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MEMORANDUM

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THE CONSTITUTION AND THE CELEBRATION OF CHRISTMAS: DISPELLING THE MYTHS

Introduction

For millions of people in this country, Christmas is the celebration of the single-most important moment in the history of the world: the birth of Jesus Christ. For many of those who do not believe or otherwise acknowledge the profound religious nature of Christmas, it is still a time of joy and gift-giving. The holiday is celebrated in churches, family gatherings, parties, and in the public square. It is a precious time that brings communities together in various ways, through worship services, Christmas tree lightings, parades, and the like.

Unfortunately, during this season, modern day Scrooges and other cranks are keen to claim that the government can have nothing to do with the celebration of Christmas. They argue that because the First Amendment requires the "separation of church and state," the government must treat the holiday as a purely private affair, allowing for no government acknowledgment or participation. These grumblers complain in editorials, school board meetings, letters to public officials, and—yes—lawsuits.

While the law about what the government can and cannot do to recognize the Christmas season can sometimes be murky, due to conflicting opinions from the United States Supreme Court and lower federal courts, there are nonetheless many statements of law that are crystal clear and cannot be denied. Regrettably, many public officials and other people fall prey to believing one of the many pervasive myths that surround the First Amendment and government action during the holidays. It is high time that many of those myths be put to rest.

Myth No. 1: Because the Establishment Clause requires a total Separation of Church and State, the Government can have nothing to do with Christmas.

Though much ink has been spilled over its nature, meaning, and contours, the First Amendment's Establishment Clause can be written on the back of an envelope: "Congress shall

make no law respecting an establishment of religion . . ."[1] Nowhere in this provision of the First Amendment is there anything about a "wall of separation of church and state"; rather, that phrase appeared in Thomas Jefferson's private letter to the Danbury Baptists in 1802.[2]

In fact, as the United States Supreme Court has correctly noted, the Establishment Clause does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[3] Indeed, the Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[4] One federal court of appeals had this to say about Jefferson's metaphor, in a case successfully handled by the ACLJ:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state.[5]

Indeed, as the Supreme Court observed in a case upholding the constitutionality of a government-erected nativity scene: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[6] That unbroken history is seen in Presidential Proclamations, beginning with George Washington, as well as other official announcements of Presidents and the Congress that proclaimed Christmas as a national holiday in religious terms, the motto of the United States ("In God we trust"), the Pledge of Allegiance (which includes "One nation under God"), the invocation that begins sessions of the Supreme Court ("God save the United States and this Honorable Court"), Congressional chaplains, government-funded art galleries that display works of religious art, and so on.[7]

Undoubtedly, "this Nation's history has not been one of an entirely sanitized separation between Church and State," nor has it ever "been thought either possible or desirable to enforce a regime of total separation."[8] In fact, as the Supreme Court observed, the Establishment Clause does not permit the federal courts to "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[9] According the Court, "we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion."[10]

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[1] U.S. Const. amend. I. While the Establishment Clause was, by its very terms, designed to apply only to acts of Congress, it has since been interpreted by the Supreme Court to apply to state and local governments as well. *See Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Justice Clarence Thomas has repeatedly criticized this holding of the Court. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80, and n.3 (2002) (Thomas, J., concurring).

[2] *Jefferson's Letter to the Danbury Baptists*, LIBR. OF CONGRESS (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html.

[3] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

[4] *Everson*, 330 U.S. at 18.

[5] *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 638 (6th Cir. 2005).

[6] *Lynch*, 465 U.S. at 674.

[7] *Id.* at 675–78.

[8] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

[9] *Van Orden v. Perry*, 545 U.S. 677, 684 (2005).

[10] *Id.* at 747 n.3.

Finally, in 2019, the Supreme Court upheld the display of large World War I memorial cross that has stood in Bladensburg, Maryland for close to 100 years.[11] The Court held that the cross passed constitutional muster under the Establishment Clause because of its longstanding, unchallenged history and because of the multiplicity of meanings it conveys. The Court noted that, for many people, "destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."[12] The bottom line is that, if the Establishment Clause mandated a total separation of church and state, the Supreme Court would not have permitted the public display of a large cross no matter how long it has stood.

