D.32-1 at 18:20-25, cited at Resp. Br. 16). But Woodring never asked the County, and therefore has never stablished, **how** the County pays for that electricity – whether through revenues from fines, licensing fees, donations or taxes. (*Id*.) This evidentiary failure is fatal to

Woodring's claim, because it is *Plaintiff's* burden—not the County's—to establish her standing. *See Protect Our Parks*, 971 F.3d at 734 (holding that the burden is on the plaintiffs to establish standing under the municipal taxpayer standing doctrine).

Finally, even if Woodring had provided evidence that the County pays for the electricity with actual **tax** dollars, which she did not, that expenditure here would be *de minimis* and would amount to no more than "an incomputable scintilla" of the County's operating expenses. *See Doremus v. Bd. of Educ.*, 342 U.S. 429, 431 (1952); *cf. ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 264 (3d Cir. 2001) ("[W]e cannot simply assume that the Township expends more than a de minimis amount in lighting the religious elements of the display.") Accordingly, Woodring cannot prove that "the minuscule cost of the electricity required to keep the lights lit," *St. Charles*, 794 F.2d at 267–68, converts this suit into "a good-faith pocketbook action." *Doremus*, 342 U.S. at 434.

In short, Woodring's taxpayer standing argument cannot rescue her claim. This Court should reverse.

II. The Establishment Clause Permits a Community to Include a Nativity Scene in its Annual Holiday Display on Public Property.

Because Woodring lacks standing, the district court lacked jurisdiction to reach the merits of this case. If this Court reaches the merits, it should reverse the judgment below because the Brownstown community's Display and all its elements are constitutionally permissible.

A. The Display is constitutional under *Lynch* and *Village of Mundelein*.

The Display does not violate the Establishment Clause. To determine whether a display containing a nativity alongside secular symbols endorses religion, this Court looks to *Lynch v. Donnelly*, *supra*, holding that "the context—the context of the ensemble, and more important the context of the secular holiday the government observes—is the controlling consideration." *Vill. of Mundelein, supra*, 864 F.2d at 1293; *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 127–28 (7th Cir. 1987) ("[T]he critical inquiry is whether, considered in its unique physical context, the nativity scene at issue in this case communicates a message of government endorsement.").

Here, the nativity scene is one element of a matching set of light-up symbols in the Display that include Santa Claus, reindeer, candy canes, and, of course, figures from the Nativity. As the County described (Cnty. Br. 5–8), the

Display is privately owned and maintained. Although the Brownstown Ministerial Association legally owns the Display, *for all intent and purposes* it *belongs* to the community. (*Id.*) The local Lions Club assembles this decorative tableau as part of the Brownstown Chamber of Commerce's annual Hometown Christmas event. (*Id.*) In that context, the nativity scene's inclusion in the Display serves *only* to depict the historical origins of Christmas—nothing more.

1. Woodring's refusal to view the Display in its full context squarely conflicts with Supreme Court precedent.

Woodring devotes much of her Establishment Clause argument rejecting *Lynch*, at least as applied to this case. She contends (Resp. Br. 30) that there is "nothing secular about a crèche itself" and that it is "inherently religious." In Woodring's view, because the County is displaying an "inherently religious" object, it is necessarily endorsing religion. Woodring's argument is fundamentally flawed.

As the County demonstrated (Cnty. Br. 50) in its initial brief, the reasonable observer does not isolate the religious component of a government display but instead views it in its full context. The County's position squarely fits within the permissible boundaries set by *Lynch*. *See* 465 U.S. at 679–80. There, the Supreme Court evaluated the constitutionality of the City of Pawtucket's

crèche in its "proper context of the Christmas Holiday season." *Id*. at 680. As the Court observed, "[f]ocus *exclusively* on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Ibid*. (emphasis added).

