Religious Holiday Displays Information Letter

Dear Concerned Citizen:

Members of your community are undoubtedly making preparations for the celebration of the holidays by decorating public streets, sidewalks, and parks with a variety of cheerful and festive holiday decorations. Some communities may choose decorations that include snowmen, reindeer, trees, bells, holly, etc. Most certainly, many individuals will want to express the religious origins of the holiday season by erecting nativity scenes and menorahs.

By way of introduction, the American Center for Law and Justice (ACLJ) is a not-for-profit public interest law and educational group. 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 religious sentiments. Jay Sekulow, Chief Counsel for the American Center for Law and Justice, has argued before the Supreme Court of the United States in several significant cases in this area, including *Locke v. Davey*, 540 U.S. 712 (2004); *McConnell v. FEC*, 540 U.S. 93 (2003); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993); and *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990). The ACLJ has also submitted amicus briefs in numerous Supreme Court cases, including *Good News Club v. Milford Central School Dist*., 533 U.S. 98 (2001); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

This letter addresses the constitutionality of privately-erected or government-sponsored holiday displays, and will assist you in defending the rights of citizens in your community who desire to erect such displays during the holiday season. This letter will specifically address your questions regarding the placement of religious Christmas displays in public parks. You may use this letter to educate your city leaders about your rights. Please call me if after reviewing this letter you would like me to correspond with your city officials directly.

I. The First Amendment to the United States Constitution Protects the Right of Citizens, Civic Groups, and Churches to Erect Religious Displays in Public Fora.

The Constitution protects the right of private citizens to engage in religious speech in a "public forum." In a leading First Amendment case, 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 760. 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. (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).

Before *Pinette*, the Supreme Court decided two other cases specifically addressing the constitutionality of holiday displays: *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Lynch* and *County of Allegheny* involved holiday displays erected by the government itself either on private property or on government property that was not a public forum. These two 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 on which the government has permitted a wide variety of expressive conduct, and 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 June 2005 reaffirmed that holiday displays similar to the one in *Lynch* are constitutional. In *Van Orden v. Perry*, 125 S. Ct. 2854 (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 2861 (Rehnquist, C.J., plurality) (quoting *Lynch*, 465 U.S. at 674); *see also id.* at 2863. 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 noted that the display in *Lynch* had a more secular context. *Id.* at 2869-70 (Breyer, J., concurring); *id.* at 2893-97 (Souter, J., dissenting).

In *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (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 2734-38. The Court distinguished its holiday display cases by stating, "Crèches 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 2743, 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 2759 (Scalia, J., dissenting). He argued that *Lynch* and *Marsh v. Chambers*, 463 U.S. 783 (1983), "ought to decide this case." *Id.* at 2760.

Most lower federal courts have upheld the rights of private citizens and governments to erect holiday displays. What follows is a summary of the decisions from various federal courts of appeals and district courts around the country. Even in the absence of a case from your jurisdiction, it is imperative to understand that the Supreme Court's decisions in *Lynch*, *County of Allegheny*, and *Pinette* are binding upon the courts in every state.

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 court affirmed that a locality may place content-neutral restrictions on 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 expressive purposes as long as the restriction is 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 (2nd 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 (2nd 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). However, in *Pinette*, the Court cited these two Second Circuit decisions as well as a Fourth Circuit case in stating that its decision would resolve the split in the federal appellate courts on the issue of holiday religious displays. Thus, these decisions 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 set up 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*.

The district courts in the Second Circuit have decided several holiday display cases. *See Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. 2004) (upholding a public school policy which encouraged schools to display "secular" holiday symbols such as Christmas trees, Menorahs, and the Star and Crescent and discouraged the display of more religious symbols such as nativity scenes or excerpts from the Bible, Torah, or Qur'an); *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 Kwanza, and signs mentioning Muslim prayer services and noting that the addition of a nativity scene was not constitutionally required); *Mehdi v. United States Postal Servs.*, 988 F. Supp. 721 (S.D.N.Y. 1997) (rejecting a claim that post offices cannot 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 which prohibited fixed outdoor displays of religious or political symbols such as menorahs in city parks).

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 (1999), upheld the constitutionality of a city holiday display depicting, *inter alia*, a crèche, menorah, Christmas trees, Santa Claus, Frosty the snowman, a sled, Kwanza 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? "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 Kwanza. The court noted that public officials have some latitude in designing permissible holiday displays and added 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 Jaycees from erecting a crèche in a public forum. Notwithstanding the fact that the display constituted private religious speech in a public forum, the court held that because the display would be near a county office building, it would convey an "unmistakeable message" of government endorsement of religion.

Smith predates and cannot be reconciled with *Pinette*. In *Pinette*, the Court cited *Smith* as well as two Second Circuit decisions, indicating that its decision in *Pinette* would resolve the split in the federal appellate courts on the question of private religious displays in public fora. Thus, although *Smith* is the only case in the Fourth Circuit addressing the constitutionality of private religious displays in public fora, it is has been superseded by the Supreme Court's decision in *Pinette* on that issue.

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

At present, there are no Fifth Circuit court opinions clarifying the Supreme Court's guidelines for religious holiday displays.

