

# **“Seasonal Religious Expression on Public Property”**

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## SEASONAL RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

The Alliance Defense Fund is a not-for-profit legal alliance of more than 1,300 attorneys and like-minded organizations that educate the public and the government about important constitutional rights, particularly *Our First Liberty*—religious freedom. The Alliance Defense Fund has assisted many individuals and government entities in knowing and understanding their rights and responsibilities concerning seasonal religious expression on public property. The discussion below addresses these rights and responsibilities. As each legal situation differs, the information provided below should only be used as a general reference and should not be considered legal advice.<sup>1</sup> If you think your rights have been violated as a result of a restriction on your religious expression at a public school or if you represent a public entity whose policies regarding seasonal religious expression are being challenged please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us via telephone at 1-800-TELL-ADF, or visit our website at [www.telladf.org](http://www.telladf.org) and select the "Need Legal Help?" link to submit a request for legal assistance.

Many Americans approach Christmas with great eagerness: fancifully decorating houses, attending glistening church buildings, setting up live nativity scenes, and enjoying the warm sounds of merry carolers. In both the public and private sectors, millions commemorate the birth of Christ through enjoyably joyous events. And rightfully so, for on the day of His birth the angels proclaimed: “Glory to God in the highest, and on earth peace, good will toward men with whom His favor rests.”<sup>2</sup>

This joyous event, however, has been clouded in recent years by misconceptions and controversies concerning the legality of many Christmas celebrations. School calendars that once announced “Christmas Vacation” now read “Winter Vacation,” and religiously themed decorations featuring nativity scenes have been replaced by snowmen and reindeer. School officials have reprimanded children for sharing the story of Christ’s birth with classmates, have censored religious Christmas carols from school concerts, and have banned students from uttering the words “Merry Christmas.”

America’s founders and writers of the Constitution could not envision these acts of suppression. And this explains why no court has ever ruled that the Constitution requires government officials to censor Christmas carols, eliminate all references to Christmas, or silence those who celebrate Christmas. But these efforts to suppress Christmas celebrations demonstrate that many public officials mistakenly believe that allowing seasonal religious expression on public property would violate the so-called “separation of church and state”—a mantra often

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<sup>1</sup> Disclaimer: This booklet provides general legal information, not specific legal advice. The legal citations are intended for licensed attorneys and do not constitute specific legal advice. The material contained in the booklet does not create or imply the existence of any attorney-client relationship with the Alliance Defense Fund, Inc. or any of its attorneys, employees, or allies. It is also noted that the statements of law are based upon current court decisions which are in fact more limited in their application and scope than the original version of the constitution envisioned by those who wrote it. As the authors of these materials may not be licensed to practice in your state, you are encouraged to research the applicable state and local law pertaining to the particular area of law covered in these materials and to supplement your research by consulting licensed counsel familiar with the applicable state law.

<sup>2</sup> *Luke 2:14* (King James Version).

cited in reference to the Establishment Clause of the First Amendment. As a result, public officials across our free nation have improperly denied citizens their constitutional rights of religious speech and expression on the mistaken plea that the constitution requires them to do so. Some public officials are merely misinformed; others have purposefully sought to eradicate the celebration, observance, or even the acknowledgment of the religious origins of Christmas from the public square.

But the Establishment Clause is not a tool to root out religious expression. It merely requires the state to be neutral in its relations with religious believers and nonbelievers, not to act as their adversary.<sup>3</sup> In fact, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>4</sup> As Supreme Court Justice Black wrote, “State power is no more to be used so as to handicap religions than it is to favor them.”<sup>5</sup> And as early as 1833, Justice Story was reminding government officials that the First Amendment prohibited them from treating religion with hostility and indifference:

[A]t the time of the adoption of the constitution, and of the amendment to it, the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

....

But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires.<sup>6</sup>

The Establishment Clause is a limitation on government speech and action. The Supreme Court has highlighted the “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.”<sup>7</sup> Therefore, it is unconstitutional for public officials to deny individuals the right to religious speech and expression by imposing on them a limitation intended for the government.

The Framers of our Constitution established a boundary between religion and government to prevent the government from creating a state denomination, not to eradicate religious acknowledgement, tradition, and expression from public life. But opponents of religious liberty have transformed this boundary into a moving line that steadily pushes religious history, tradition and expression out of the public square. The following examples demonstrate

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<sup>3</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

<sup>4</sup> *Lynch*, 465 U.S. at 673.