Despite its pervasiveness, the so-called wall of church-state separation is a mythical construct that crumbles under the weight of history, Supreme Court decisions, and the words of the Establishment Clause itself.

Myth No. 2: Government cannot allow private religious speech celebrating Christmas on public property.

Not long ago, the ACLJ was contacted by a religious group in Pennsylvania that wanted to host a live nativity scene on public property. The group applied for a permit and satisfied all the conditions for obtaining it, but was initially denied for one reason: city officials said that allowing the nativity scene would violate the Establishment Clause. The idea that the government cannot allow private speakers to engage in religious speech on public property is yet another myth that needs dispelling.

The Supreme Court has consistently ruled that the First Amendment does not allow the government to exclude private religious speech from a public forum based on its religious viewpoint. In addition to "traditional public forums" (such as streets, sidewalks, and parks), the right to free speech applies to other public areas that "the state has opened for use by the public as a place for expressive activity" (such as government buildings, community centers, or other publicly owned facilities). In these public areas, the ability of governing authorities "to limit expressive activities [is] sharply circumscribed."[13] State officials may not prohibit speakers from these places on the basis of their religious viewpoint unless they demonstrate a compelling government interest for doing so—a tough standard for the government to satisfy.[14] As the Supreme Court has held, "[t]he principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[15]

The Supreme Court has made it clear that the right to free speech in a public forum protects religious speech as robustly as it protects non-religious speech. It would be "peculiar," the Court has written,

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[11] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).
[12] *Id.* at 2090.
[13] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).
[14] *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).
[15] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993) (internal quotations and citation omitted).

> to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.[16]

In a powerful proclamation upholding the rights of private religious speakers, the Supreme Court wrote:

> It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.[17]

Supreme Court decisions make it clear that when the government suppresses speech in a public forum based on its religious viewpoint, it does *not* act in a neutral manner with respect to religion, but acts with unconstitutional antagonism against it:

> [I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[18]

The practical import of these Supreme Court teachings is clear. If a county government allows groups to give secular speeches on the lawn outside its public offices, it can't prohibit a religious group from giving a presentation about the religious importance of Christmas on that same property. If city officials permit a community center to be used for non-religious holiday celebrations, then it must allow the center to be used for Christmas celebrations too. If local groups are permitted to display banners on public property saying, "Happy Holidays," or "Season's Greetings," then the government must allow others to display, "Jesus is the Reason for the Season."

For example, in *Doe v. Small*, the Seventh Circuit Court of Appeals upheld the free speech right of private citizens to display paintings depicting the life of Christ in a public park.[19] The court

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[16] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763–64 (1995).
[17] *Id*. at 766–67 (internal citations omitted). *See also id*. at 760 ("[O]ur precedent establishes that private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."); *id*. at 760–61 (the First Amendment protects even "religious proselytizing" and "acts of worship.").
[18] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).
[19] 964 F.2d 611 (7th Cir. 1992) (en banc).

held that "the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government."[20] As a concurring opinion in that case succinctly put it:

> Government may not discriminate against private speech in a public forum on account of the speaker's views. The Free Exercise Clause assures speakers whose message is religious no less access to public forums than that afforded speakers whose message is secular or sacrilegious.[21]

During the Christmas season (and throughout the year), the government must permit private religious speech under the same terms and conditions that it permits non-religious speech. The Establishment Clause creates no exception to this rule.

Myth No. 3: Government can never create or maintain Christmas displays on government property.

One of the biggest myths that continues to hold sway over many uninformed individuals, advocacy groups, and public officials is that the government can never create or maintain Christmas displays that include religious items on government property. In *Lynch v. Donnelly*, the Supreme Court upheld the constitutionality of a government-erected nativity display because it was a part of a larger holiday display that included a variety of secular symbols. As the Court pointed out:

> It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.[22]

While *Lynch* does not mean that the government can create any Christmas-related display it chooses to under the Establishment Clause (since the details, purpose, and context always matter), it is wrong to think that government holiday displays must be devoid of any and all religious content.