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

In *Americans United for Separation of Church and 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 does not violate the Establishment Clause. Grand Rapids had no role in funding, housing, or erecting the statue—the city's only role in the case was granting the permit. While this was the only holiday display erected in the area, this was simply because the city did not create its own display and no other organization had requested a permit to erect a 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 stated:

> 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.

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 discussed 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 which 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 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.

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

In *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc), the Seventh Circuit upheld the right of private citizens to display in a public park paintings depicting the life of Christ. 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 occurred as a result of the city's ownership.

In *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995), the Seventh Circuit reversed the district court's decision refusing 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 *Grossbaum* court distinguished the facts of that case from a previous ruling that affirmed a locality's right to prohibit all private displays. *Cf. Lubavitch Chabad House, Inc. v. City of*

Chicago, 917 F.2d 1476 (7th Cir. 1990). Although *County of Allegheny* permits private individuals to erect religious displays, the Seventh Circuit court stated that the law does not *require* localities to permit such displays. In determining the constitutionality of a locality's action, the court focuses on whether the policy is viewpoint neutral or attempts to discriminate against certain religious content and also the nature of the forum at issue.

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, *inter alia*, 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 clearly convinced of the display's constitutionality.

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 grant of a permit allowing 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."

The Ninth Circuit has also noted that localities cannot utilize public holiday displays to promote one religion to the exclusion of all others. *See American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (holding unconstitutional a city's policy of allowing a private stand-alone menorah display in a public park every year while denying other groups' requests to build a winter solstice or Latin cross display).

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, *inter alia*, 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 right as a government speaker to determine the contents of the holiday display.

K. Court of Appeals for the Eleventh Circuit – governing the States of 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 *Lamb's Chapel*, *Widmar*, and *Mergens* 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 *Miller* court stated that

> [b]ecause 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.

In *Snowden v. Town of Bay Harbor Islands,* 358 F. Supp. 2d 1178 (S.D. Fla. 2004), the district court issued a preliminary injunction requiring the town to allow the plaintiff to include a nativity scene in an already existing holiday display on public property which included a Christmas tree, menorah, and decorative sailboats. The court stated that the display was unconstitutional in its earliest 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. Broward County,* 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. Conclusion

There is virtual unanimity among the federal courts that private religious displays in public fora are constitutional. In parks, town squares, plazas, and even government buildings which have been opened for public expression, citizens, civic groups, and churches can erect private religious displays without violating the Constitution. In certain circumstances, localities can deny private individuals the right to put up displays (for example, by prohibiting "unattended displays" in a non-traditional public forum), but such policies must be based on content-neutral criteria rather than the "religious" nature of the display. Arguments that privately-erected religious displays cause an Establishment Clause problem are completely devoid of merit. Similarly, the government may erect holiday displays that contain a crèche, menorah, or other religious elements as long as the display also celebrates the secular facets of the holiday.

II. Frequently Asked Questions

There are many questions that may arise when dealing with the important issues of free speech in the context of privately sponsored religious displays. What follows are answers to questions that arise most frequently.

A. What is a public forum?

The United States Supreme Court 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 Education 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).

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 Education Ass'n*, 460 U.S. at 45. State officials cannot censor religious speakers from these places unless they demonstrate a compelling government interest for such a content-based exclusion. *Carey v. Brown*, 447 U.S. 455, 461, 464 (1980). The Court held in *Lamb's Chapel*, 508 U.S. at 494, that "[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."

B. Does the "separation of church and state" forbid religious displays on government property?

NO. Some officials mistakenly believe that the Constitution mandates that no religious activity can take place on public property, even when private citizens are involved. 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 speech 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.

Pinette, 515 U.S. 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 such a policy of excluding private religious speakers from public places when other speakers are permitted without interference from officials 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."

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

C. Can the government erect holiday displays that include religious components?

YES. 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 examine several aspects of the display to determine whether a government-sponsored display violates the Constitution. In general, as long as the religious elements of the display are part of a larger holiday expression—with Christmas trees, Santa Claus, or the like—then the display is constitutional. This particular area of the law is finely nuanced, however, and various circuits have examined different aspects of the displays to determine their constitutionality. At present, the Supreme Court has offered no further clarification of the principles it espoused in *Lynch*, *County of Allegheny*, and *Pinette.*

D. Are private citizens ever prohibited from erecting religious holiday displays on public property?

YES. 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 a forum that the government controlled, thus increasing the importance 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*, the Supreme Court distinguished *County of Allegheny* by noting that location of the crèche in that case was not a public forum, but if it had been, "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 (internal citations omitted). Thus, despite what some special interest groups may claim, *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.

III. Conclusion

It is our hope that this letter has helped clarify the rights of private citizens to erect religious displays in public parks and other public fora. The American Center for Law and Justice is committed to defending the rights of individuals in the public arena. Because of our commitment, we are available to answer any questions you might have concerning this letter. Please feel free to share this informational letter with your city council, their attorney, and others in your community.

Very truly yours,

AMERICAN CENTER FOR
LAW AND JUSTICE

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