ACLJ
American Center for Law & Justice

December 9, 2011

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For City of Athens
214 East College Street
Athens, Texas 75751

Re: Holiday Display in Front of the Henderson County Courthouse

Dear Mr. Bateman:

The American Center for Law and Justice (ACLJ) has been contacted by numerous people who support keeping the nativity scene in front of the Henderson County Courthouse in Athens. 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.

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.[1]

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

In many instances, 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.*

[1] *See, e.g., Pleasant Grove v. Summum*, 129 S. Ct. 1125 (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).

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)).

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.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-64 (1995).

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 *Mergens*, 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)).

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court addressed the constitutionality of a government-erected crèche. Significantly, the *Lynch* Court upheld the constitutionality of the holiday display in that case because the crèche was a part of a larger holiday display in which there were a variety of secular symbols.

Courts generally examine several aspects of a display to determine whether a government-sponsored display violates the Constitution. 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 generally Salazar v. Buono*, 130 S. Ct. 1803, 1817-20 (2010) (plurality opinion) (noting the importance of context and purpose when items with religious significance are displayed on public land, and reiterating that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm"). This particular area of the law is finely nuanced, and various federal circuits have examined different aspects of displays to determine their constitutionality, as discussed later in this letter. At present, the Supreme Court has offered little clarification of the principles it espoused in *Lynch*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Pinette*.

II. The Display of Christmas Trees is Not an Endorsement of Religion.

The Supreme Court has not said that the government may not display Christmas trees during the Christmas holiday season. In fact, the Court has said the opposite:

> The Christmas tree, unlike the menorah, 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.*

County of Allegheny, 492 U.S. at 616-17 (emphasis added) (internal citation omitted).

Moreover, in *Lynch v. Donnelly*, the Supreme Court 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." 465 U.S. 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).

III. In Some Instances, Private Citizens May Be Prohibited From Erecting Religious Holiday Displays on Public Property.

In *County of Allegheny*, private citizens erected a crèche inside a government office building. The situs of the crèche was not traditionally open to a variety of speakers, and the Supreme Court specifically noted that a public forum was not involved. This display was held unconstitutional because the private speaker's message was communicated in an area that the government closely controlled, thus increasing the impression of government sponsorship of the speech at issue. Because the display focused on Christian elements of Christmas (depicting only a crèche), the display unconstitutionally entangled the government with religion.

In *Pinette*, however, the Supreme Court distinguished *County of Allegheny* by noting that the crèche in that case was not located in a public forum. If the location in question had been "available to all on the same terms, 'the presence of the crèche in that location for over six weeks would then *not* serve to associate the government with the crèche.'" *Pinette*, 515 U.S. at 764 (quoting *County of Allegheny*, 492 U.S. at 599-600 n.50). Thus, *Lynch* and *County of Allegheny* do not support the proposition that public officials must exclude private religious speech from a public forum. Any resort to these cases to justify prohibiting private citizens from erecting religious holiday displays in traditional or open public fora is erroneous.

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. As mentioned above, 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.

The Ten Commandments cases decided by the Supreme Court in 2005 reaffirmed that holiday displays similar to the one in *Lynch* are constitutional. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court upheld a display of monuments and historical markers near the Texas State Capitol which included the Ten Commandments. The *Van Orden* plurality discussed *Lynch* at several points and reiterated the *Lynch* Court's statement that "[t]here 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." *Id.* at 686 (Rehnquist, C.J., plurality) (quoting *Lynch*, 465 U.S. at 674); *see also id.* at 689-90. Justice Breyer's concurring opinion emphasized that the context of a Ten Commandments display largely determines whether it is constitutional, and Justice Souter's dissent compared the Ten Commandments display to the holiday display that the Court struck down in *County of Allegheny* and argued that the display in *Lynch* had a more secular context. *Id.* at 700-02 (Breyer, J., concurring); *id.* at 738-97 (Souter, J., dissenting).

In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court declared a courthouse display of historical documents which included the Ten Commandments unconstitutional. The Court analyzed the purpose, context, and history of the display, noting that it began as the Ten Commandments standing alone. *Id.* at 681-68. The Court distinguished its holiday display cases by stating that "[c]rèches placed with holiday symbols . . . do not insistently call for religious action on the part of citizens; the history of posting the Commandments expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." *Id.* at 877 n.24. Justice Scalia's dissent argued that "[t]he acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage . . . seems to be on par with the inclusion of a crèche or a menorah in a 'Holiday' display that incorporates other secular

symbols." *Id.* at 905 (Scalia, J., dissenting). He argued that *Lynch* and *Marsh v. Chambers*, 463 U.S. 783 (1983), "ought to decide this case." *Id.*

The following is a summary of additional relevant decisions from various federal and state courts around the country.