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[20] *Id*. at 619.
[21] *Id*. at 629 (Easterbrook, J., concurring) (citations omitted).
[22] 465 U.S. at 686 (citation omitted).

Until the Supreme Court decisively puts an end to the much-criticized "*Lemon* test,"[23] at least with respect to evaluating new government displays,[24] public officials contemplating the creation of a government-sponsored Christmas display would be wise, as a general matter, to follow what many have called the "Reindeer Rule."[25] That rule simply requires that a Christmas display not be predominately religious in content and context. A crèche, for example, should be accompanied by a sufficient number of non-religious objects to ensure that the overall display is secular in nature and appearance. For example, in *ACLU v. City of Florissant*, the Eighth Circuit Court of Appeals upheld the constitutionality of a holiday display in a city civic center that contained, among other items, a crèche, candy canes, a Christmas tree, wrapped gifts, a snowman, reindeer, and Santa Claus.[26]

In *ACLU v. Schundler*, the Third Circuit Court of Appeals upheld the constitutionality of a city holiday display depicting, among other things, a nativity scene, a menorah, Christmas trees, Santa Claus, Frosty the Snowman, and signs celebrating the cultural and ethnic heritage of the city's residents.[27] The city owned, maintained, and stored the items in the display, which was located in front of city hall. In that case, Justice Alito wrote that since neither a crèche nor a menorah are "per se unconstitutional . . . it is hard to accept the proposition that the Establishment Clause is violated when these two symbols are displayed together as part of a holiday display that includes secular symbols and is dedicated to the celebration of a municipality's cultural diversity."[28]

In another case, *Doe v. Clawson*, the Sixth Circuit upheld a government Christmas display on a City Hall lawn.[29] The display included figures of the infant Jesus, Mary and Joseph, all in a stable; three kings, various animals, and an angel; lighted trees, with Christmas gift packages underneath; and a large Santa Claus figure and a "Season's Greetings" sign.[30] The court held that because the multiplicity of these holiday items conveyed a "message of pluralism," the Establishment Clause was not violated.[31]

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[23] The *Lemon* test requires (1) a secular purpose; (2) that the principal or primary effect be one that neither advances nor inhibits religion; and (3) that the governmental practice not create an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). That test has been further refined to include the question whether a reasonable observer would believe the display constitutes an endorsement of religion. *Lynch*, 465 U.S. at 687–94 (O'Connor, J., concurring).

[24] While the Supreme Court in *American Legion* made it clear that "lower courts may no longer apply the nebulous *Lemon* factors to overturn religiously expressive monuments, symbols, or practices that were created in the past," the Court "did not state what 'test' will apply to the erection of new monuments." Michael W. McConnell, *No More (Old) Symbol Cases*, CATO INST., https://www.cato.org/publications/supreme-court-review/no-more-old-symbol-cases (last visited Jan. 3, 2020).

[25] The idea that the drafters of the First Amendment envisioned anything like the "Reindeer Rule" is of course absurd, but the state of Establishment Clause doctrine, as many Supreme Court Justices have noted, is confounding. *See, e.g.*, *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.) (observing that "[t]his Court's Establishment Clause jurisprudence is in disarray.").

[26] 186 F.3d 1095 (8th Cir. 1999).

[27] 168 F.3d 92 (3d Cir. 1999) (Alito, J.).

[28] *Id*. at 107–08. Justice Alito wrote the opinion for the Third Circuit prior to his appointment as a Supreme Court Justice in 2006.

[29] 915 F.2d 244 (6th Cir. 1990).

[30] *Id*. at 249.

[31] *Id*.

The constitutionality of a government display that includes overtly religious components, such as a crèche or menorah, turns on a number of various factors, including the content of the display and its context. What is undeniably true, however, is that the Establishment Clause does not forbid the government from celebrating Christmas by incorporating religious symbols into a larger secular display. It is a myth to suggest that the government can *never* create or maintain a Christmas display that includes religious themes or objects, such as a nativity scene that includes Joseph, Mary, and the baby Jesus.