2. The Display's constitutionality does not hinge on marginal distances and an inventory of secular items.

Despite spending many pages arguing that the nativity scene's religious identity dooms the Display's constitutionality, Woodring then suddenly reverses course, admitting (Resp. Br. 30) that "the inherent religiosity of a display celebrating the birth of Jesus" may be "mitigated by context." Yet Woodring argues (Resp. Br. 40) that *Lynch* is distinguishable, because by her appraisal, there is too much space between the Display's "limited secular figures" and the nativity scene to fully mitigate the crèche's alleged message of religious endorsement. Woodring misses the point. Although *Lynch* noted the secular decorations surrounding the Pawtucket crèche, the Court made it clear that the decisive context was the "Christmas Holiday season," 465 U.S. at 680, and that within that context, the government may permissibly acknowledge the historical and religious origins of Christmas, *see id*. at 686. And to the extent that Woodring compares (Resp. Br. 41) the Display's nativity scene with the *isolated, stand-alone* crèche in the Chicago City Hall in *American Jewish*

Congress, *supra*, 827 F.2d at 122, the County previously refuted (Cnty. Br. 51) that misguided argument in detail.

Woodring relatedly suggests (Resp. Br. 37) that a nativity scene is permissible under *Lynch* only if it is "a small part of a larger display awash in secular symbols." But the dismantling of a nearly 20-year-old display by a federal court order should not hinge on marginal differences in the overall display. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane." *Am. Jewish Cong.*, 827 F.2d at 130 (Easterbrook, J., dissenting); *see also Am. Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting) ("I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations….").

B. Woodring's defense of *Lemon*'s applicability is a rejection of controlling precedent.

Relying on no more than the district court's decision, Woodring insists (Resp. Br. 12–13) that this case be examined under the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). But the Supreme Court recently

confirmed that the *Lemon* test does not apply to "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." *Am. Legion*, *supra*, 139 S. Ct. at 2081–82 & n.1; *see also id*. at 2097 (Thomas, J., concurring in judgment) (acknowledging that *Lemon* does not apply to passive display cases); *id.* at 2102 (Gorsuch, J., concurring in judgment) (same). The Court further affirmed that "established, religiously expressive monuments, symbols, and practices" are accorded "a strong presumption of constitutionality." *Id*. at 2085.

Woodring labors to undermine *American Legion*'s clear instruction and simultaneously subvert the Display's presumption of constitutionality. Woodring first contends (Resp. Br. 29) that the Display is not presumptively constitutional under *American Legion* because that presumption only applies to "longstanding monuments." In Woodring's view, the Display is only a "temporary display," and "there is no hint" in *American Legion* that such displays are "longstanding." That argument is meritless wordplay. Whether a display is "longstanding" is not an exclusionary criterion for its presumption of constitutionality.

Indeed, the Court noted that most Establishment Clause cases "can be divided into six rough categories," the first of which are "religious references

or imagery in public monuments, symbols, mottos, displays, and ceremonies." *Am. Legion*, 139 S. Ct. at 2082 n. 16. The *first* case the Court cites as an example is *Lynch*. *Id.* It follows that just like the crèche in *Lynch* and the "public monument" in *American Legion*, *id.*, the Display here is presumptively constitutional, notwithstanding its inclusion of a nativity scene.

Equally unavailing is Woodring's insistence (Resp. Br. 30) that *American Legion* is inapplicable because there is "simply nothing secular about a crèche," and it "was and is inherently religious." *American Legion*'s considerations are not limited to "secularized" passive displays like memorial crosses. Just like the cross has historically been a symbol of Jesus' crucifixion, the nativity scene has historically been a depiction of Jesus' birth. And as the Supreme Court noted, "[t]hat the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials." *Am. Legion*, 139 S. Ct. at 2089.

Likewise, as Justice O'Connor explained in *Lynch*, a crèche is "a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols," 465 U.S. at 692 (O'Connor, J., concurring). It follows that

displaying a crèche, like the City of Pawtucket's display and the County's Display, "likewise serves a secular purpose—celebration of a public holiday with traditional symbols." *Id*. at 693. In all cases, as the Third Circuit recently made clear: "Courts are not to focus solely on the religious component in challenged government displays; they should consider the overall message conveyed and the broader context in which the display appears." *Freedom From Religion Found., Inc. v. Cty. of Lehigh*, 933 F.3d 275, 282 (3d Cir. 2019) (citing *Am. Legion*, 139 S. Ct. at 2074–78, 2089–90).

C. A reasonable observer would not view the Display as an endorsement of religion but rather as an expression of celebrating the holiday season.