A. Court of Appeals for the First Circuit – governing Maine, New Hampshire, Vermont, and Rhode Island.

In *Knights of Columbus v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001), the First Circuit held that a government may place content-neutral restrictions on the time, place, and manner of speech in public fora as long as the restrictions are narrowly tailored to achieve a significant governmental interest and allow the public ample alternative avenues of communication. The court upheld a city policy forbidding all "unattended displays" on public property over the plaintiff's objection that the policy violated individual free speech rights. Thus, in some circumstances, the government may deny all private citizens access to a forum for purposes of unattended displays as long as the restriction is reasonable and not based on the content of the citizens' speech.

In *Osediacz v. City of Cranston*, 344 F. Supp. 2d 799 (D.R.I. 2004), the district court rejected an Establishment Clause challenge to a holiday display on the front lawn of City Hall. The display included a lighted Christmas tree, a menorah with a "Chabad wishes you a Happy Chanukah" sign, a nativity scene, an angel, snowmen, Santa Claus, pink flamingos with Santa hats, and a "Happy Holidays from the Teamsters Union" sign. There was also a disclaimer near the display. *See also Osediacz v. City of Cranston*, 414 F.3d 136 (1st Cir. 2005) (dismissing plaintiffs' free speech claim for a lack of standing and noting that plaintiff did not appeal the district court's grant of summary judgment on the Establishment Clause claim); *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998) (holding that a holiday display on the Town Hall's lawn containing a nativity scene, a Christmas tree, and Santa Claus violated the Establishment Clause because it lacked sufficient secular content).

B. Court of Appeals for the Second Circuit – governing Connecticut, New York and Vermont.

Before *Pinette* was decided, the Second Circuit twice held that holiday displays on public property containing religious symbols violated the Establishment Clause. *See Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991) (refusing to require a city to include a menorah in its holiday display at city hall because doing so would violate the Establishment Clause); *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989) (holding that an unattended menorah display violated the Establishment Clause). *But see McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court as Bd. of Trs. v. McCreary*, 471 U.S. 83 (1985) (applying *Lynch* in holding that a crèche display in a public park with an appropriate disclaimer would not violate the Establishment Clause). In *Pinette*, however, the Court cited these two Second Circuit decisions, as well as a Fourth Circuit case, to state that its decision would resolve the split in the federal appellate courts on the issue of holiday religious displays. Thus, both *Chabad-Lubavitch* and *Burlington* have been superseded by the Supreme Court's decision in *Pinette*.

After *Pinette*, the Second Circuit upheld the constitutionality of a city holiday display that included a crèche, menorah and Christmas tree. *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997). Wreaths and lighting adorned nearby city lamps and buildings, and the city owned the contents of the display and paid for its setup and illumination throughout the holiday season. The display was located in a public park, and a sign posted near the menorah stated that a private group sponsored the display. The Second Circuit noted that the display was similar in content to the displays upheld in *Lynch* and *County of Allegheny*. In 2006, the court also upheld a public school policy that 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. *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006).

The district and state courts in the Second Circuit have also decided several cases involving holiday displays. *See Ritell v. Village of Briarcliff*, 466 F. Supp. 2d 514 (S.D.N.Y. 2006) (prohibiting the display of a menorah in a city park without any other holiday displays; the Village's prohibition of all unattended private displays was lawful, but once it displayed a menorah, it had to include some other displays such as the plaintiff's crèche); *Spohn v. West*, 2000 U.S. Dist. LEXIS 14290 (S.D.N.Y. 2000) (upholding a holiday display in a government medical center which included "Happy Hanukkah" signs, menorahs, toy soldiers, Christmas trees, Santa Clauses, posters celebrating Kwanzaa, and signs mentioning Muslim prayer services; the court noted that the addition of a nativity scene was not constitutionally required); *Mehdi v. U.S.P.S.*, 988 F. Supp. 721 (S.D.N.Y. 1997) (holding that post offices may be decorated with Christmas trees and menorahs without also displaying the Muslim Crescent and Star since post offices are typically nonpublic fora); *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993) (holding unconstitutional a city resolution that prohibited fixed outdoor displays of religious or political symbols such as menorahs in city parks); *Chabad of Mid-Hudson Valley v. City of Poughkeepsie*, 907 N.Y.S.2d 286 (App. Div. 2010) (upholding the display of a privately owned menorah on a public sidewalk in a downtown area that was in the vicinity of white lights, garland, and wreaths, but prohibiting the use of public funds, labor, or equipment for the nightly menorah lighting).