<sup>5</sup> *Everson*, 330 U.S. at 18.

<sup>6</sup> Joseph Story, *Commentaries on the Constitution of the United States* 700-01 (1833) (reprinted in 1987).

<sup>7</sup> *Mergens v. Board of Educ. of Westside Cmty. Sch.*, 496 U.S. 226, 250 (1990).

how individuals who take a stand for their faith can put an end to this unconstitutional government action.

## **I. Unconstitutional Attempts to Silence Seasonal Religious Expression**

### **A. A Soldier Says “God Bless America”**

For many years, the state of Wisconsin has had a tradition of celebrating the Christmas season by displaying a 40-foot Wisconsin-grown balsam fir in the rotunda of the state Capitol.<sup>8</sup> The “Capitol Holiday Tree” is decorated each year with 1,400 handmade ornaments donated by Wisconsin residents across the state.<sup>9</sup>

In preparation for the annual festivities in 2001, the Wisconsin Municipal Clerks Association solicited ornaments for the Christmas tree.<sup>10</sup> The guidelines that they distributed, however, prohibited ornaments of a religious nature.<sup>11</sup> Although the state of Wisconsin did not have a written policy on tree ornaments, an unwritten policy banning religious ornaments had existed since the 1980s.<sup>12</sup>

That ban was about to be tested as Sergeant Wayne Bird, with the Air National Guard, was preparing to leave for overseas duty in an F-16 fighter group.<sup>13</sup> Before he left, Sergeant Bird, along with seven others, wanted to display religiously themed ornaments with messages such as “God Bless America.”<sup>14</sup> Even though these ornaments were privately donated, Sergeant Bird and the others were not permitted to display them because they bore a religious message.<sup>15</sup> Sergeant Bird remarked that although he was prepared to fight against terrorists, he would first have to fight his own government for the right to hang an ornament on the state holiday tree.<sup>16</sup>

With the assistance of an ADF-trained volunteer attorney, these Wisconsin citizens challenged the state policy.<sup>17</sup> After the suit was filed, the state changed its policy and agreed to hang up to 2,000 ornaments without regard to any ornament’s religious expressive content. This was a victory for the Constitution and the citizens of Wisconsin. They are again free to express their faiths through religiously themed ornaments on the tree in the rotunda of the Capitol.

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<sup>8</sup> Capitol Tour, Wisconsin State Capitol Rotunda, *available at* [http://www.wisconsin.gov/state/capfacts/rotunda\\_c.html](http://www.wisconsin.gov/state/capfacts/rotunda_c.html) (last visited Sept. 25, 2006).

<sup>9</sup> *Id.*

<sup>10</sup> Dennis Chaptman, *8 Citizens File Suit to Display Religious Ornaments on State Tree*, MILWAUKEE J. SENTINEL (Nov. 5, 2001), *available at* <http://www.jsonline.com/news/state/nov01/tree06110501.asp>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

## B. Candy Canes and the Constitution

For two years, school officials in Westfield, Massachusetts, have repeatedly denied the requests of student members of the Westfield High School Life and Insight for Eternity Club (“L.I.F.E. Club” or “Club”) to distribute candy canes with an attached religious message.<sup>18</sup> “The front of the message read ‘Merry Christmas’ in large lettering on the left side, and the right side contained information about LIFE Club meetings and a Bible passage.”<sup>19</sup> The inside of the message contained the story behind the creation of the candy cane and a prayer.<sup>20</sup>

Following school policy, L.I.F.E. Club members approached the school principal in 2001 to review the content of their religious message.<sup>21</sup> The principal told the L.I.F.E. Club members that they could not distribute their “offensive” message unless they changed the message to something non-offensive, such as “Seasons Greetings” or “Happy Holidays.”<sup>22</sup> To distribute the candy canes, club members agreed to change the wording in the message to read “Happy Holidays from the Bible Club.”<sup>23</sup>

Then in 2002, a L.I.F.E. Club member asked the school principal, and eventually the superintendent, “for permission to distribute the candy canes with the religious message.”<sup>24</sup> After the principal and the superintendent repeatedly denied the request, L.I.F.E. Club members proceeded to distribute about “450 candy canes to fellow students during the school day and during non-instructional time between classes and during lunch.”<sup>25</sup> After the school’s “Winter Break,” the principal summoned L.I.F.E. Club members to his office at which time he “informed the members that each would have to serve a one-day in-school suspension for insubordination . . . for distributing the candy canes with the religious message after the Club was denied permission to do so.”<sup>26</sup>

