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December 9, 2015

Via Email and Fax

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Re: Unconstitutional Crèche in Courthouse

Dear Judge Bise, Judge Steckler, Ms. Pollard, Mr. Holleman, and Harrison County Board of Supervisors,

This letter is written on behalf of a concerned citizen who has alerted us to a serious constitutional violation that is occurring under your authority. In particular, a stand-alone Christian nativity scene (also known as a crèche) is prominently displayed inside of the Harrison County (Judicial 1) Courthouse. Religious (specifically, Christian) elements overwhelmingly dominate the display, thus violating the Establishment Clause of the First Amendment. A photograph of the display is shown below.

As is readily apparent, the prominent display is dedicated exclusively to a nativity scene that represents the New Testament account of the birth of Jesus. This display has been up since approximately November 30, 2015; however, we understand that the county has put up a similar (or identical) standalone Christian display each holiday season for many years. It is our further understanding courthouse staff helped erect the display. This letter demands that Harrison County remove the crèche from government property immediately and refrain from putting up a similar display in the future.

The American Humanist Association (AHA) is a national nonprofit organization with over 515,000 supporters and members across the country, including in Mississippi. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including in Mississippi, and we have litigated constitutional cases in state and federal courts from coast to coast, including in Mississippi. You should also know that the AHA, represented by the undersigned, recently prevailed in a lawsuit challenging a courthouse crèche in Arkansas. *See Am. Humanist Ass'n v. Baxter Cnty.*, 2015 U.S. Dist. LEXIS 153162, *20 (W.D. Ark. Nov. 12, 2015).

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989) (county's crèche display violated the Establishment Clause). Not only must the government not advance, promote, affiliate with, or favor any particular

religion, it "'may not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). The Establishment Clause prohibits the government from sending a message to "nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members[.]" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. Concurring)).

The Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In short, the government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). As shown below, it is beyond clear that the county's exclusively Christian display, prominently placed on government property and with the government's approval, violates the Establishment Clause pursuant to these tests as well as directly applicable precedent.

Numerous courts, including the Supreme Court, have held government crèche displays unconstitutional. *See*, *e.g.*, *Allegheny*, 492 U.S. at 610 (crèche display in courthouse violated the Establishment Clause); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (crèche on the front lawn of a county office building conveyed unmistakable message of governmental endorsement of religion); *American Jewish Congress v. Chicago*, 827 F.2d 120 (7th Cir. 1987) (placement of crèche near city hall conveyed the impression that the municipality endorsed Christianity); *ACLU v. Birmingham*, 791 F.2d 1561 (6th Cir. 1986) (effect of crèche was an unconstitutional endorsement of religion); *Am. Humanist Ass'n v. Baxter Cnty.*, 2015 U.S. Dist. LEXIS 153162, *20 (W.D. Ark. Nov. 12, 2015); *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998) (holiday display erected by town on front lawn of town hall unconstitutional); *Burelle v. Nashua*, 599 F. Supp. 792, 797 (D. N.H. 1984) (privately owned crèche in front of city hall unconstitutional); *Citizens Concerned for Separation of Church & State v. City & County of Denve*r, 481 F. Supp. 522 (D. Colo. 1979) (crèche near city building unconstitutional).

"A nativity scene undoubtedly qualifies as the depiction of a deity, with the infant Jesus usually being worshiped as God-made-man by adoring angels, shepherds, and wise men. While a menorah is understood to commemorate a miracle performed by God, it does not itself depict a deity." *Skoros v. City of New York*, 437 F.3d 1, 28 (2d Cir. 2006).[2] Yet the courts have still held

[1] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[2] Nevertheless, the courts have held that a standalone menorah on government property is equally unconstitutional, as is a display of both the crèche and the menorah with no secularizing elements.

that a standalone menorah on government property is unconstitutional, as is a display of both the crèche and the menorah with no secularizing elements. *See ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997) (display of a crèche and a menorah on the front lawn of city hall violated the Establishment Clause); *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (city violated Establishment Clause by permitting the erection of a menorah in a public park); *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991) (affirming denial of application for a permit to display a menorah in a park at city hall); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989) (menorah displayed by itself in a public park violated the Establishment Clause).

