ACLJ
American Center for Law & Justice

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VIA OVERNIGHT DELIVERY SERVICE
AND VIA FACSIMILE

Colonel Dwight C. Sones
Commander, 60th Air Mobility Wing
400 Brennan Circle,
Travis AFB, CA 94535

Dear Colonel Sones:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued numerous free speech and religious freedom cases before the Supreme Court of the United States.[1]

It has come to our attention that you recently received a letter from the Jones Day law firm representing the Military Religious Freedom Foundation (MRFF), which criticizes a base holiday display, singling out the Nativity scene and the Menorah as unconstitutional. We believe that the Jones Day legal analysis is incomplete and inaccurate. The purpose of this informational letter is to provide an overview of the law concerning the validity of private and government-sponsored holiday displays on public property to aid in your review of this matter and to demonstrate that the Travis AFB display at issue is lawful.

According to our information, there are more than fifteen secular holiday displays on the base in the vicinity of the Nativity scene and the Menorah. If true, then you have the right to

[1] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); McConnell v. FEC, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); 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).

display the Nativity scene and the Menorah, since they are part of a larger holiday display, which includes secular holiday decorations.

I. Government-Sponsored Religious Displays are Not Unconstitutional so Long as the Religious Elements of the Display Are Part of a Larger Holiday Expression.

The Supreme Court of the United States has upheld the constitutionality of government holiday displays that include religious components. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld the constitutionality of a display that included a government erected crèche because it was a part of a larger holiday display in which there was a variety of secular symbols. The Supreme Court further recognized that Christmas is a National Holiday observed "in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries." *Id.* at 686. As Justice O'Connor explained, "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." *Id.* at 691 (O'Connor, J., concurring).

The Court held that the inclusion of the crèche as part of a holiday display did not violate the three-prong Lemon Test. Specifically, under the "primary effect" prong, the Court held that "display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id*. at 683.

In examining these types of displays, courts generally hold that so long as the religious elements of the display are part of a larger holiday expression—with Christmas trees, Santa Claus, or the like—such that the primary effect of the entire display is secular, the display is constitutional. *See Salazar v. Buono*, 130 S. Ct. 1803, 1817-20 (2010) (plurality opinion) (noting importance of context and purpose of public displays and reiterating that "goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm"); *see also McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005) (conducting similar purpose and effect analysis of entire display in Ten Commandments cases).

II. In Some Instances, Religious Displays May be Prohibited on Public Property.

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Supreme Court clarified the law regarding holiday displays with religious content, holding that *the context of the display is key*. In *Allegheny,* the Court examined two holiday displays inside a government office building: 1) a crèche bearing a banner that proclaimed "Glory to God in the highest," standing alone on the Grand Staircase of the county courthouse; and 2) a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building, which included a Christmas tree and a sign saluting liberty. *Id.* at 598.

The Court held that the crèche display violated the Establishment Clause, but that the menorah and Christmas tree display did not. *Id.* at 600. In applying Justice O'Connor's endorsement test, the Court focused on content and context, examining the physical setting of the displays. "The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 597. The appropriate standard for judging the context of the display was what a reasonable observer would think. *Id.*

Applying this standard to the crèche, the Court determined that "it sends an unmistakable religious message." *Id.* at 598. "The crèche stands alone" such that "nothing in the context of the display detracts from the crèche's religious message." *Id.* The crèche's location on the Grand Staircase, the main and most beautiful part of the building, was also problematic since "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.*

By contrast, the Court held that the menorah was constitutional because the accompanying Christmas tree and the sign saluting liberty neutralized the religious dimension of the menorah display and emphasized its secular dimensions. *Id.* at 616-19. Justice Blackmun, the only Justice who dissented in *Lynch*, agreed that the inclusion of a menorah in a holiday display did not endorse Judaism and acknowledged that the Christmas holiday had attained a sort of "secular status" in our society. 492 U.S. at 616.

Thus, *Lynch* and *County of Allegheny* do not support the proposition that governments must exclude religious symbols from general holiday displays. Exclusion of a religious symbol is only required by the Establishment Clause if the religious symbol is not part of a larger holiday display containing other holiday symbols. Therefore, *Lynch* and *County of Allegheny* establish that context is the linchpin when evaluating the constitutionality of religious symbols on government property. In other words, religious symbols that might, standing alone, raise Establishment Clause concerns, are permissible when presented in the context of a broader, holiday display, which includes secular symbols like Christmas trees and Santa with his reindeer.