C. Court of Appeals for the Third Circuit – governing Pennsylvania, New Jersey, and Delaware.

The Third Circuit, in *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), upheld the constitutionality of a city holiday display depicting, among other things, a crèche, a menorah, Christmas trees, Santa Claus, Frosty the Snowman, a sled, Kwanzaa candles, and two signs celebrating the cultural and ethnic heritage of the city's residents. The city owned, maintained, and stored the items in the display, which was located in front of city hall. Using *Lynch* and *County of Allegheny* for the basic legal principles involved, the court lamented the conundrum of discerning what type of display passes constitutional muster. The court asked: Within what distance must each display element be from another element? What effect does the size of each element have on the constitutionality of the overall approach? In other words, "how many candy canes offset one Jesus?" The court upheld the display because it was similar in many respects to the display upheld in *County of Allegheny*.

In *Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 2000), the district court applied *Schundler*, *Lynch*, and *County of Allegheny* in upholding a school's holiday

display and song program which included various references to Christmas, Chanukah, and Kwanzaa. The court noted that public officials have some latitude in designing permissible holiday displays, adding that a plaintiff displeased with a display is "not entitled to a display of his choosing."

D. Court of Appeals for the Fourth Circuit – governing Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

In *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), the Fourth Circuit held that the Establishment Clause banned a local chapter of the Jaycees from erecting a crèche in a public forum. However, *Smith* predates and cannot be reconciled with *Pinette*. As noted previously, the *Pinette* Court cited *Smith*, as well as two Second Circuit decisions, indicating that its decision would resolve the split among federal appellate courts on the question of private religious displays in public fora. Thus, regarding the constitutionality of private religious displays in public fora, *Smith* has been superseded by the Supreme Court's decision in *Pinette*.

E. Court of Appeals for the Fifth Circuit – governing Texas, Louisiana, and Mississippi.

We are not aware of any Fifth Circuit court opinions applying the Supreme Court's guidelines to religious holiday displays on public property.

F. Court of Appeals for the Sixth Circuit – governing Kentucky, Ohio, Michigan, and Tennessee.

In *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992), the Sixth Circuit held that a privately funded menorah display erected during Chanukah in a traditional public forum did not violate the Establishment Clause. Grand Rapids had no role in funding, housing, or erecting the statue—the city merely granted a permit for the display. While this was the only holiday display erected in the area, this was simply because the city had not created its own display and no other organization had requested a permit to erect its own private display. In addition to a "Happy Chanukah" sign, the private organization displayed a sign stating that the city did not endorse the contents of the display.

The Sixth Circuit discussed the constitutionality of the display:

> What the members of Chabad House seek in this court is fully consistent with, and does not violate, our traditional division between church and state. . . . They merely ask that they not be spurned because they choose to praise God. Instead of forcing them to remain on our sidelines, our Constitution offers them a platform from which to proclaim their message. In a traditional public forum, as at the ballot box, all citizens are insiders as they seek to influence our civic life.

Id. at 1554. The court concluded that the government permit was not an endorsement of any particular message, and that the disclaimer of city endorsement was "not necessarily required." The court added that the presence of a disclaimer and the location of a display are just some of the many factors to be considered in cases of this type.

The Sixth Circuit has considered the constitutionality of holiday religious displays on several other occasions. *See Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004) (holding unconstitutional a city ordinance that prohibited the display of privately owned structures at a public square during the holiday season because the area was traditionally open to the public for expression and the city's purpose was to prohibit unpopular content from being expressed); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993) (noting that religious symbols can be part of a constitutional holiday display and holding that a city cannot use its ability to regulate the time, place, and manner of expression to effectively exclude unpopular viewpoints from a public forum); *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990) (upholding a holiday display on the front lawn of a city hall which included a nativity scene, Santa Claus, a Noel sign, Christmas trees, gift packages, a "Season's Greetings" sign, lights, and candles).