After following the school appeal process, L.I.F.E. Club members and their parents filed a lawsuit—backed with ADF funding and ADF-allied attorneys—against the city, the principal, and the superintendent, which alleged “that the school’s policies deny them their statutory and constitutional rights to free speech.”<sup>27</sup> A federal district court agreed with the L.I.F.E. Club, noting that students “enjoy the right to free personal intercommunication with other students.”<sup>28</sup> The court required the school district to stop enforcing their unconstitutional policies, prevented the school district from punishing the L.I.F.E. Club members, and required the school district to stop prohibiting the L.I.F.E. Club from distributing literature to students during non-instructional time.<sup>29</sup>

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<sup>18</sup> *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 104–06 (D. Mass. 2003).

<sup>19</sup> *Id.* at 104.

<sup>20</sup> *Id.* at 105.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 106.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 106–07.

<sup>27</sup> *Id.* at 107.

<sup>28</sup> *Id.* at 123.

<sup>29</sup> *Id.* at 129.

### C. Religious Valentines Dwell in the Heart of the Constitution

On Valentine's Day in a Milwaukee-area public school, children waited in anticipation for their teacher's announcement to put away their books and pass out valentines and candy. Students eagerly delivered their Valentine's Day mail into the boxes that each of their classmates had creatively decorated. In preparation for the Valentine's Day party at her school, second-grader Morgan Nyman designed Valentine's Day cards with her mother on their home computer.<sup>30</sup> Some of the cards had Morgan's name and a cross on them, while others had the message "F.R.O.G.—Fully Rely on God."<sup>31</sup>

Before taking the valentines to school, "Morgan and her parents asked permission from the principal to distribute valentine cards that contained religious messages."<sup>32</sup> They sought permission because of an incident on Halloween in which Morgan passed out classroom treats but was forced to "go around the classroom and collect the tracts and candy from the other students."<sup>33</sup> School officials required her to do this "because the candy was attached to a religious tract that also featured the words: 'Costumes are cool but heaven is awesome.'"<sup>34</sup> According to Morgan's mother, the incident upset Morgan so much that she was crying when she got off the bus and continued to do so the entire night until she eventually vomited.<sup>35</sup>

The school refused Morgan's request to distribute religiously themed valentines.<sup>36</sup> School officials stated that "distributing religious literature during class time is not allowed because it violates the separation of church and state."<sup>37</sup> During class, however, other students were allowed to exchange cards featuring Britney Spears, 'N Sync, Star Wars, Harry Potter, and Scooby-Doo.<sup>38</sup>

The school's conduct offended Morgan's parents because they knew that none of the other students "had to ask permission to hand out their valentines."<sup>39</sup> Understanding that Morgan had the right to distribute materials along with the other students, Morgan and her parents filed an ADF-backed lawsuit against the elementary school and school board.<sup>40</sup> Morgan's mother stated that their goal was to educate people, not to "bash" anyone.<sup>41</sup> Later, the school board agreed to a settlement that required the school to permit Morgan to hand out

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<sup>30</sup> Amy Hetzner, *School Rejected Girl's Religious Cards, Suit Says*, MILWAUKEE J. SENTINEL (Mar. 21, 2001), available at <http://www.jsonline.com/news/wauk/mar01/relig22032101a.asp>.

<sup>31</sup> *Student's Parents May Sue School Over Cards*, Beloit Daily News (Mar. 22, 2001).

<sup>32</sup> Press Release, Liberty Counsel, *Distraught Second Grader Sues School After She Was Publicly Humiliated For Distributing Religious Literature* (Mar. 21, 2001).

<sup>33</sup> Hetzner, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Beloit Daily News, *supra* note 31.

<sup>37</sup> *Id.*

<sup>38</sup> Hetzner, *supra* note 30.

<sup>39</sup> *Id.*

<sup>40</sup> Liberty Counsel, *supra* note 32.

<sup>41</sup> Hetzner, *supra* note 30.

religious cards and to publicly apologize to Morgan through a statement in the local newspaper.<sup>42</sup>

These needless acts of censorship violate the Constitution and hurt students who sincerely want to share their faith with their friends. The following questions and answers spell out what the federal courts have said regarding Christmas questions and dispel the extremist myths that have sadly prompted school officials and others to suppress religious expression as is demonstrated in the previously described examples.

## **II. Questions and Answers about Religious Speech in Public Places**

Public school and other governmental officials can avoid similar violations if they understand a few basic rules about religious speech. The following questions and answers explain those basic rules.