This matter is governed by *Allegheny*, the Supreme Court's second and most recent case involving a crèche. In *Allegheny*, the Court held that a privately-donated crèche displayed inside a county courthouse violated the Establishment Clause of the First Amendment; it was a visual representation of the New Testament account of the birth of Jesus and therefore endorsed religion. 492 U.S. at 580, 587, 597-98. Similar to the Harrison County crèche, it contained a manger and included figures representing the baby Jesus, Mary and Joseph, farm animals, shepherds and wise men. *Id.* The "county also placed a small evergreen tree, decorated with a red bow" near the crèche. *Id.* There was even a disclaimer stating: "This Display Donated by the Holy Name Society." *Id.* The Court held that neither the disclaimer nor the Santa Claus figures and other Christmas decorations elsewhere in the courthouse could negate the religious endorsement effect of the crèche. *Id.* Harrison County's display, like the display in *Allegheny* (and unlike the display in *Lynch*) focuses exclusively on the nativity scene, and is therefore unconstitutional.[3]

Harrison County's nativity scene's "physical setting [also] plainly distinguishes it from *Lynch*:" its placement inside a county courthouse. *American Jewish Congress v. Chicago*, 827 F.2d 120, 126 (7th Cir. 1987). The "creche in *Lynch*, although sponsored by the City of Pawtucket, was located in a privately-owned park, a setting devoid of the government's presence." *Id.* But the crèche here is located inside "a government building – a setting where the presence of government is pervasive and inescapable." *Id.* The Court's holding "in *Lynch* that the inclusion of a creche in a holiday display located in a private park did not violate the Establishment Clause cannot control this case, where the display" is placed within an official government building. *Id.* Thus, by "permitting the 'display of the creche in this particular physical setting,' . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *Allegheny*, 492 U.S. at 600 (citation omitted).

While *Allegheny* is dispositive of the unconstitutionality of this crèche for the reasons set forth above, applying the *Lemon* test furthers the inescapable conclusion that the nativity scene violates the Establishment Clause.

Where, as here, the government sponsors a "patently religious" display, it "cannot meet the secular purpose prong." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005) (holding display of Ten Commandments in courthouse had no secular purpose); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989). *See Santa Fe Indep. Sch. Dist. v.*

[3] *Cf. Lynch v. Donnelly*, 465 U.S. 668, 671, 686 (1984).

Doe, 530 U.S. 290, 309 (2000); *Stone v. Graham*, 449 U.S. 39, 41 (1980); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983) (Christian monument in public park held unconstitutional under *Lemon*); *see also Holloman v. Harland*, 370 F.3d 1252, 1285-86 (11th Cir. 2004) (even though teacher's purpose was to show "that praying is a compassionate act; such an endorsement of an intrinsically religious activity" fails the purpose test); *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

A number of courts have specifically invalidated nativity displays under the purpose prong of *Lemon*. *See Am. Humanist Ass'n v. Baxter Cnty*., 2015 U.S. Dist. LEXIS 153162, *20 (W.D. Ark. Nov. 12, 2015) ("the 'purpose' prong is not satisfied here"); *Burelle*, 599 F. Supp. at 797 (finding no secular purpose for crèche display outside city hall); *Denver*, 481 F. Supp. at 528 (same). *See also McCreary*, 545 U.S. 844. Indeed, many "courts addressing . . . challenges to the maintenance of religious symbols" and displays have ruled that the symbols fail *Lemon* upon the "finding of a religious purpose." *Id.* at 1110 n.23.[4]

The "Supreme Court has placed the burden on the government to articulate a predominantly secular purpose for using the symbols under *Lemon*." *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *21 (C.D. Cal. 2014) (war memorial depicting cross headstone markers lacked secular purpose). *See McCreary*, 545 U.S. at 870-72 (government failed to articulate a secular purpose for Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (same); *see also Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (a secular purpose "is in the nature of a defense, and the burden of producing evidence in support of a defense is . . . on the defendant"); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993) ("the defendant [must] show by a preponderance of the evidence that action challenged" has a secular purpose).[5]