The Sixth Circuit's holding in *Americans United* was subsequently applied in *Jocham v. Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003), where the district court upheld a holiday display that appeared every year outside the Tuscola County Courthouse and included a privately owned nativity scene, toy soldiers, wreaths, a "Seasons Greetings" message, and pine garlands. *See also ACLU of Kentucky v. Grayson County*, 591 F.3d 837, 854 (6th Cir. 2010) (citing *Lynch* and *County of Allegheny* concerning the importance of context in a case involving a Ten Commandments display); *Satawa v. Bd. of County Road Comm'rs*, 687 F. Supp. 2d 682 (E.D. Mich. 2009) (holding that the government's denial of a request to place a Nativity display in the median of a public roadway—where the display had been placed for many years previously—was justified by an interest in traffic safety and avoiding an Establishment Clause violation); *Doe v. Wilson County Sch. Sys.*, 564 F. Supp. 2d 766, 799-801 (M.D. Tenn. 2008) (upholding the "inclusion of a brief two minute nativity scene at the end of a twenty-two minute Christmas program" that featured numerous secular aspects such as a ballerina, toy doll, toy soldier, Santa Claus, jack-in-the-box, teddy bear, and reindeer).

G. Court of Appeals for the Seventh Circuit – governing Illinois, Indiana, and Wisconsin.

In *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992), the Seventh Circuit upheld the right of private citizens to display paintings depicting the life of Christ in a public park. The *Doe* court rejected the argument that the exhibition had been "poisoned" because at one point the government owned and sponsored the exhibition. The court held that the city had properly relinquished ownership of the paintings to a private group and that such relinquishment cured any government endorsement of religion that resulted from the city's ownership.

In *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995), the Seventh Circuit reversed a district court decision that refused to allow a religious group to display a menorah in a government building. The court held that the building was a non-public forum. Even so, because various other groups were permitted to place displays in the building, the court held that the denial of the religious display was unconstitutional viewpoint discrimination. The court further stated that the "religious holiday" was correctly characterized as a "subject" for purposes of the forum analysis and that the religious display must be included along with the various other viewpoints.

The court in *Grossbaum* distinguished the facts of that case from a previous ruling that affirmed a locality's right to prohibit all private displays. *Id.* at 592 n.12; *cf. Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287 (7th Cir. 1996) (holding that the government may prohibit all private displays inside government buildings). Although *County of Allegheny* allows the government to permit private individuals to erect religious displays, the Seventh Circuit explained that the law does not *require* localities to permit such displays because "[t]he City could use its own property to send a non-religious holiday message without opening its property to messages by others." 63 F.3d at 592 n.12. However, the facts of *Grossbaum* were different; the *Grossbaum* decision affirmed that viewpoint discrimination is not permissible, even in a non-public forum.[2]

H. Court of Appeals for the Eighth Circuit – governing Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Missouri, and Arkansas.

The Eighth Circuit, in *ACLU v. City of Florissant*, 186 F.3d 1095 (8th Cir. 1999), upheld the constitutionality of a holiday display that contained, among other things, a crèche, candy canes, a Christmas tree, wrapped gifts, a snowman, reindeer, and Santa Claus. The display was located at the city civic center. Based on *County of Allegheny*, the court was firmly convinced that the display was constitutional.

In addition, in *Arkansas Society of Freethinkers v. Daniels*, 2009 U.S. Dist. LEXIS 116982 (E.D. Ark. 2009), a judge issued a preliminary injunction requiring the Arkansas Secretary of State to permit an atheist organization to place a temporary Winter Solstice display near a private nativity display on the state Capitol grounds. The government had enacted a policy governing the placement of private displays on Capitol grounds that created a designated public forum for private speech, and the denial of approval for the Winter Solstice display based on its theme and tone was an impermissible content-based restriction.

I. Court of Appeals for the Ninth Circuit – governing California, Arizona, Nevada, Oregon, Idaho, Washington, Montana, Hawaii, and Alaska.

In *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), the Ninth Circuit upheld a city's issuance of a permit granting a private group's annual request for use of a pavilion in a public park for a biblical display during the holiday season. In affirming the free speech rights of private citizens, the *Kreisner* court held: "the Committee [seeking to erect the display], like other citizens of diverse views, has a right to express its views publicly in areas traditionally held open for all manner of speech. Tolerance of religious speech in an open forum does not confer any imprimatur of state approval on religious sects or practices." *Id.* at 785 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

The Ninth Circuit has also noted that localities cannot utilize public holiday displays to promote one religion to the exclusion of all others. *See Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (holding unconstitutional a city's policy of allowing a private stand-

[2] *See also Freedom From Religion Found. v. Manitowoc County*, 708 F. Supp. 2d 773 (E.D. Wisc. 2010) (dismissing as moot an Establishment Clause challenge to a County's practice of permitting a Nativity scene on a courthouse lawn in light of a new policy creating a forum for private displays during the holiday season).

alone menorah display in a public park every year while denying other groups' requests to build a winter solstice or Latin cross display); *see also Curley v. Arpaio*, No. CV 09-0217-PHX-GMS (DKD), 2010 U.S. Dist. LEXIS 199 (D. Ariz. Jan. 4, 2010) (noting in the prison context that the playing of holiday music for a secular purpose is permissible).