### **A. Activities of Public Schools and Other Governmental Bodies**

#### **1. May public schools have students sing religious Christmas carols?**

**Yes.** Religious Christmas carols may be sung in public schools without offending the Constitution. Religious Christmas carols may be sung by individual students or by a group of students during school activities such as choir, Christmas programs, and other events. Although challenges have been brought, public schools have successfully defended against constitutional challenges to the singing of Christmas carols by their students.<sup>43</sup>

In *McGowan v. Maryland*, the United States Supreme Court held that government involvement in an activity of unquestionably religious origin does not violate the Establishment Clause if it also has a secular purpose and effect.<sup>44</sup> Thus, no lower court has ever ruled that public schools must ban the singing of religious Christmas carols. In *Florey v. Sioux Falls School District*, the Eighth Circuit Court of Appeals held that permitting observance of holidays having both a religious and a secular basis allowed by a school board's policy and rules was in furtherance of a secular program of education that did not violate the Establishment Clause.<sup>45</sup> The court approved the school's stated purpose of advancing "the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama. . . ."<sup>46</sup> Other federal appeals courts have reached similar results concerning singing religious songs in public schools.<sup>47</sup>

#### **2. Do school officials violate the Constitution by calling a school break "Christmas Vacation"?**

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<sup>42</sup> *Wisconsin School Board: Girl May Hand Out Religious Cards*, Associated Press (Aug. 29, 2001), available at <http://www.freedomforum.org/templates/document.asp?documentID=14741>.

<sup>43</sup> See, e.g., *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1319 (8th Cir. 1980).

<sup>44</sup> 366 U.S. 420, 445 (1961).

<sup>45</sup> 619 F.2d 1311.

<sup>46</sup> *Id.* at 1314.

<sup>47</sup> See *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

**No.** School officials may refer to the school break in December as “Christmas Vacation” without offending the Constitution. Government has long recognized holidays with religious significance such as Christmas.<sup>48</sup> For example, Congress has proclaimed Christmas to be a legal public holiday.<sup>49</sup>

### **3. May public schools close on religious holidays, such as Christmas and Good Friday?**

**Yes.** School officials do not violate the Constitution by closing on religious holidays such as Christmas and Good Friday. States have successfully defended attacks on holiday closures by showing compliance with current Supreme Court Establishment Clause decisions.<sup>50</sup> Currently, the Court uses the test set out in *Lemon v. Kurtzman* to review Establishment Clause claims.<sup>51</sup> Under the *Lemon* test, courts will inquire “whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”<sup>52</sup>

In *Bridenbaugh v. O’Bannon*, the Seventh Circuit Court of appeals ruled that “the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day.”<sup>53</sup> In *Koenick v. Felton*, a school board successfully defended a Maryland law that permitted public school holidays on Good Friday by demonstrating a secular purpose—a high rate of absenteeism on those days.<sup>54</sup> The court also found that the holidays did not advance or inhibit religion because they gave students and teachers the day off to use as they like and did not entangle government with religion.<sup>55</sup>

### **4. If a public school recognizes Christmas, must it then recognize all religious holidays?**

**No.** It is a common misconception that it is only permissible to celebrate one religious holiday if equal time is allowed for celebration of all other religious holidays. The Supreme Court has explained that governmental action is not unconstitutional merely because it confers an indirect, remote, and incidental benefit to one faith or religion, or to all religions.<sup>56</sup> Government recognition of a holiday that incidentally coincides with a religious holiday is not unconstitutional.<sup>57</sup>

### **5. May school districts ban the saying of “Merry Christmas”?**

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<sup>48</sup> *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

<sup>49</sup> 5 U.S.C.A. § 6103(a) (2006).

<sup>50</sup> *Bridenbaugh v. O’Bannon*, 185 F.3d 796, 802 (7th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000); *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000).

<sup>51</sup> 403 U.S. 602 (1971)

<sup>52</sup> *Lynch*, 465 U.S. at 679 (citing *Lemon*, 403 U.S. at 612–13).

<sup>53</sup> *Bridenbaugh*, 185 F.3d at 801.

<sup>54</sup> *Koenick*, 190 F.3d at 266.

<sup>55</sup> *Id.* at 267–68.

<sup>56</sup> *Lynch*, 465 U.S. at 683.

<sup>57</sup> *Bridenbaugh*, 185 F.3d at 801.