Woodring's answering brief seriously mischaracterizes the actual geographic and physical context of the Display. Expanding on the district court's inaccurate perception, Woodring repeatedly makes unsupported and unrealistic factual statements:

- Asserting that the nativity scene is the "centerpiece of the display on the Courthouse lawn" and that it "dominates the lawn" (Resp. Br. 13, 39, 40, 42, 47.) This is incorrect. A reasonable observer could clearly see that the nativity scene figurines are uniformly manufactured at a similar size and dimension to the "secular" figurines. (D.1-1.). Further, the Display is assembled and stored as a single set of decorations.

- Stating repeatedly that the Display's secular figures are separate from the nativity scene, "far removed from the crèche itself," that the "secular figures remain at the edge of what remains a religious display," "some distance from the crèche." (Resp. Br. 14, 40, 43.) This is also incorrect. Again, a reasonable observer would see that the entire Display is assembled in the center of the western lawn and directly in front of the Courthouse's main doors.
- Postulating (Resp. Br. 13–14) that when the County modified the Display after the Freedom from Religion Foundation's letter in December 2018 (but before this lawsuit was filed), "it consciously chose not to attempt to integrate multiple secular images" and "chose not to place the limited non-religious items anywhere near the crèche." That is a baseless assumption that reaches beyond the record.

Contrary to Woodring's belief (Resp. Br. 40–41), the entire western lawn of the courthouse grounds as a whole—from the Sherman tank down to the war memorial—forms the proper context in which a reasonable observer may perceive the effect of the Display's nativity scene. And this outdoor setting, "though not neutralizing the religious content" of the nativity scene, "negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring.).

Woodring nonetheless presses (Resp. Br. 41) that a reasonable observer would only ever view the Display from the perspective of the photograph submitted with her complaint (Compl.; D.1-1.) In her view (Resp. Br. 41, at note 18), the Display may only be "properly viewed from the walk entering the Courthouse." That is wrong. "A reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the crèche." *Elewski v. City of Syracuse*, 123 F.3d 51, 54 (2d Cir. 1997). Instead, the reasonable observer, knowing "the history and context of the community and the forum in which the religious display appears," *Capitol Sq. Rev.& Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment), would perceive a holiday display in a historical courthouse square, in the heart of Brownstown's shopping district, "essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season." *Lynch*, 465 U.S. at 671.

Further evidence of endorsement, Woodring contends (Resp. Br. 42), is "the fact that until late 2018 the few secular figures were even further physically removed from the crèche display." Woodring again misunderstands the nature of the full Display and its physical context. Like the display in *Lynch*, the Brownstown Display "comprise[s] a series of figures and objects, each group

of which had its own focal point." *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch.*, 492 U.S. 573, 598 (1989). For example, the Lions Club erected the Santa Claus figure and supporting characters near the tank at the northwest corner of the lawn (Bevers 25–26; SA22–23), which "obviously was a center of attention separate from the crèche." *Cty. of Allegheny*, 492 U.S. at 598. Similarly, the carolers at the southwest corner were also their "own focal point," *id.* (Bevers 25–26; SA22–23). All these "were objects of attention separate from the creche, and had their specific visual story to tell." 492 U.S. at 598. Thus, the secular symbols' arrangement as separate focal points from the nativity scene mitigated the latter's religious message.

Woodring repeatedly contends (Resp. Br. 40) that the nativity scene dominates the rest of the Display. Setting aside that Woodring's assertion is belied by her own photograph, "[d]ominance alone is not controlling on the question of whether or not a given religious display such as a nativity scene constitutes an endorsement of religion." *Doe v. City of Clawson*, 915 F.2d 244, 248 (6th Cir. 1990). Instead, "dominance is considered within the composition of the display." *Ibid.* And as noted previously, the Display's nativity scene is not a standalone decoration like the crèches in *American Jewish Congress* and *County of Allegheny*; it is a collection of figures that form but just one part of a larger set

of light-up pieces. In any event, whatever the nativity scene's size and precise physical location, it is the overall holiday setting that affects what viewers may fairly understand to be the nativity scene's purpose as part of the Display, which negates any message of religious endorsement.

