

U.S. DISTRICT COURT
WESTERN DIST ARKANSAS
FILED

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

DEC 23 2014

CHRIS R. JOHNSON, Clerk
By

Deputy Clerk

AMERICAN HUMANIST
ASSOCIATION and
DESSA BLACKTHORN,

PLAINTIFFS

14-326 TLB

V.

BAXTER COUNTY, ARKANSAS, and
MICKEY PENDERGRASS, BAXTER COUNTY
JUDGE, IN HIS OFFICIAL AND INDIVIDUAL
CAPACITIES

DEFENDANTS

COMPLAINT

Plaintiffs, for their Complaint against Defendants, allege:

NATURE OF THE CLAIMS

1. This action challenges the constitutionality of Defendants' maintenance and prominent display on government property of a Christian nativity scene or crèche (hereafter the "Nativity Scene"). For at least 15 years, Defendants have featured an almost exclusively Christian nativity scene on the front lawn of the Baxter County Courthouse (hereafter the "Courthouse") during the holiday season. The large display is dedicated almost entirely to the New Testament account of the birth of Jesus Christ, in violation of the Establishment Clause of the First Amendment of the United States Constitution, as applied to Arkansas by the Fourteenth Amendment.

2. The primary if not sole purpose of Baxter County's annual Nativity Scene is to promote Christianity to the exclusion of all other religions and religion over non-religion.

3. This action challenges Defendants' policy, practice, and custom of advancing, endorsing, affiliating with, and sponsoring – both symbolically and tangibly – Christianity, in the context of official governmental activity, in violation of the Establishment Clause.

4. Plaintiffs seek injunctive and declaratory relief and damages under 42 U.S.C. § 1983 against Defendants to redress said Establishment Clause violations, together with recovery of attorney's fees and costs under 42 U.S.C. § 1988(b).

JURISDICTION AND VENUE

5. This case arises under the First Amendment to the United States Constitution and 42 U.S.C. § 1983 and presents a federal question within this Court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The Court has jurisdiction to issue a declaratory judgment under 28 U.S.C. § 2201 and to provide injunctive relief and damages under 28 U.S.C. § 1343 and Fed. R. Civ. P. 65.

6. Venue is appropriate in the United States District Court for the Western District of Arkansas, Harrison Division, pursuant to 28 U.S.C. § 1391(b)(2), because the actions giving rise to the claims occurred in this district and at least one Plaintiff and one Defendant reside in this judicial district.

PARTIES

7. The first Plaintiff, the American Humanist Association (“AHA”), is a nonprofit 501(c)(3) organization incorporated in Illinois with a principal place of business at 1777 T Street N.W., Washington, D.C. AHA is a membership organization, with over 30,000 members, 181 chapters and 80 affiliates nationwide, and over 360,000 online supporters and followers. AHA promotes humanism and is dedicated to advancing and preserving separation of church and state and the constitutional rights of humanists, atheists and other freethinkers. AHA brings this action to assert the First Amendment rights of its members.

8. Plaintiff Dessa Blackthorn is a citizen of the United States and the State of Arkansas is an individual resident of Baxter County, Arkansas. She is a non-Christian and member of the AHA. Ms. Blackthorn lives approximately eleven or twelve miles from the Courthouse. She first encountered Defendants’ display in approximately 1997 and has since encountered it annually.

9. Ms. Blackthorn perceives the Nativity Scene as a government endorsement of the Christian religion. As a non-Christian, Ms. Blackthorn is personally offended and feels excluded by this governmental message. She opposes this appearance of governmental favoritism for religion and for a particular religion, Christianity. She does not wish to encounter the Nativity Scene in the future.

10. Ms. Blackthorn was injured and aggrieved by the acts and practices complained of herein because governmental actions directed at her community, Baxter County, violate the Establishment Clause, and because she personally witnessed the governmental acts that violate the Establishment Clause, as described in this complaint, and was offended and otherwise harmed by them.