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[4] *See McCreary Cnty. v. ACLU of Ky*., 545 U.S. 844 (2005) (Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (same); *Deweese*, 633 F.3d at 434 (same); *ACLU v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2004) (same); *Baker v. Adams County/Ohio Valley Sch. Bd*., 86 Fed. Appx. 104 (6th Cir. 2004) (same); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (same); *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001) (same); *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (same); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus); *Gonzales*, 4 F.3d at 1421 (cross); *Harris*, 927 F.2d at 1414 (cross); *Rabun*, 698 F.2d at 1110 (cross); *Eckels*, 589 F. Supp. 222 (cross); *Gilfillan*, 637 F.2d at 930 (cross); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *19 (cross); *Kimbley v. Lawrence Cnty*., 119 F. Supp. 2d 856 (S.D. Ind. 2000) (Ten Commandments); *Mendelson*, 719 F. Supp. 1065 (cross); *Mississippi State*, 652 F. Supp. at 382 (cross); *Libin*, 625 F. Supp. at 399 (cross); *Fox*, 22 Cal.3d 792 (1978) (cross); *CCSCS v. Denver*, 481 F. Supp. 522 (D.C. Colo.1979) (creche); *Ahlquist*, 840 F. Supp. 2d at 522 (prayer mural); *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 37 (C.D. Ill. 1996) (religious sign); *Burelle v. Nashua*, 599 F. Supp. 792, 797 (D.N.H. 1984) (creche).

[5] *See also Freethought Soc'y v. Chester Cnty.*, 191 F. Supp. 2d 589 (E.D. Pa. 2002) (holding that plaque of Ten Commandments on courthouse primarily religious and only incidentally secular); *ACLU of Mississippi v. Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (holding

This secular purpose must be the "pre-eminent" and "primary" force driving the government's action, and "has to be genuine, not a sham[.]" *McCreary*, 545 U.S. at 864. A court must judge the purpose of government action through the eyes of an "objective observer" who takes into consideration the history and context of the action. Courts can "infer[] purpose from" "openly available data." *Id.* at 862-63 (citations omitted). Religious intent may also be inferred where "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *Id.*

A religious purpose may thus be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *Id.* at 862-63. *See Stone*, 449 U.S. at 41 ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths."). *See also ACLU of Ohio Found., Inc. v. Deweese*, 633 F.3d 424, 434 (6th Cir. 2011) ("The poster's patently religious content reveals Defendant's religious purpose"); *Gonzales*, 4 F.3d at 1421 (the court could find "no secular purpose served by a crucifix"); *Indiana Civ. Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842, 852 (S.D. Ind. 2000) (finding unconstitutional religious purpose based on "the very design"); *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 36-37 (C.D. Ill. 1996) ("the sign 'THE WORLD NEEDS GOD' is undeniably a religious message….[and thus lacks a] secular purpose."). *Cf. Am. Humanist Ass'n v. City of Ocala*, 2015 U.S. Dist. LEXIS 115443, *1-3, *30-31 (M.D. Fla. July 2, 2015).[6]

Where, as here, government action entails placing the display of "'an instrument of religion'" on its property, its purpose can "presumptively be understood as meant to advance religion[.]" *McCreary*, 545 U.S. at 867 (quoting *Stone*, 449 U.S. at 41 n.3) (noting that given the facts before the court in *Stone*, the Court could presume a predominantly religious purpose in displaying of the Ten Commandments because the Ten Commandments monument is "an instrument of religion")). *See also Stone*, 449 U.S. at 41 ("[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").

Due to its patently religious nature, the "only purpose which can be ascribed to the display" here "is to either advance or endorse the Christian religion." *Mississippi State*, 652 F. Supp. at 383. A "nativity scene undoubtedly qualifies as the depiction of a deity, with the infant Jesus usually being worshiped as God-made-man by adoring angels, shepherds, and wise men." *Skoros v. City of New York*, 437 F.3d 1, 28 (2d Cir. 2006). "When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose

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display of cross in holiday season "so religious in effect that no secular purpose can be ascribed to it"); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985).

[6] *See also ACLU v. Rabun Cnt'y Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) ("even if the . . . purpose for constructing the cross was to promote tourism, this . . . would not have provided a sufficient basis for avoiding conflict with the Establishment Clause"); *Mendelson v. St. Cloud*, 719 F. Supp. 1065, 1069-70 (M.D. Fla. 1989) (rejecting contention that a cross had "secular and historical value as a guidepost for fishermen" because "[s]ecular means are availing"); *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) (allowing teacher to wear shirt "that was emblazoned with the words 'JESUS 2000 - J2K'" would "not have a secular purpose").

for that activity." *Mellen v. Bunting*, 327 F.3d 355, 367, 373 (4th Cir. 2003). *See McCreary*, 545 U.S. at 862-63; *Stone*, 449 U.S. at 41. Finding a memorial cross unconstitutional pursuant to *Lemon's* purpose prong, the Eleventh Circuit in *Rabun* relied on the fact that the "cross is universally regarded as a symbol of Christianity." 698 F.2d at 1111. In this matter, as in *McCreary* and *Stone*, a court will likely infer a religious purpose in the County's decision to display an overwhelmingly Christian crèche.