D. The County's wholly secular purpose for the Display has been, and always will be, to publicly celebrate the holiday season and promote the common good.

Woodring was required, but failed, to show that the County's purpose for allowing the Brownstown Chamber of Commerce to erect the Display was "motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added); *Books II*, *supra*, 401 F.3d at 863. The burden is on Woodring to prove that the County's exclusive purpose was to advance or endorse religion and not on the County to prove that its exclusive purpose was secular. *See Lynch*, 465 U.S. at 680 (observing that the purpose test is not satisfied where there was "insufficient evidence to establish … a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message"). The County's purpose is clear: Like the City of Pawtucket in *Lynch*, the County permits the Brownstown Display "to celebrate the Holiday and to depict the origins of that Holiday." 465 U.S. at 681. As the Court noted, "[t]hese are legitimate secular purposes." *Ibid*.

Woodring contends (Resp. Br. 43) that consolidating the entire display in front of the courthouse "is neither purposeful nor persuasive." To the contrary, in *Village of Mundelein*, officials "added a Christmas tree with lights and, after questions had been raised about the propriety of displaying a crèche on public property, many other symbols of the season—a Santa Claus and sleigh, carolers, snowmen, carriage lights, wreaths, and two soldiers in the shape of nutcrackers." 864 F.2d at 1292. The County's relocation of the entire Display to directly in front of the courthouse is no different from the Village's additions. And even more critically, a reasonable observer would see that the Display is a uniform collection of light-up symbols that include Santa Claus, reindeer, candy canes, and, of course, figures from the Nativity.

Woodring insists (Resp. Br. 46) that a two-word apology from a County commissioner some 17 years ago proves the County's religious purpose. She declares (*id.*), "Words matter." But so does common sense. As the County explained (Cnty. Br. 59–60) in its opening brief, Woodring's argument is a stretch: Gleaning a religious purpose from these two words is the type of "judicial psychoanalysis of a drafter's heart of hearts" that the Supreme Court expressly disfavors. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005); *cf. Freedom From Religion Found., Inc. v. City of Warren,*

Mich., 707 F.3d 686, 693 (6th Cir. 2013) ("Just as a court may not isolate a creche in deciding whether a holiday display amounts to an impermissible establishment of religion, it also may not isolate two sentences in a letter to show what the City meant by a particular action or how a reasonable observer would perceive that action.") (internal citation omitted).

Woodring insists (Resp. Br. 46) that the Brownstown Ministerial Association's role as the nativity scene's donor further proves the County's religious purpose. But accepting a Display containing both secular and religious elements depicting a federal holiday does not necessarily mean that the County "endorse[s] the specific meaning that any particular donor sees in the [display]." *Pleasant Grove*, *supra*, 555 U.S. at 476–77. Instead, by allowing the Chamber of Commerce to include another community organization's contribution to the town's holiday decorations, the County simply respects the local community's coming together to publicly celebrate the holiday season. At the same time, refusing to accept the ministerial association's donated Display solely because some of its pieces acknowledge the religious origins of Christmas shows an official antipathy to religion at odds with the First Amendment.

Finally, Woodring suggests (Resp. Br. 47) that the Brownstown community's rally held on at the courthouse grounds after the Freedom from Religion

Foundation's litigation threat further proves the County's religious purpose. She points out (*id.*) that two commissioners attended the rally, which, she darkly adds (*id.*), featured prayer. But Woodring offered no evidence that the commissioners were there in their official capacity or that they even participated in the prayer or otherwise acted to convey the County's official endorsement of religion. *Cf. Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1242 (10th Cir. 2009) (Kelly, J., dissenting) ("Attendance does not necessarily indicate endorsement; rather, it reflects what elected officials do—including attending functions and representing the constituency.") Just like Woodring manufactured standing to sustain this action, she attempts to manufacture a religious purpose behind the County's actions where simply none exists.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's entry of final judgment for Woodring and remand the case with instructions to dismiss for want of standing or grant summary judgment to the County.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for defendant-appellant Jackson County, Indiana, certifies that this brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 6,997 words.

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in proportionally spaced 13-point Century Schoolbook font.

DATE: October 7, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

DATE: October 7, 2020.

/s/ Horatio G. Mihet
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