11. Defendant Baxter County, Arkansas (hereafter “County”) is a political subdivision of the State of Arkansas.

12. Defendant Mickey Pendergrass is the County Judge of Baxter County. As such, he is in charge of the county courthouse grounds and makes decisions regarding matters and items placed on the courthouse grounds. Ark. Code Ann. § 14-14-1101(a)(5) and 14-14-1102(b)(3)(A). He exercises the authority to authorize or refuse to authorize the placement of decorations are there matters of public interest on the courthouse grounds. Mr. Pendergrass is sued in his individual and his official capacity.

FACTS

13. For at least 15 years, a Nativity Scene has been displayed on the lawn of the Baxter County Courthouse.

14. Religious and specifically Christian elements overwhelmingly dominate the County’s annual Nativity Scene display.

15. A true and accurate photograph depicting the County’s Nativity

Display in 2013 is attached herein as Exhibit 1.

16. In the 2013 Nativity Scene, as in previous years, the baby Jesus was the focal point of the display situated in the center with two angels directly behind him. Statues of Mary and Joseph were placed by Jesus' side, with the wise men nearby. The life-sized display sat entirely on an expansive bed of hay and included the usual manger-scene animals – camels, donkey, ox, and sheep. The very few symbols within the display that were not nativity-related (one Santa Claus statue, one reindeer and a sleigh, and a Christmas tree) were incidental to the display and were nonetheless dedicated to the Christian holiday.

17. On or about December 5, 2013, a person contacted the County to request permission to put up a Happy Solstice banner near the Nativity Scene. Her request was denied.

18. On or about December 11, 2013, two Baxter County residents made an in-person request to Judge Pendergrass to install a Happy Solstice Banner near the Nativity Scene. Defendant Judge Pendergrass denied the request.

19. Among other things, Judge Pendergrass denied the request for the Solstice Banner on the asserted grounds that a County ordinance prohibited banners. He also stated that if he were to allow one banner, hundreds would want to put one up.

20. On or about January 24, 2014, a large, unattended banner was

displayed on or near the Courthouse property. A true and accurate photograph of this banner taken on or about January 24, 2014, is attached herein as Exhibit 2.

21. On or about February 10, 2014, Judge Pendergrass signed a statement confirming that he denied the request to display the secular Solstice banner. A true and accurate photograph of this signed statement is attached herein as Exhibit 3.

22. The public placement of religious or secular displays, including Nativity scenes, in prominent places on the courthouse property is a divisive issue. In particular, the placement of a predominantly Christian display can suggest and in the context in the case at bar does indeed suggest that Christianity is a preferred religion, and that the County favors religion over non-religion.

23. Because of the risk of creating the impression that Baxter County endorses the Christian religion above all others, and over non-religion, Plaintiff AHA sent a letter to Defendant Pendergrass on January 1, 2014, placing him on notice that the Baxter County courthouse lawn display was overwhelmingly Christian and that as such it violated the Establishment Clause of the First Amendment of the United States Constitution.

24. A true and accurate copy of the Plaintiff AHA's letter is attached herein as Exhibit 4. No formal response to that letter has been received, although upon information and belief Mr. Pendergrass has told members of the press that he would not comment on the letter until he has had an opportunity to consult with

legal counsel for the county.

25. On or about October 23, 2014, an AHA attorney sent Defendant Pendergrass and several Mountain Home government officials an email to advise them that a predominantly Christian Nativity Scene is unconstitutional. The email, which included a copy of the original letter sent in January 2014, stated: "As you recall, I sent a letter to you and other Baxter County officials in January regarding an unconstitutional nativity display prominently featured in front of the county courthouse. (See attached). The purpose of this email is to notify you of our intent to file a lawsuit if the county erects a similar display this coming holiday season. Please do not hesitate to contact me if you have any questions or concerns." A true and accurate copy of this email is attached herein as Exhibit 5. Plaintiffs never received a response to the email.

26. Notwithstanding Plaintiffs' January letter and October email, Defendants persist in permitting and sponsoring the predominantly Christian display on the County Courthouse lawn.

27. The Nativity Scene was placed on the Courthouse grounds on or about December 4, 2014.

28. The 2014 display, as with the 2013 display, is dedicated almost exclusively to a scene that represents the New Testament account of the birth of Jesus of Nazareth. The few non-nativity symbols of Christmas, such as one Santa

Claus, a reindeer and a sleigh, and a Christmas tree, are incidental to the display.

