



# MEMORANDUM

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## Holiday Observance in Public Schools

The American Center for Law and Justice (ACLJ) wishes you a Merry Christmas and a Happy New Year. While students, teachers, administrators, and staff are celebrating the holidays in a variety of creative and entertaining ways in public schools across the country, we are aware that some of these celebrations may be hindered by questions of what is legally permitted or prohibited.

It is our concern that public schools may feel pressured to censor religious expression during the Christmas season. The purpose of this letter is to assist you by answering common questions concerning what activities are permissible for schools to engage in, and to protect the rights of students to participate in Christmas or other holiday observances in public schools.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.<sup>1</sup>

### **I. May schools display religious symbols during Christmas?**

**YES.** Several federal district courts have ruled that under certain circumstances, it is permissible for a public school to display religious holiday symbols in school calendars and in holiday displays. For example, a district court in New Jersey directly addressed this issue in *Clever v. Cherry Hill Twp.*, 838 F. Supp. 929 (D.N.J. 1993). In *Clever*, the plaintiffs

challenged a school policy that provided for religious symbols to be used in school calendars and in a Christmas display. After noting the importance of context and the absence of denominational preference, the court upheld the policy:

Christmas and Chanukah are celebrated as cultural and national holidays as well as religious ones, and there is simply no constitutional doctrine which would forbid school children from sharing in that celebration, provided that these celebrations do not constitute an unconstitutional endorsement of religion and are consistent with a school's secular educational mission.

*Id.* at 939.

The court then recognized that religion is an appropriate subject of secular study and found it "hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others." *Id.*; see also *Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. 2004) (upholding a public school policy which encouraged schools to display "secular" holiday symbols such as Christmas trees, Menorahs, and the Star and Crescent and discouraged the display of more religious symbols such as nativity scenes or excerpts from the Bible, Torah, or Qur'an), *aff'd* 437 F.3d 1, 4 (2d Cir. 2006) (upholding the policy and declining to decide whether the addition of a crèche would violate the Establishment Clause); *Sechler v. State College Area School District*, 121 F. Supp. 2d 439 (M.D. Pa. 2000) (upholding a school's holiday program which included various references to Christmas, Chanukah, and Kwanza).

In *Doe v. Wilson County Sch. System*, the district court upheld "the inclusion of a brief two minute nativity scene at the end of a twenty-two minute Christmas program" that occurred after school hours. 564 F. Supp. 2d 766, 800 (M.D. Tenn. 2008). The court cited the Supreme Court's cases involving nativity scenes and noted that "[a] nativity scene may be displayed as one item among many secular symbols of Christmas and meet constitutional muster. . . . [but] isolating a nativity scene in such a way as to show government solidarity with the Christian faith violates the Establishment Clause." *Id.* (citations omitted). The court explained:

[I]n the main secular portion of the Christmas program, students assumed roles with costumes and special clothing, including members of the chorus, the reader, soloist, ballerinas, toy doll, toy soldier, Santa Claus, jack-in-the-box, teddy bear, reindeer, Rudolph, and a mouse. It was much more of an extravaganza with more student participation and fanfare than the rather meager, stark nativity scene

placed at the very end. The nativity scene included at the end of the Christmas program was an example of the religious heritage of the holiday and was very limited in duration as compared to the balance of the program. Unlike in the secular presentation, there were no words spoken by the students or narrated by others in the ending portion of the program. The Court concludes that the nativity scene was presented in a prudent, unbiased, and objective manner to present the traditional historical, cultural, and religious meaning of the holiday in America.

*Id.*

The court concluded,

[c]onsidering the Christmas program as a whole, it was a secular performance with a bit of religious symbolism at the very end to reflect the historic, cultural and religious significance of the Christmas holiday. Taken as a whole, the inclusion of the nativity scene as a part of the program did not offend the Constitution.

*Id.* at 801; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (“[G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine.”).

## **II. Are students allowed to sing Christmas carols with religious themes at school events or in holiday programs?**

**YES.** The Establishment Clause does not prevent the singing of Christmas carols with religious origins by public school choirs. A case that addressed this specific issue upheld the singing of religious Christmas carols in public schools. In *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), the United States Court of Appeals for the Eighth Circuit held that the study and performance of religious songs, including Christmas carols, are constitutional if their purpose is the “advancement of the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.” *Id.* at 1314.