Myth No. 4: A government display of a Christmas tree is an endorsement of religion.

Several years ago, the ACLJ was contacted about a Florida county attorney who ordered that all Christmas trees be removed from county-run libraries, recreation centers, community centers and other public areas. The notion that the Establishment Clause forbids the display of a Christmas tree is a total myth. While the origin of the Christmas tree had a clear religious purpose, its display on public property raises no constitutional concerns. The Supreme Court has *never* said that the government may not display Christmas trees during the holiday season. In fact, the Court has said the opposite:

> The Christmas tree . . . is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. . . . Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and *when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith.*[32]

Nothing in the First Amendment requires that the government erect a wall of separation between itself and the celebration of the Christmas season. Displays of Christmas trees, wreaths, and similar adornments of the holiday season in the public square are entirely in keeping with constitutional commands. These decorations need not be purged from public property under the myth that Christmas is entirely a private affair.

Myth No. 5: The government cannot use the word "Christmas".

Despite the fact that the Supreme Court has never banned the government from recognizing Christmas in various constitutional forms, some misguided public officials don't seem to get the message. The ACLJ was once contacted by a concerned citizen regarding a New York state school district's refusal to use the word "Christmas" when describing "Christmas vacation" on the school calendar. The lawyer for the school district stated she was concerned that the word "Christmas" would be perceived as an endorsement of religion by the school.

The idea that government actors cannot use the word "Christmas" is another myth. Christmas is not just a day for Christians to celebrate the birth of Jesus Christ, it is a nationally recognized holiday—like the Fourth of July or Memorial Day—for all citizens to enjoy no matter

[32] *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 616–17 (1989) (emphasis added).

their religious beliefs. The United States Code specifically identifies "*Christmas day*, December 25" as a federal holiday.[33]

Twenty years ago, an anti-Christmas activist sued the federal government, claiming that this federal law violated the Establishment Clause. In an order dismissing the case, Judge Dlott of the Southern District of Ohio had this to say:

> The Court will address plaintiff's seasonal confusion
> erroneously believing Christmas *merely* a religious intrusion.
> Whatever the reason constitutional or other,
> Christmas *is not* an act of Big Brother!
> Christmas is about joy and giving and sharing,
> it is about the child within us, it is most about caring!
> One is never jailed for not having a tree,
> for not going to church, for not spreading glee!
> The Court will uphold seemingly contradictory causes,
> decreeing "the establishment" *and* "Santa" *both worthwhile "Claus(es)!*"
> We are all better for Santa, the Easter bunny too,
> and maybe the great pumpkin, to name just a few!
> An extra day off is hardly high treason.
> It may be spent as you wish, regardless of reason.
> The Court having read the lessons of "Lynch"
> *refuses* to play the role of the Grinch!
> There is room in this country and in all our hearts too,
> for different convictions and a day off too![34]

In *Koenick v. Felton*,[35] a federal court of appeals *rejected* a legal challenge brought against a public school board for recognizing a public school holiday, pursuant to state law, "[t]he Friday before Easter and from then through the Monday after Easter." The court held that recognizing these days as holidays "is supported by a pragmatic, legitimate, secular purpose, it does not advance or inhibit religion, and it does not result in an excessive entanglement with religion."[36] What the Fourth Circuit held about the Easter holiday applies with equal force to Christmas.[37]

Our society and culture is steeped in religion and religious history, including the customs and practices associated with Christmas. The idea that the Founding Founders desired a religion-free nation, and incorporated such a desire into the First Amendment, is an insupportable myth.

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[33] 5 U.S.C. § 6103(a) (1966) (emphasis added).
[34] *Ganulin v. United States*, 71 F. Supp. 2d 824, 825–26 (S.D. Ohio 1999).
[35] 190 F.3d 259 (4th Cir. 1999).
[36] *Id*. at 268–69.
[37] The result in *Koenick* was similar in effect to decisions from three other federal courts of appeal: *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999) (holding that recognition of Good Friday as a legal holiday did not violate Establishment Clause); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (holding that the closing of county and state courts and offices on Good Friday did not violate the Establishment Clause); *Cammack v. Waihee*, 932 F.2d 765, 780 (9th Cir. 1991) (holding that "the mere calendar recognition of a holiday [Good Friday] would [not] have the effect of endorsing the religion").

