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December 20, 2016

Via Email
The Honorable Ed Janecka
151 North Washington St., Room 301
La Grange, TX 78945
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cc: cassie.austin@co.fayette.tx.us

Re: Unconstitutional Christian Display

Dear Judge Janecka,

This office was recently contacted by a local resident, David Allen, regarding what he correctly perceived as a violation of the Establishment Clause of the First Amendment of the United States Constitution. While on his normal route running errands, Mr. Allen observed a prominent, standalone Christian nativity display in front of the County Courthouse. As the photos below show, the display includes representations of the baby Jesus, Mary and Joseph, and various other characters and items typically included in such crèche scenes. Further, the Christian nativity scene is the sole decoration in front of the courthouse.

It is our understanding that the County purchased the nativity scene itself, stores it, and installs it early each December. This is at least the third year in a row the nativity has been installed. There is no sign indicating that an outside group donated it or erected it (and even if that were the case, it would not result in the display surviving Establishment Clause scrutiny).

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Texas. 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 Texas, and we have litigated constitutional cases in state and federal courts from coast to coast, including in Texas. You should also know that the AHA recently prevailed in a lawsuit challenging a courthouse crèche in Arkansas, and was awarded attorneys' fees and costs from the county. *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)).

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

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

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 outside a government building and with the government's approval, violates the Establishment Clause.

Numerous courts, including the Supreme Court, have held similar 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 Denver*, 481 F. Supp. 522 (D. Colo. 1979) (crèche near city building unconstitutional).[2]

Indeed, the display at issue here is plainly unconstitutional under *Allegheny*, the Supreme Court's second and most recent case involving a crèche display. 492 U.S. at 580. The Supreme Court first addressed the issue of government holiday displays in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Splitting five to four, the Court held that the City of Pawtucket did not violate the Establishment Clause by including a crèche in an otherwise secular holiday display in a private park. *Id.* at 671, 687. Unlike Fayette County's display, the Pawtucket display included many nonreligious and non-Christian items, including "candy-striped poles . . . carolers, cut-out 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 creche." *Id.* at 671. The Court found that the inclusion of a single religious symbol, the crèche, did not "taint" the entire display. *Id.* at 686.

Five years later, in *Allegheny*, the Supreme Court concluded that a crèche at a county courthouse violated the Establishment Clause. 492 U.S. at 597. Two displays were challenged. The first, which is most analogous to the Fayette County display, consisted of a crèche display in a county courthouse, whereas the second involved an elaborate display featuring a 45-foot Christmas tree and an 18-foot menorah, placed outside the City-County Building. The Court held that the crèche was unconstitutional but not the tree/menorah. The crèche was a visual representation of the New Testament account of the birth of Jesus. *Id.* at 580. Like the Fayette 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

[2] The courts have held that a standalone menorah display 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 crèche and a menorah near city hall); *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (menorah in a public park); *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991) (same); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989) (same).

tree, decorated with a red bow" near the crèche. *Id.* Despite a disclaimer on the display stating: "This Display Donated by the Holy Name Society," the Court held it was unconstitutional. *Id.* The presence of Santa Claus figures and other Christmas decorations elsewhere in the courthouse did not negate the endorsement effect of the crèche either. *Id.* at 598.

The Court noted that "unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message." *Id.* In distinguishing the case from *Lynch*, the Court observed: "The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point." *Id.* In contrast, the primary feature of the *Allegheny* display was the crèche, rendering it unconstitutional. Fayette County's display, like the display in *Allegheny* and unlike the display in *Lynch*, focuses exclusively on the nativity scene, and is therefore unconstitutional.

Moreover, a critical aspect of Fayette County's nativity scene's "physical setting plainly distinguishes it from *Lynch*:" its placement outside of a county building. *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 display here is located outside "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).

Applying the *Lemon* test in particular 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*, 545 U.S. at 862-63 (holding display of Ten Commandments in courthouse had no secular purpose). A number of courts have specifically invalidated nativity displays under the purpose prong of *Lemon*. *E.g.*, *Baxter Cnty*., 2015 U.S. Dist. LEXIS 153162, at *20 ("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 (government failed to articulate a secular purpose for Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (same).

A religious purpose may thus be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary*, 545 U.S. 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"); *Greater Hous. Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984) (county's display of cross as a war memorial failed *Lemon*'s purpose test).

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")). 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). 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." *Am. Civil Liberties Union v. Miss. State Gen. Servs. Admin.*, 652 F. Supp. 380, 383-84 (S.D. Miss. 1987).

Regardless of the unabashedly religious purposes motivating the annual crèche, it clearly violates the Establishment Clause under *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.

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. 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. A "Christian creche explicitly favors one religion over another." *Croft v. Perry*, 604 F. Supp. 2d 932, 940 (N.D. Tex. 2009). "A creche standing alone without any of the nonreligious symbols of Christmas affirms the most fundamental of Christian beliefs -- that the birth of Jesus was not just another historical event. Rather, to the believer Christ's birth was an act of divine intervention in human affairs that set this birth apart from all others." *Birmingham*, 791 F.2d at 1566. "Since the majority does not need its protections, the Bill of Rights was adopted for the benefit and protection of minorities. From the beginning, Christians have constituted a majority in America and non-Christians are acutely aware of this fact. Their assurance of equality before the law, despite their religious

nonconformance, derives from the guarantees of the First Amendment. It is difficult to believe that the city's practice of displaying an unadorned creche on the city hall lawn would not convey to a non-Christian a message that the city endorses Christianity." *Id.* The creche, thus displayed, "'sends 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 of the political community.'" *Id.* (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

In view of the above, it is plain that the county's crèche violates the Establishment Clause. 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.

Very truly yours,
Monica Miller, Esq.