III. The Establishment Clause Does Not Forbid All Private Religious Displays on Government Property.

If any of the displays complained about by MRFF's law firm were privately erected, the following principles apply. The government allows private individuals or groups to display holiday themed items on public property. The Supreme Court of the United States has identified three types of public property for First Amendment expressive purposes: the traditional public forum, the open or designated public forum, and the non-public forum. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). Certain government properties are presumed to be traditional public fora (streets, sidewalks, and parks). *See United States v. Grace*, 461 U.S. 171, 177 (1983). As the Supreme Court has stated, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and

discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). While the First Amendment does not require the government to allow privately-owned permanent or seasonal displays in public parks, *see Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), the government must act in a viewpoint-neutral manner if it chooses to do so.

In addition to streets, sidewalks, and parks, other areas that "the state has opened for use by the public as a place for expressive activity" may be considered "open or designated" public fora. Whether the property in question is considered a traditional public forum (*e.g.*, street, sidewalk, park, or plaza) or a designated public forum (*e.g.*, a government building, community center or other state-owned facility), the ability of governing authorities "to limit expressive activities [is] sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45. State officials may not prohibit religious speakers from these places on the basis of viewpoint unless they demonstrate a compelling government interest for doing so. *Carey v. Brown*, 447 U.S. 455, 461, 464 (1980). As the Court held in *Lamb's Chapel*, "[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.'" 508 U.S. at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Hence, were Travis AFB to allow secular holiday displays but exclude displays with religious symbols, it would unconstitutionally disfavor religion to the benefit of non-religion.

The Supreme Court has consistently ruled that the Establishment Clause does not require a state entity to exclude private religious speech from a public forum. It is, in fact,

> peculiar 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.

Pinette, 515 U.S. at 763-64.

In one of the most powerful proclamations upholding the rights of private religious speakers in a public forum, the Supreme Court stated:

> The contrary view . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . 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.

Id. at 766-67 (internal citations omitted).

Moreover, in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), the Supreme Court noted a key distinction in this regard: "there 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. In fact, the Supreme Court has stated that a policy of excluding private religious speakers from public places where other speakers are permitted is unconstitutional:

> Indeed, the message is one of neutrality rather than endorsement; if 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."

Id. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)).

IV. The First Amendment Protects the Right of Citizens, Civic Groups, and Churches to Erect Religious-Themed Holiday Displays in Public Areas Where Private Non-Religious Holiday Displays are Permitted.

The Constitution protects the right of private citizens to engage in religious speech in a public forum. In *Pinette,* the Supreme Court held that a private group could erect a cross in a public park during the holiday season. *Pinette*, 515 U.S. at 770. The Court noted:

> Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is 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.

Id. at 760 (internal citations omitted). Key factors in the Court's decision were: 1) the public park in question had historically been open to the public for a variety of expressive activities; 2) the group erecting the cross had requested permission through the same application process and on the same terms required of other private groups; and 3) the group planned to accompany the cross with a sign disclaiming any government sponsorship or endorsement. *Id*. at 763; *id*. at 782 (O'Connor, J., concurring); *id*. at 784 (Souter, J., concurring).

In addition, the *County of Allegheny* and *Lynch* cases establish that religious displays on government property that is not a public forum may nevertheless be constitutional if they are accompanied by other secular symbols relating to the holiday. For example, the holiday display upheld in *Lynch* contained a crèche, as well as a Santa Claus house, reindeer, candy canes, a Christmas tree, carolers, and toys. 465 U.S. at 671. The display upheld in *County of Allegheny* contained a menorah and a Christmas tree. 492 U.S. at 582.

Thus, *Pinette*, *Lynch*, and *County of Allegheny* teach that private citizens may erect religious displays on public property if: 1) the property is a public forum in which the government has permitted a wide variety of expressive conduct (at least where there is a sign informing the public that the display is sponsored by private citizens and the government is not endorsing its message); or 2) the display is accompanied by a variety of secular holiday symbols such that the overall message of the display is not exclusively or primarily religious.

VI. CONCLUSION

This foregoing information is intended to help you understand the full extent of the current law governing holiday displays. Assuming our information is correct that the crèche and the Menorah are displayed in the vicinity of more than fifteen secular holiday displays, such as a Christmas tree, such a display passes constitutional muster and is not in violation of the First Amendment's Establishment Clause. If our assumption is true, then Jones Day's legal analysis challenging the constitutionality of the display is incorrect. Furthermore, if any of the holiday displays complained about were erected by private individuals, you must allow religious displays on the same basis as you allow secular displays in order to avoid singling out religion for special detriment, which would indeed violate the Establishment Clause of the First Amendment.

Please feel free to contact us if you have further questions about this area of law.

Sincerely yours,

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