



November 28, 2006

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**Re: Unconstitutional Viewpoint Discrimination By the City of Chicago With Regard
to *The Nativity Story*'s Sponsorship of Christkindlmarket Chicago**

Dear Ms. Georges:

The American Center for Law and Justice (ACLJ) has recently learned that the City of Chicago threatened to withdraw its support of the Christkindlmarket Chicago festival unless the new movie, *The Nativity Story*, was dropped as a sponsor of the festival. This letter explains why the First Amendment to the United States Constitution prohibits the City of Chicago from using its financial resources to pressure festival organizers to discriminate on the basis of religion.

By way of introduction, the ACLJ is a public interest law firm specializing in the area of the First Amendment's freedom of speech and religion clauses. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of political and religious sentiments. I have argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States, and our law firm has extensive experience litigating constitutional issues before various federal and state courts.

Christkindlmarket Chicago is a major Christmas celebration attended by over one million people each year. The festival chose to drop *The Nativity Story* as a sponsor in response to the City of Chicago's threat to withdraw its financial support. *The Nativity Story* film is a Biblically accurate account of the birth of Jesus and was initially accepted as a festival sponsor. The City's use of its financial resources to pressure the festival to drop *The Nativity Story* as a sponsor due to the movie's religious content constitutes viewpoint discrimination in violation of the First

Amendment and contradicts the anti-discrimination efforts of the City and the State of Illinois. The City's decision is particularly troubling given that the film describes the very event that the Christkindlmarket festival was created to celebrate.

I. The First Amendment Prohibits Viewpoint Discrimination By the Government.

The City's decision to pressure festival organizers to cut *The Nativity Story* as a sponsor constitutes viewpoint discrimination in violation of the First Amendment. It is a fundamental proposition of constitutional law that the government may not suppress or exclude the speech of private parties for the sole reason that the speech is religious. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). As the Supreme Court has explained:

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

Pinette, 515 U.S. at 760.

The First Amendment's prohibition on viewpoint discrimination applies to government funds and facilities as well as to laws and ordinances. For example, in *Lamb's Chapel*, the Supreme Court held that the First Amendment prohibits the government from denying religious groups access to its facilities for expressive purposes due to the content of the group's message. The Court noted that "the government violates the First Amendment when it denies access to a speaker *solely to suppress the point of view* he espouses" *Id.* at 394 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)) (emphasis added). The Court also stated that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

Similarly, in *Rosenberger*, the Court held that the government may not deny funding to a religious group solely due to the viewpoint of its message. *Rosenberger*, 515 U.S. at 837. The Court noted that "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828. The Court also added, "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Id.* The Court clearly stated that "ideologically driven attempts to *suppress a particular point of view are presumptively unconstitutional in funding*, as in other contexts." *Id.* at 830 (emphasis added). Moreover, the Court added, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* at 835.

Here, the City of Chicago's threat to pull its sponsorship of the festival because of the *The Nativity Story*'s religious message constitutes unconstitutional viewpoint discrimination. The City's actions are the kind of "ideologically driven attempt[] to suppress a particular point of view . . . in funding" that the *Rosenberger* Court called "presumptively unconstitutional." *See Rosenberger*, 515 U.S. at 830 (emphasis added). The City has "impose[d] financial burdens on certain speakers based on the content of their expression" in a manner that "offends the First Amendment." *See id.* at 828. The government simply cannot use its financial resources in a manner designed to suppress religious speech due to the viewpoint of its message.

The City's decision to threaten removal of its sponsorship of the festival because of the presence of *The Nativity Story* as a sponsor runs counter to the City's professed goal of fighting religious and other forms of discrimination. The Chicago Human Rights Ordinance expressly states that "prejudice, intolerance, bigotry and discrimination occasioned thereby threaten the rights and proper privileges of the city's inhabitants and menace the institutions and foundation of a free and democratic society." *Chicago Human Rights Ordinance* § 2-160-010. City agencies are prohibited from discriminating on the basis of religion with regard to housing, employment, public accommodation, credit transactions, and bonding. *Guide to Discrimination Complaints and Adjudication Procedures*, CITY OF CHICAGO COMMISSION ON HUMAN RELATIONS ADJUDICATION DIVISION, available at <http://www.ci.chi.il.us> (last visited Nov. 28, 2006). The City's actions with regard to the Christkindlmarket festival directly contradict the City's expressed commitment to fighting religious discrimination.

Additionally, it is the public policy of the State of Illinois to prohibit discrimination on the basis of religion with regard to employment, public accommodations, housing and financial credit. Illinois Human Rights Act, § 775 ILCS 5/1-102 *et seq.* The Illinois Attorney General's office has a Division for the Enforcement of Civil and Equal Rights whose sole responsibility is the investigation of violations of laws relating to religious and other discrimination. § 15 ILCS 210/1. The City's actions with regard to the Christkindlmarket Chicago festival severely undermine the State's expressed goal of eliminating religious and other discrimination.

II. The Establishment Clause Does Not Require the Removal of All Religious References From the Public Arena During the Christmas Season.

The City of Chicago's decision to pressure festival organizers to drop *The Nativity Story* as a sponsor cannot be justified by the "separation of church and state" or concerns that the City would appear to endorse religion. The Establishment Clause imposes no affirmative duty upon the government to suppress private religious expression. The Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*" *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added). The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 263. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

No reasonable person could conclude that the City had impermissibly endorsed the content of *The Nativity Story* by simply sponsoring the same festival that the movie sponsored. The Supreme Court has noted that “attribut[ing] to a neutrally behaving government private religious expression has no antecedent in our jurisprudence.” *Pinette*, 515 U.S. at 764. “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Mergens*, 496 U.S. at 215-16 (emphasis in original). In other words, there is a key difference between official government sponsorship of a sectarian religious message and a privately-funded message detailing the birth of Jesus.

The Supreme Court has consistently held that the Constitution is not to be interpreted in a manner that would purge religion or religious reference from society. As early as 1892, the Supreme Court noted that “this is a religious nation.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), the Court stated, “[w]e are a religious people whose institutions presuppose a Supreme Being.” The Court has discussed the historical role of religion in our society and concluded 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.” *Lynch*, 465 U.S. at 674. Moreover, in *Lee v. Weisman*, 505 U.S. 577, 598 (1992), the Court noted that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” There can be no question that the City of Chicago may permissibly sponsor a festival that is also sponsored by a movie with religious content. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O’Connor, J., concurring).

Conclusion

In sum, the City should insist that festival organizers reinstate *The Nativity Story* as a festival sponsor. The City’s use of its resources to pressure the festival to drop the film as a sponsor due to the movie’s religious content constitutes unconstitutional viewpoint discrimination and counteracts the City’s stated purpose of eradicating religious and other discrimination.

Sincerely,

Jay Alan Sekulow
Chief Counsel
**AMERICAN CENTER FOR
LAW AND JUSTICE**

cc: Ray Lotter
German American Chamber of Commerce of the Midwest
Christkindlmarket Chicago