The Eighth Circuit in *Florey* found that religious songs and symbols can be used in public schools if they are presented in a “prudent and objective manner and only as part of the cultural and religious heritage of the holiday.” *Id.* at 1317.<sup>2</sup> It is important to note that the decision in *Florey* was based upon Supreme Court cases that permit the study of the Bible in

public schools. For example, in *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), the Supreme Court explained:

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Other court of appeals cases have bolstered the central holding of *Florey*. The United States Court of Appeals for the Fifth Circuit, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), upheld a school's longtime use of "The Lord Bless You and Keep You" as its theme song. In its decision, the Court stated:

A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. . . . Such animosity towards religion is not required or condoned by the Constitution.

*Id.* at 408.

Similarly, in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998), a student sued the school due to the religious content of the songs performed by the school choir. The Tenth Circuit dismissed the lawsuit, citing *Doe* and noting that "the Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion." *Id.* at 553. Furthermore, the court recognized that "a significant percentage of serious choral music is based on religious themes or text. Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs." *Id.* at 554 (citations omitted). It is hardly surprising, then, that "the Constitution does not forbid all mention of religion in public schools." *Id.*; *see also Sease v. School Dist. of Philadelphia*, 811 F. Supp. 183 (E.D. Pa. 1993) (noting that the Equal Access Act protects the ability of student-led and initiated choirs to sing religious songs and access school facilities on the same basis as other student groups). In short, a school has discretion to decide whether to include music that contains religious themes as part of an objective classroom study or holiday performance for the purpose of advancing students' knowledge of our cultural and religious heritage.<sup>3</sup>

### III. Can schools teach about the biblical origins of Christmas and Easter?

**YES.** In *Stone v. Graham*, 449 U.S. 39, 42 (1980), the Supreme Court stated that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” Therefore, it would be constitutional for a public school teacher to have students study Biblical passages that relate to Christmas (*e.g.*, Matthew 1:18-2:22, Luke 2:1-20) if the purpose was to study the historical or literary significance of the passages. In considering the type of activities that are appropriate in public schools, the federal appeals court in *Florey* stated, “[w]e view the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.” *Florey*, 619 F.2d at 1316. The *Florey* court went on to quote the lower court with approval, stating “[t]o allow students only to study and not to perform [religious art, literature and music when] such works . . . have developed an independent secular and artistic significance would give students a truncated view of our culture.” *Id.* (alteration in original). Of course, any student that has ideological or religious objections to participating in a particular performance should be excused from the assignment.

The United States Department of Education has issued guidelines for the nation’s school leaders that address the extent that religious expression and teaching are allowed in public schools. The guidelines state that:

Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies.<sup>4</sup>

The guidelines further state that “public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays . . . .” In addition, “[t]eachers and school administrators, when acting in those capacities . . . are prohibited . . . from soliciting or encouraging religious activity, and from participating in such activity with students . . . [and also] from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.”<sup>4</sup> These guidelines reaffirm that students and teachers may celebrate the Christmas holiday in an appropriate manner without fear of running afoul of the Establishment Clause.

The case of *Sechler v. State College Area School District*, 121 F. Supp. 2d 439, applied the principles set forth in *Stone* and the Department of Education guidelines. In *Sechler*, the district court upheld a school's holiday display and song program which included various references to Christmas, Chanukah, and Kwanza. In finding no "excessive entanglement" with religion, the court noted that no clergy were involved in the planning or administration of the program, and the School District was not involved in any doctrinal questions. *Id.* at 449. In fact, the opposite was true; the program and display "sen[t] a message of inclusion and celebrate[d] freedom to choose one's own beliefs." *Id.* at 453. Consequently, the program and display did "not offend the Establishment Clause, either as favoring one religion over others or as favoring religion over non-religion." *Id.* The court noted that public school officials have some latitude in designing permissible holiday programs. *Id.* at 452 n.13; *see also Doe v. Wilson County Sch. Sys.*, 564 F. Supp. 2d 766, 799–800 (noting "it is generally understood that the custom of giving thanks for our provisions and welfare is the basis for our Thanksgiving holiday. . . . Learning about a typical generic prayer which may have been said by the early Pilgrims has both historic and religious overtones" and is constitutionally permissible if done in an objective manner to explain the historical origins of Thanksgiving).