29. The defendant, Mickey Pendergrass, being made aware of the divisiveness of public displays of religious symbols has nevertheless chosen once again to permit the placement of a Nativity Scene that is overwhelmingly Christian in content, including figurines representing Jesus, Mary, Joseph, the three wise men, a shepherd, and various animals. The scene also includes an angel with a sign exclaiming “Gloria in Excelsis Deo.”

30. True and accurate photographs of the County’s 2014 Nativity Scene are attached herein as Exhibit 6.

31. On or about December 2, 2014, the Baxter County Quorum Court unanimously approved placing the Nativity Scene on the Courthouse lawn. They also approved of including a disclaimer on the Nativity Scene.

32. On or about Friday, December 5, 2014, the County held its annual Christmas tree lighting on the Courthouse lawn, which includes the religious display. During the ceremony, a sectarian Christian prayer was delivered.

33. Sometime on or prior to December 5, 2014, Defendant Pendergrass was reported as stating to the media: “I’m just not allowing anything else, anywhere else on the square, besides that (crèche).”

34. Attached herein as Exhibit 7 is a true and accurate copy of an article in the Baxter Bulletin dated December 5, 2014, reflecting the above-quoted text.

See also <http://www.baxterbulletin.com/story/news/local/2014/12/04/nativity-scene-goes-courthouse/19920299/>.

35. The Nativity Scene is not a small part of a secular holiday display but is, rather, central to the display. The display is overwhelmingly Christian with a few random non-Nativity Christmas-themed elements included in a futile attempt to sanitize the sectarian display. Such a display promotes a single religious tradition above all others.

36. In an apparent attempt to insulate the County from responsibility, on or about November 21, 2014, Baxter County entered into a purported lease of the “North West Corner of Baxter County Courthouse” to the Mountain Home Chamber of Commerce for \$1.00.

37. The purpose of the lease is set forth in Court Order 2014-93 signed by Judge Pendergrass. A true and accurate copy of this order, which was furnished to Plaintiffs by Defendants, is attached herein as Exhibit 8.

38. Court Order 2014-93 states that the purpose of the lease is to authorize a Christian display on County property. It provides in part as follows: “it is the overwhelming desire of the citizens of Baxter County that a display celebrating the Christmas holidays be erected on the Courthouse lawn” and is “an effort to continue the Christmas holiday tradition[.]”

39. The lease lasts only for two months, from November 21, 2014,

through January 15, 2015.

40. This lease is nothing more than a sham attempt to insulate the County from responsibility for the Christian Nativity Scene, in direct response to Plaintiff AHA's letter and email. Further, the provisions of Ark. Code Ann. § 14-16-110 governing the lease of public property to nonprofit organizations do not appear to have been complied with. Plaintiffs sought all documentation regarding this lease through a freedom of information request. The lease was provided, but no evidence of publication of notice, a hearing on the lease, or a finding that the property would not be needed by the county for the terms of the lease was provided. This is further evidence of the pretextual nature of the lease.

41. Notwithstanding the purported lease, on December 2, 2014, the Quorum Court approved a resolution authorizing the display of a crèche accompanied by a disclaimer on the same property that had allegedly been leased to the Mountain Home Chamber of Commerce. A copy of Resolution No. 2014-35 is attached hereto as Exhibit 9.

42. Said Resolution by the County Quorum Court indicates that Baxter County retains authority over the Courthouse lawn and the annual Nativity Scene.

43. Moreover, even if the lease had complied with Arkansas law and actually served to grant the Chamber of Commerce authority over the property for two months, notwithstanding the Quorum Court's order, it does not in any way

insulate the County from liability for the Nativity Scene on the courthouse lawn. *See ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983 (cross erected by chamber of commerce held unconstitutional); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 n.12 (10th Cir. 2010) *cert. denied*, 132 S. Ct. 12 (2011) (it was irrelevant that “at least one, and perhaps several, of these [cross] memorials are located on private land”); *cf. Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (it was irrelevant to Establishment Clause analysis that city-owned crèche was situated in a privately owned park); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-25 (1961) (government property leased to a private entity still must comply with the Constitution); *Wirtz v. City of S. Bend, In.*, 813 F. Supp. 2d 1051, 1068 (N.D. Ind. 2011) (below-market-rate transfer of property to religious school had effect of placing “adherents and nonadherents on different footing.”).