Myth No. 6: Public schools can never allow the singing of Christmas carols.

Unfortunately, many Christmas cranks think that public schools must keep an arm's length away from anything to do with Christmas. That is another myth. While the Supreme Court has banned officially sanctioned prayer in school, it has not ruled that public schools must be religious-free zones, including with respect to Christmas. As one court has explained:

> 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.[38]

For instance, the Establishment Clause does not prevent the singing of Christmas carols with religious origins by public school choirs. Of course, any student that has ideological or religious objections to participating in a particular performance should be excused from doing so, but a public school is not constitutionally obligated to ban the presentation of religiously-themed music at school-sponsored events when there is a secular reason for including such music.

In *Florey v. Sioux Falls School District*, the Eighth Circuit Court of Appeals 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."[39] The court concluded that religious songs and symbols can be used in public school programs if they are presented in a "prudent and objective manner and only as part of the cultural and religious heritage of the holiday."[40]

The decision in *Florey* was based upon Supreme Court cases that permit the academic, objective study of the Bible in public schools. For example, in *School District of Abington Township v. Schempp*, the 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.[41]

Also, in *Stone v. Graham*, the Supreme Court stated that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[42] In considering the type of activities that are appropriate in public schools, the court in *Florey*

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[38] *Clever v. Cherry Hill Twp.*, 838 F. Supp. 929, 939 (D.N.J. 1993) (upholding a school policy that provided for religious symbols to be used in school calendars and in a Christmas display).
[39] 619 F.2d 1311, 1314 (8th Cir. 1980).
[40] *Id*. at 1317.
[41] 374 U.S. 203, 225 (1963).
[42] 449 U.S. 39, 42 (1980).

stated, "We view the term 'study' to include more than mere classroom instruction; public performance may be a legitimate part of secular study. . . . [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."[43]

Similarly, in *Doe v. Duncanville Independent School District*, the United States Court of Appeals for the Fifth Circuit upheld a school's longtime use of "The Lord Bless You and Keep You" as its theme song.[44] 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.[45]

Additionally, in *Bauchman v. West High School*, a student sued the school due to the religious content of the songs performed by the school choir.[46] 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."[47] 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."[48] It is hardly surprising, then, that "the Constitution does not forbid all mention of religion in public schools."[49]

Most recently, in *Freedom from Religion Foundation v. Concord Community Schools*, the Seventh Circuit held that a public school's "Christmas Spectacular" passed constitutional muster under the Establishment Clause after the school district removed some—*but not all*—of its religious content.[50] The court noted that "[t]he religious nature of the nativity and the [religious] songs do not come off as endorsement in part because they make up only a fraction of the Spectacular."[51]

In sum, so long as a public school Christmas presentation does not celebrate the religious nature of the holiday to the exclusion of other religious traditions and the plentiful (and laudable) secular aspects of the holiday, the Establishment Clause (at least as it is presently interpreted) is not violated. While, as previously explained, context and detail always matter when it comes to what the government can and cannot do with respect to acknowledging Christmas, one thing is

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[43] 619 F.2d at 1316.
[44] 70 F.3d 402 (5th Cir. 1995).
[45] *Id*. at 408.
[46] 132 F.3d 542 (10th Cir. 1997).
[47] *Id*. at 553.
[48] *Id*. at 554 (citations omitted).
[49] *Id*. at 555.
[50] 885 F.3d 1038 (7th Cir. 2018).
[51] *Id*. at 1047.

clear: the Constitution does not require that public schools purge *all* references to the religious origins and aspects of the Christmas season.

Myth No. 7: Students may not share the story of Christmas in public schools.