It is important to note that students are free to discuss the Biblical origins of the Christmas and Easter holidays with other students during non-instructional time. For example, while schools may impose reasonable time, place and manner restrictions on candy distribution containing religious messages, they may not impose an absolute ban on such religious speech activity.<sup>5</sup> In 2011, the Court of Appeals for the Fifth Circuit held, in an en banc review, that the First Amendment prohibits viewpoint discrimination against elementary students' religious expression, such as the distribution of religious-themed gifts or literature to other students at school parties or during non-instructional time when secular items may be distributed. *Morgan v. Swanson*, 659 F.3d 359, 401–12 (5th Cir. 2011) (en banc). The court first noted that "First Amendment rights are of paramount importance in school facilities." *Id.* at 403 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 265, 267 (1981)). Considering the particular facts at issue, the court disagreed with the defendants' claims, finding that, among other similar incidents, student distribution of candy canes with a religious message attached (during a school party in which other students could distribute personal gifts), could not be considered school-sponsored speech that implicates the Establishment Clause. *Id.* at 407–10.

Discussing the limited parameters of the school-sponsored speech exception, the Fifth Circuit explained that, “[l]ike all exceptions to the First Amendment’s protections, the *Hazelwood* exception should be construed narrowly.” *Id.* at 408. Moreover,

[w]hatever latitude school officials may have with respect to school-sponsored speech under *Hazelwood*, or with government-endorsed speech under the Establishment Clause—that is, speech that could be erroneously attributed to the school—outside of that narrow context, viewpoint discrimination against private, student-to-student, non-disruptive speech is forbidden by the First Amendment.

*Id.* at 409. “Accordingly, the principals were not permitted to discriminate on the basis of viewpoint; yet, in each incident the principals allegedly censored speech solely because it expressed a religious message.” *Id.* In conclusion, the majority explained further:

In short, what one child says to another child is within the protection of the First Amendment unless one of the narrow exceptions . . . applies, and none does in this case. Accordingly, we hold that the First Amendment protects all students from viewpoint discrimination against private, non-disruptive, student-to-student speech. Therefore, the principals’ alleged conduct—discriminating against student speech solely on the basis of religious viewpoint—is unconstitutional under the First Amendment.

*Id.* at 412.

#### **IV. Are students permitted to write about the origin of Christmas and the birth of Jesus or other religious sentiments in school assignments?**

**YES.** A student’s private religious speech is protected by the First Amendment, so long as that speech does not “materially or substantially interfere with school discipline.” *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 504 (1969). It is well established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Supreme Court’s cases:

establish[] that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). In *Mergens*, the Court noted: “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” 496 U.S. at 250.

Additionally, the U.S. Department of Education’s guidelines on religious expression in public schools clearly state that students are permitted to discuss religious topics in class assignments:

#### *Religious Expression and Prayer in Class Assignments*

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher’s assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.<sup>7</sup>

Thus, for example, if a student is instructed to write an essay discussing what his favorite holiday is and why, he should be able to write an essay explaining that his favorite holiday is Christmas because it represents the birth of Jesus. The essay should be judged by normal academic standards, such as literary quality and grammar, without regard to the essay’s religious viewpoint.

#### **V. May schools continue to refer to the “Christmas” and “Easter” holidays?**

**YES.** School districts are under no constitutional obligation to rename the Christmas and Easter holidays. The Supreme Court itself has acknowledged with approval that Congress gives federal employees a paid holiday on December 25 and calls that holiday “Christmas.” *See Lynch v. Donnelly*, 465 U.S. 668, 675, 680 (1984); *see also Ganulin v. United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999), *aff’d*, 238 F.3d 420 (6th Cir. 2000) (upholding the federal law making Christmas a legal holiday).

Federal and state laws that designate Christmas and Easter as official holidays are constitutionally sound.<sup>8</sup> For instance, in *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999), the Seventh Circuit held that Indiana's recognition of Good Friday as a legal holiday did not violate the Establishment Clause. In reaching this result, the court noted that:

the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day. No court has ever held that the Establishment Clause is violated merely because a state holiday has the indirect effect of making it easier for people to practice their faith.