The history and sequence of events underscore the County's unconstitutional religious purpose for displaying the crèche. An objective observer would be aware of the history and context of the crèche and would take into account the fact that the County has consistently placed a standalone Christian display at its courthouse. *McCreary*, 545 U.S. at 862. The observer would understand the essentially isolated crèche to be an instrument of religion, giving rise to the presumption of a predominantly religious purpose as in *McCreary*, 545 U.S. at 867 and *Stone*, 449 U.S. at 41 n.3.

New statements of purpose, advanced after this letter, will carry very little weight in a court of law. The Supreme Court has made clear that "new statements of purpose" do not erase the past. *McCreary*, 545 U.S. at 873 (holding that a decision to add secular images to surround a Ten Commandments display in response to litigation revealed a religious purpose). A court must ensure that the government's stated purpose is "not a sham, and not merely secondary to a religious objective." *Id.* at 862, 864, 866. A reasonable observer would understand new statements of purpose as the County "simply reaching for any way to keep a religious [display] on the [inside] of [the] courthouse[]." *Id.* at 873. She would understand "[t]hese new statements of purpose [to be] presented only as a litigating position[.]" *Id.* at 871. Indeed, many courts have "held that a later-stated purpose for the religious symbol could not alleviate a constitutional violation." *Gonzales*, 4 F.3d at 1420 (citations omitted).

And not just any secular purpose will suffice. *E.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) ("Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature"). "[A]ttempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004). For instance, the "argument that a religious display is art or a tourist attraction will not protect the display from restrictions on government-sponsored religion." *Hewitt v. Joyner*, 940 F.2d 1561, 1572 (9th Cir. 1991). In *Denver*, the city argued that "its purpose in including the crèche in the Christmas Display is sufficiently secular, in that the entire display is designed to draw tourists and residents alike into the downtown business district, and to improve the City's national image." 481 F. Supp. at 528. In rejecting this purpose, the court explained: "This contention is troublesome, . . . because it fails to explain the importance of the crèche itself to such a commercial purpose." *Id.* The court continued: "If the City's intent is indeed to use an appeal to sectarian religious sentiments to attract people into the city, that purpose might well be constitutionally impermissible." *Id.*

Likewise, in *Kimbley v. Lawrence Cnty.*, 119 F. Supp. 2d 856, 868 (S.D. Ind. 2000), the government averred that the Ten Commandments Monument "is on the Courthouse lawn to honor the importance of the limestone industry in the County[.]" However, this failed to explain "why the documents depicted on the Monument were chosen." *Id.* The court concluded that

"[w]hile honoring the limestone industry is a valid secular purpose, as in *O'Bannon*, the *design and content* of the Monument indicate that such is not the *true purpose* for the Monument, but that the purpose is, in fact, religious in nature." *Id.* (emphasis added). Similarly, in *Mendelson v. St. Cloud*, 719 F. Supp. 1065, 1067-70 (M.D. Fla. 1989), a cross was given as a gift to a city and was placed on the city's water tower. The city contended "that the cross has secular and historical value as a guidepost for fishermen and pilots and as a landmark." *Id*. Yet the court declared: "Even if the court found the City's purpose to be truly secular, a government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'" *Id.* (citation omitted).

Notably, the purpose test must be applied independent of the *Lynch*/*Allegheny* analysis. As the Arkansas district court recently ruled in finding a similar crèche unconstitutional:

> [W]here the "purpose" prong of the *Lemon* test is concerned, there is very little, if any, guidance to be gleaned from *Lynch*, *Allegheny*, and *Florissant*. Instead, the Court will apply the rule articulated in *McCreary*, and determine whether there is any material factual dispute as to whether Defendants' primary or preeminent purpose in erecting the instant crèche was a religious or secular one. Fortunately, no mind-reading is required for this inquiry; rather, the inference as to whether a government action has a "predominantly religious purpose" can be made as a matter of "commonsense" from "openly available data." 545 U.S. at 862-63. Under this analysis, "although a [state actor]'s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id*. at 864.

Am. Humanist Ass'n v. Baxter Cnty., 2015 U.S. Dist. LEXIS 153162, *17 (W.D. Ark. Nov. 12, 2015).