Because of the unfounded fear that many school officials have about religious viewpoints being expressed in the public schools, students have, time and time again, been improperly instructed to keep Christmas at home. In a case out of Massachusetts, students were suspended by school officials for distributing religious messages attached to candy canes.[52] The students sued in federal court for the violation of their First Amendment rights. The court rejected the school's argument that it could suppress the students' distribution of religious material pursuant to the Establishment Clause:

> Because the candy cane distributions are private expressive activities, the school has no basis for arguing that, by allowing the candy cane distribution, it is affirmatively promoting religion in violation of the Establishment Clause. At the heart of the school's argument lies a widely held misconception of constitutional law that has infected our sometimes politically overcorrect society: The Establishment Clause does not apply to private action; it applies only to government action. Because the LIFE Club's activities are private, school-tolerated (rather than school-sponsored) expressive activities, the Establishment Clause only works against the defendants.[53]

In the end, the court barred school officials from "[p]rohibiting the student plaintiffs and the Club from distributing literature to fellow students during non-instructional time based on the content of the literature unless the school reasonably forecasts that the distribution will substantially disrupt or materially interfere with the operation of the school."[54]

While public schools are free to establish reasonable time, place, manner restrictions on student distribution of literature, federal courts have consistently held that school officials may not suppress the distribution of student-sponsored literature based *solely* on its religious content or viewpoint. As the Seventh Circuit Court of Appeals forcefully put it:

> The [F]irst [A]mendment's ban on discriminating against religious speech does not depend on whether the school is a 'public forum' and, if so, what kind . . . . Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint . . . . [e]specially not on account

[52] *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).
[53] *Id*. at 120 (emphasis supplied) (citing *Rivera v. East Otero Sch. Dist*., 721 F. Supp. 1189, 1195 (D. Colo. 1989) (finding that students' distribution of a non-student, religious newspaper was private expressive action which implicated no Establishment Clause concerns); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575, 580 (M.D. Fla. 1994) ("[R]ather than preventing violation of the Establishment Clause, the [school] policy itself violates that clause.") (internal citations omitted).
[54] *Westfield High Sch. L.I.F.E.* Club, 249 F. Supp. 2d at 129.

> of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.[55]

Moreover, it is critical to note that a school's fear of an Establishment Clause violation is not a valid reason for quashing student-sponsored religious speech. As the Seventh Circuit also noted, "The Supreme Court has . . . rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech."[56]

In sum, when students are the ones initiating and delivering religious speech about the meaning of Christmas on public school grounds, the Establishment Clause does not even come into play. The First Amendment only sets limits on the actions of the government and public officials, not private speakers, such as students. Any idea that public schools need to keep students from expressing their religious convictions about Christmas based on the Establishment Clause is pure myth.

Conclusion

Much confusion surrounds what the government can and cannot do consistent with the First Amendment's Establishment Clause. Unfortunately, much of that confusion can be traced to confounding and inconsistent decisions of the Supreme Court, as many Supreme Court Justices have themselves recognized. Nonetheless, with respect to government recognition and acknowledgement of Christmas, there are certain constitutional truths that cannot be seriously disputed.

It is our hope that the various myths dispelled in this paper help to clarify the ability of local governments to create constitutionally permissible holiday displays and the right of private citizens to celebrate Christmas without governmental interference. Please feel free to share this memorandum with public officials or members of your community.

DISCLAIMER

The legal summary presented in this paper is an overview of the law as of the date it was written and is for educational purposes only. It may become outdated and may not represent the current state of the law. Reading this material DOES NOT create an attorney-client relationship between you and the American Center for Law and Justice, and this material should NOT be taken as legal advice. You should not take any action based on the educational materials provided on this website, but should consult with an attorney if you have a legal question.

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[55] *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (internal citations omitted). *See also Muller by Muller v. Jefferson Lighthouse Sch*., 98 F.3d 1530, 1543–44 (7th Cir. 1996) ("Banning religious expression, 'which the Free Exercise Clause of the First Amendment singles out for protection,' solely because it is religious is per se unreasonable.").

[56] *Muller by Muller*, 98 F.3d at 1544 (citing *Widmar v. Vincent*, 454 U.S. 263, 271–73 (1981); *Mergens*, 496 U.S. at 247–52 (plurality opinion); *Lamb's Chapel*, 508 U.S. at 384).