*Id.* at 801–02. The Seventh Circuit added that people are free to celebrate Good Friday as they choose.<sup>9</sup>

## **Conclusion**

We hope that this memorandum helps to clarify the legal issues surrounding the role of religious expression in the public schools during the Christmas season. The American Center for Law and Justice is committed to defending the constitutional rights of students on their public school campuses and to assisting public schools in complying with the First Amendment. Please feel free to share this information with your school's board, attorney, principal, staff, and students.

<sup>1</sup> *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously upholding the First Amendment rights of minors); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

<sup>2</sup> In other words, there is a key difference between permissible use of holiday music for secular reasons at school assemblies or concerts and the impermissible use of religious music considered to be proselytizing or disparaging of other faiths. *See, e.g.*, *S.D. v. St. John's County Sch. Dist.*, 632 F. Supp. 2d 1085 (M.D. Fla. 2009) (prohibiting the use of a proselytizing religious song at an elementary school assembly); *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195, 1197 (S.D. Iowa 2002) (enjoining the singing of "The Lord's Prayer" by a school choir at a graduation ceremony because the School chose the song due to its Christian content, not because of its independent musical significance).

<sup>3</sup> See generally *Stratechuk v. Bd. of Educ.*, 587 F.3d 597 (3d Cir. 2009) (upholding a public school district policy that prohibited the performance of “celebratory” religious holiday music at school-sponsored concerts; the policy permitted religious-themed music at school-sponsored events that did not celebrate a specific religious holiday and also allowed religious-themed holiday music to be taught objectively in music classes), *cert. denied*, 131 S. Ct. 72 (2010).

<sup>4</sup> U.S. Dept. of Educ., Guidelines on Religious Expression in Public Schools (Aug. 1995, revised in 1998), available at

[http://www2.ocreger.com/newsimages/news/2007/12/doe\\_education\\_religion\\_and\\_schools.pdf](http://www2.ocreger.com/newsimages/news/2007/12/doe_education_religion_and_schools.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008) (upholding restriction on leafleting in school hallways between classes because school officials allowed students to distribute materials during lunchtime and post leaflets on hallway bulletin boards); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (upholding restriction on distributing candy canes with a religious story attached during a holiday party because school officials allowed the student “to distribute the candy canes in the hallway outside the classroom, at recess, or after school as students were boarding buses”), *cert. denied*, 541 U.S. 936 (2004); *J.S. v. Holly Area Schs.*, 749 F. Supp. 2d 614 (E.D. Mich. 2010) (enjoining the enforcement of a ban on all student-to-student religious distribution at a public elementary school); *M.B. v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117 (N.D.N.Y. 2007) (holding that a school violated the First Amendment by refusing to allow a student to distribute religious tracts during non-instructional time).

<sup>7</sup> U.S. Dept. of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003), available at

[http://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

<sup>8</sup> See generally *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding a Maryland law recognizing Good Friday as a public school holiday); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (upholding a practice of some Kentucky state court offices to close on Good Friday); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (upholding a Hawaii law recognizing Good Friday as a public holiday) *amend. by* 91 Cal. Daily Op. Service 6628 (1991); see also *Jock v. Ransom*, 2007 U.S. Dist. LEXIS 47027, \*18 (N.D.N.Y. June 28, 2007) (noting that “Thanksgiving is not religious” but is related “to all persons supportive of this nation or otherwise wishing to recognize the values of the Thanksgiving holiday”), *aff’d by* 2009 U.S. App. LEXIS 6048 (2d Cir. 2009) (unpublished opinion).

<sup>9</sup> *Bridenbaugh’s* analysis supersedes earlier decisions in the Seventh Circuit to the contrary. See *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995) (holding unconstitutional an Illinois law that closed schools for a religious holiday, Good Friday and suggesting that individual Illinois school districts could close schools on Good Friday if supported by a valid secular purpose); *Freedom From Religion Found. v. Thompson*, 920 F. Supp. 969 (W.D. Wisc. 1996) (applying *Metzl* in holding Wisconsin’s recognition of Good Friday unconstitutional).