J. Court of Appeals for the Tenth Circuit – governing Utah, Wyoming, Colorado, Kansas, Oklahoma, and New Mexico.

The Tenth Circuit, in *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), upheld the constitutionality of a Denver display on public property that included, among other things, a crèche, tin soldiers, Christmas trees, snowmen, reindeer, and Santa Claus. The city owned the display, but corporate sponsors provided some funding. A private citizen demanded the right to display her "winter solstice" sign as part of the city's exhibit, but the court upheld Denver's authority as a government speaker to determine the content of its holiday display. *See also Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010) (applying *Lynch* and *County of Allegheny* in considering the legality of highway memorial crosses on public land).[3]

K. Court of Appeals for the Eleventh Circuit – governing Alabama, Florida, and Georgia.

In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993), the Eleventh Circuit upheld the right of a religious group to erect a religious display in a public forum within a government building during a religious holiday. The court relied heavily on the principle established in several cases that the Establishment Clause does not present a barrier to religious persons seeking equal access to public properties on the same basis as other groups in the community. The court in *Miller* explained that,

> because the religious speech is communicated in a true public forum . . . the state, by definition, neither endorses nor disapproves of the speech. By permitting religious speech in a public forum—whether in the heart of a core government building, in the Georgia Governor's mansion, or in the outer reaches of some state-owned pasture—the state simply does not endorse, but rather acts in a strictly neutral manner toward, private speech.

Id. at 1393.[4]

In *Snowden v. Town of Bay Harbor Islands,* 358 F. Supp. 2d 1178 (S.D. Fla. 2004),[5] the district court issued a preliminary injunction requiring a town to allow the plaintiff to include a nativity scene in an already existing holiday display on public property comprised of a Christmas tree, menorah, and decorative sailboats. The court stated that the display was unconstitutional in its original form—when it included only a menorah and sailboats—and that the later addition of a Christmas tree made the display constitutional. *See also Calvary Chapel Church, Inc. v.*

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[3] *Cert. denied*, Nos. 10-1276, 10-1297, 2011 U.S. LEXIS 7919 (Oct. 31, 2011).

[4] *But see ACLU of Fla., Inc. v. Dixie Cnty., Fla.*, No. 1:07-cv-00018MP-GRJ, 2011 U.S. Dist. LEXIS 76957 (N.D. Fla. July 15, 2011) (holding that a privately owned and maintained permanent monument, with the Ten Comandments inscribed, located on the front steps of the county courthouse indicated a government endorsement and was thus unconstitutional).

[5] *Aff'd by* 198 Fed. Appx. 833 (11th Cir. 2006) (per curiam) (unpublished).

Broward Cnty., 299 F. Supp. 2d 1295 (S.D. Fla. 2003) (holding that Broward County must include Calvary Chapel's "Jesus is the Reason for the Season" display in its annual "Holiday Fantasy of Lights" event so long as the display identifies the Church as the speaker).

L. Court of Appeals for the District of Columbia Circuit.

There are cases in this Circuit that deal with the government's involvement in the annual Christmas Pageant of Peace. *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992 (D.C. Cir. 1990) (holding that the National Park Service did not violate the First Amendment by excluding a group's sculpture bearing a political message from the annual Christmas Pageant of Peace event, which included a Nativity scene and the National Christmas Tree, because it was not consistent with the Pageant's theme); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973) (per curiam) (requiring the government to alter its participation in the Christmas Pageant of Peace due, in part, to the presence of a creche that lacked any explanatory plaques disclaiming government sponsorship of religious beliefs associated with the creche).

CONCLUSION

We hope that this informational letter helps to clarify the law concerning holiday displays on public property. The ACLJ is committed to ensuring that local governments may celebrate the holiday season without needing to remove all items with religious significance from the public arena. Please feel free to contact us at 1-800-296-4529 if you would like to speak with us about this area of law.

Sincerely,

AMERICAN CENTER FOR LAW AND JUSTICE