**No.** School districts may not ban teachers and students from saying “Merry Christmas.” The Supreme Court has stated that teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>58</sup> Under the direction of President Clinton, U.S. Secretary of Education Richard Riley issued guidelines concerning religious discussion of students that stated, “Students therefore have the same right to engage in . . . religious discussion during the school day as they do to engage in other comparable activity.”<sup>59</sup> Teachers also have the right to greet students with the words “Merry Christmas,” in spite of their role as agents of the state. To violate the Establishment Clause, a teacher would have to use her authority to promote religion to impressionable youth.<sup>60</sup> Saying a simple greeting that people commonly use in December does not rise to an Establishment Clause violation.

**6. May public schools have students study the religious origins of Christmas and read the biblical accounts of the birth of Christ?**

**Yes.** The religious origins of Christmas may be studied in the classroom without offending the Constitution. The Supreme Court held in *Stone v. Graham*, that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”<sup>61</sup> A federal appeals court has defined “the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.”<sup>62</sup> Therefore, school officials may constitutionally present Christmas passages from the Bible, such as Matthew 1:18–2:22 and Luke 2:1–20, with a variety of teaching methods.

Moreover, the Supreme Court has noted “that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”<sup>63</sup> The Supreme Court has explained that the “study of the Bible or of religion, when presented objectively as part of a secular program of education,” is constitutional under the First Amendment.<sup>64</sup>

**7. May public schools display religious symbols?**

**Yes.** Public school officials may display religious symbols such as a crèche or nativity scene without offending the Constitution if they have a clear educational reason for doing so. The Supreme Court has held that a nativity scene display is constitutional if displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday.<sup>65</sup> Lower federal courts have also allowed public schools to include religious and

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<sup>58</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech).

<sup>59</sup> U.S. Department of Education, *Religious Expression in Public Schools*, Archived Information, Guidelines (May 1998), available at <http://www.ed.gov/Speeches/08-1995/religion.html> (last modified Jan. 26, 2000).

<sup>60</sup> See *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

<sup>61</sup> 499 U.S. 39, 42 (1981).

<sup>62</sup> *Florey*, 619 F.2d at 1316.

<sup>63</sup> *Schempp*, 374 U.S. at 225.

<sup>64</sup> *Id.*

<sup>65</sup> *Lynch*, 465 U.S. at 681.

Christian symbols in Christmas displays, school calendars, and holiday programs.<sup>66</sup> In a recent case, a court held that the school’s holiday display and song program, which contained religious symbols, books, and songs, did not violate the Establishment Clause.<sup>67</sup>

**8. Do students have a constitutional right to be exempt from activities with a religious component?**

**Yes.** All students have a constitutional right to opt out of activities, such as a Christmas program or a concert with a religious song, that conflict with the individual beliefs of the students or their parents.<sup>68</sup> When the religious activity does not violate the Establishment Clause, as explained above, the school is not required to prohibit the activity even though it creates conflict with some students.<sup>69</sup> Schools may not force “any person to participate in an activity that offends his religious or nonreligious beliefs.”<sup>70</sup> If a student has an objection to some school activity containing religion (e.g., a school concert containing a religious song or a field trip to a museum containing religious art), he cannot censor the expression or block the activity. The Constitution permits the student to opt out of participation, but not to silence others.

**B. Rights of Students and Other Individuals to Religious Expression**

**1. Does the Establishment Clause require government officials to silence someone for talking about his faith in God and his religious beliefs?**

**No.** To the contrary, it is well-established that the Constitution protects the religious speech of private individuals under the First Amendment.<sup>71</sup> The Establishment Clause is a restriction on the government. The Free Speech Clause of the First Amendment protects the individual’s right to expression regardless of the content or viewpoint.<sup>72</sup> Therefore, the Constitution prohibits governmental entities from suppressing or excluding the speech of private individuals solely because their speech is religious or contains a religious perspective.<sup>73</sup>

**2. Do students have a constitutional right to express their faith and religious ideas in a public school?**

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<sup>66</sup> See, e.g., *Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 2000); *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993).

<sup>67</sup> *Sechler*, 121 F. Supp. 2d at 453.

<sup>68</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents and guardians have a constitutional right to direct the upbringing and education of their children).

<sup>69</sup> *Florey*, 619 F.2d at 1318.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

<sup>72</sup> Certain types of speech fall outside the protection of the First Amendment; obscenity, fighting words, and words intending to incite others to immediate violence. But the speech that is the subject of religious discrimination falls within the protective umbrella of the First Amendment.