Regardless of the unabashedly religious purposes motivating the annual crèche, it clearly violates the Establishment Clause pursuant to *Lemon's* effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94.

Moreover, the "'disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions.'" *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (citation omitted). The Supreme Court has stated that:

> an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to

> be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985).

For state action to violate the Establishment Clause under the second prong of *Lemon*, "the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). *See Allegheny*, 492 U.S. 573 (finding that the fact that a crèche exhibited a sign disclosing its ownership by a Roman Catholic organization did not alter the conclusion that it sent a message that the county supported Christianity). Even the "mere appearance of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion," and, therefore, has the impermissible primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 174 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause—reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was not intended, but this made no difference in the observer's perception."

The crèche has the obvious effect of endorsing Christianity over other religions, and over atheism, thus violating the Establishment Clause, *supra*. Holding that a portrait of Jesus displayed in a public school violated the Establishment Clause, the Sixth Circuit in *Washegesic v. Bloomingdale Pub. Sch*., 33 F.3d 679, 684 (6th Cir. 1994) explained: "Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. … [I]t [i]s a governmental statement favoring one religious group and downplaying others. It is the rights of these few [non-adherents] that the Establishment Clause protects." *Id.* at 684.

The Court must begin its analysis with the recognition that "the Nativity scene, with its figures of Mary, Joseph, the infant Jesus, the Magi, shepherds, angels, and animals, is an unequivocal Christian symbol, unlike the Christmas tree and the reindeer and the tinsel and Santa Claus." *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986). "A vivid tableau of the birth of Jesus Christ, it brings Christianity back into Christmas, unlike the star and the wreath and the tree, which for most people are in the nature of lifeless metaphors." *Id*. at 272. *See also Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) ("Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. . . . [I]t [i]s a governmental statement favoring one religious group and downplaying others.").

In *Allegheny*, the county permitted an organization to display a crèche at its courthouse. The display bore a plaque disclaiming the county's ownership and was surrounded by a floral decoration. Santa Claus figures and other Christmas decorations were present elsewhere in the courthouse. The Court concluded that the crèche violated the effect test, declaring that the county has "chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message." 492 U.S. at 601. Likewise, in *Smith*, the Fourth Circuit ruled that a privately donated crèche displayed on the front lawn of a government building failed the second prong of *Lemon.*

895 F.2d at 955-58. Notwithstanding the fact that it had a disclaimer stating it was "Sponsored by Charlottesville Jaycees," and that it "involved no expenditure of County funds," the Fourth Circuit concluded that the display sent the "unmistakable message" of endorsement of religion. *Id.* at 958. The Seventh Circuit similarly held that in *Chicago* that the "government-approved placement of the nativity scene in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause." 827 F.2d at 128.

A driving factor in determining the "effect" of a crèche display is its physical location. *Allegheny*, 492 U.S. at 598-600; *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Id.* at 692. When, as here, the government chooses to place a primarily religious display at "the seat of . . . government," this has the effect of communicating a message of endorsement, making it difficult for any viewer to "reasonably think that it occupies this location without the support and approval of the government." *Allegheny*, 492 U.S. at 599-600. *See also Smith*, 895 F.2d at 958 ("The creche was situated on the front lawn of the County Office Building -- a prominent part, not only of the town, but of the county office structure itself. Prominent in the background is the sign identifying the building as a government office structure."); *Chicago*, 827 F. 2d at 128 ("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity").

Furthermore, "nothing in the context of the display detract[s] from the [display's] religious message." *Allegheny*, 492 U.S. at 598-600 (rejecting the County's contention that adding "traditional Christmas greens negate[d] the endorsement effect of the crèche.").[7]

In view of the aforementioned authorities, it is plain that the county's crèche violates the Establishment Clause. As such, the county and its officials may be sued under 42 U.S.C. § 1983 for damages, an injunction, and attorneys' fees. This letter serves as an official notice of the unconstitutional crèche and demands that you remove it from government property immediately and provide us with written assurances that no similar display will be put up in the future. Please respond within seven (7) days in order to avoid legal action.

The American Humanist Association wishes you a joyous holiday season.

Very truly yours,
Monica L. Miller, Esq.

[7] For instance, in *Lynch*, 465 U.S. at 671, a crèche was *de minimis* in a large display "including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and the crèche." The inclusion of a *single* religious symbol did not "taint" the entire display. *Id.* at 686. The Harrison County display, in contrast, is exclusively Christian.