44. Regardless of the actual ownership of the display or any purported lease of a portion of the Courthouse grounds, the display as it stands unmistakably sends a message that Baxter County supports and encourages the Christian religion to the exclusion of other religions and religion over non-religion. A reasonable observer seeing this display on the grounds of the County Courthouse would not doubt that the display was present with the support and approval of the County government.

45. The sectarian nature of Defendants’ decision making process is made

clear by the fact that a request to add a banner wishing the citizens of Baxter County a Happy Solstice season was not allowed, even though it was requested by citizens of Baxter County.

46. The exclusion of the Solstice banner shows that the courthouse lawn is not a public forum. If a governmental body elects to allow private displays on public property, it must do so on a content-neutral basis and it must provide consistent guidelines regarding what displays are permitted and must enforce those guidelines on a non-discriminatory basis. Here there was no decision to allow private displays on a content-neutral basis. There is no system in place for approval or disapproval of displays on the courthouse lawn. That is a matter in the sole and unfettered and unbridled discretion of the County Judge.

CAUSES OF ACTION

47. All preceding allegations are incorporated herein by reference.

48. The Establishment Clause of the First Amendment to the United States Constitution prohibits the government from maintaining or hosting a Christmas display that consists primarily of a Christian Nativity scene, thus singling out, showing preference for, and endorsing the Christian religion.

49. The display at issue in this case reflects the County's approval of the Christian religion, to the exclusion of those traditions that are not Christian, including Jewish, Pagan, Native American, Muslim, and Animist traditions, as well

as the significant and growing portion of the population that is not religious.

50. A sign has been added to this year's display. The sign does nothing to correct the constitutional infirmities of having the display on the courthouse grounds in the first place.

51. Defendants are promoting the Christian religion under the color of State law in violation of the Establishment Clause.

52. Defendant Pendergrass presided at a public ceremony to present the Christmas display to the public. As further evidence of the sectarian motivation behind the display, the County presented the display to the public with a religious ceremony at which a Christian minister delivered a Christian invocation.

53. Defendants' maintenance and prominent display on government property of the Nativity Scene amounts to the endorsement and advancement of religion (and, specifically, an endorsement of and affiliation with Christianity) in violation of the Establishment Clause of the First Amendment to the United States Constitution.

54. Defendants' maintenance and prominent display on government property of the Nativity Scene lacks a secular purpose in violation of the Establishment Clause of the First Amendment to the United States Constitution.

55. Defendants' maintenance and prominent display on government property of the Nativity Scene fosters excessive governmental entanglement with

religion in violation of the Establishment Clause of the First Amendment to the United States Constitution.

56. Defendants acted under color of state law in violating the First Amendment as described herein in violation of 42 U.S.C. §1983.

RELIEF SOUGHT

WHEREFORE, the Plaintiffs seek the following relief:

A. A declaratory judgment that the actions of the Defendants violate the Establishment Clause of the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

B. A declaratory judgment that Defendants' maintenance and prominent display on government property of the Nativity Scene violates the Establishment Clause of the First Amendment of the United States Constitution and is a violation of the Plaintiffs' constitutional rights under 42 U.S.C. §1983.

C. An order enjoining Defendants and their agents from displaying, or allowing to be displayed, the Nativity Scene on government property, including the County Courthouse lawn, and from promoting, advancing, or endorsing religion by public displays that give the appearance of government sponsorship of religion or a particular religion.

D. A judgment in the Plaintiffs' favor for nominal damages.

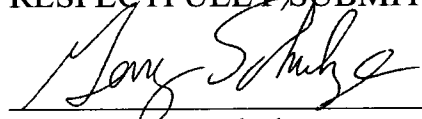
E. A judgment awarding Plaintiffs their reasonable costs, expenses, and

attorney's fees pursuant to 42 U.S.C. § 1988.

F. An award of such other and further relief as the Court shall deem just.

Dated this _____ day of _____, 201_

RESPECTFULLY SUBMITTED



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