<sup>73</sup> *Niemotko*, at 286.

**Yes.** The First Amendment protects the private religious speech of students on and off the school campus.<sup>74</sup> Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>75</sup> The Supreme Court has stated that a student’s free-speech rights apply “when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours. . . .”<sup>76</sup> The Supreme Court has warned school officials not to trample the rights of students in public schools:

[S]tate-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.<sup>77</sup>

School officials can only restrict student speech that creates a material and substantial disruption to the school’s ability to fulfill its educational goals.<sup>78</sup> But mere fear or apprehension of a disruption is not sufficient to enable the school to prohibit speech.<sup>79</sup>

### **3. Do students have the right to distribute religious materials in public schools, such as Christmas cards containing Bible verses?**

**Yes.** The First Amendment protects the right to express ideas through the distribution of literature.<sup>80</sup> And because students’ constitutional rights accompany them to school, students have the right to express ideas through the distribution of literature while at school.<sup>81</sup> Students may distribute religious materials at school on the same terms as they are permitted to distribute other material.<sup>82</sup> The Supreme Court has noted that First Amendment rights must be “applied in light of the special characteristics of the school environment.”<sup>83</sup> Therefore, school officials may “establish reasonable time, place, and manner regulations” on the exercise of students’ free-speech rights.<sup>84</sup>

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<sup>74</sup> *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a University that has opened its facilities for use by student groups cannot exclude groups because of the religious content of their speech).

<sup>75</sup> *Tinker*, 393 U.S. at 506.

<sup>76</sup> *Id.* at 512–13.

<sup>77</sup> *Id.* at 511.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 508.

<sup>80</sup> *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding that a city ordinance prohibiting the distribution of literature without city permission violated the rights of freedom of speech and the press).

<sup>81</sup> *Tinker*, 393 U.S. at 506; *see, e.g., Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 114.

<sup>82</sup> *See Mergens*, 496 U.S. 226, 247–49; *contra Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279 (3d Cir. 2003) (holding that the First Amendment was not violated when school prevented elementary school student from distributing candy canes with attached religious message *in the classroom* because school had valid educational purpose).

<sup>83</sup> *Tinker*, 393 U.S. at 506.

<sup>84</sup> *Widmar*, 454 U.S. at 278.

**4. Do students have the right to express religious viewpoints in school assignments, reading materials, and clothing?**

**Yes.** The Supreme Court has held that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>85</sup> First Amendment rights of free expression accompany each student throughout the school day both inside and outside the classroom.<sup>86</sup> School officials must permit students to convey religious sentiments through their school assignments,<sup>87</sup> selection of reading materials, and clothing that conveys a religious message through words or symbols. For example, if an assignment charges the student with writing an essay on the most influential person in their lives that student is free to write an essay on the influence of Jesus Christ.

**5. Do individuals have the right to private religious expression on public property?**

**Yes.** The First Amendment protects the right of individuals to private religious expression on public property. In analyzing free-speech cases involving religious speech or expression, the result may depend on the nature of the place where the speech takes place. The Supreme Court has recognized the following speech fora: 1) the traditional public forum, 2) the limited or designated public forum, and 3) nonpublic forum.<sup>88</sup> The forum at issue in the case determines the degree of deference that courts will extend to the governmental entity’s regulation on speech. Speech receives more protection in a traditional public forum than in a nonpublic forum.

**6. Do individuals have the right to express their religious beliefs with others in a public park, on a street corner, or on a sidewalk?**

**Yes.** Streets, sidewalks, and public parks are traditional public fora, and private religious speech in those places is constitutionally protected.<sup>89</sup> In fact, the Supreme Court has held that the government may not prohibit all communicative activity within a traditional public forum.<sup>90</sup> The Supreme Court has noted that “from ancient times” the use of public places such as parks has “been a part of the privileges, immunities, rights, and liberties of citizens.”<sup>91</sup> Public parks are held in trust for the use of the public “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>92</sup>

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<sup>85</sup> *Lynch*, 465 U.S. at 673.

<sup>86</sup> *Tinker*, 393 U.S. at 512–13.

<sup>87</sup> Compare *Tinker*, 393 U.S. at 512–13, with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns).

<sup>88</sup> *Board of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 572 (1987).

<sup>89</sup> *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

<sup>90</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>91</sup> *Hague*, 307 U.S. at 515

<sup>92</sup> *Id.*

As a result, private religious expression within public parks is highly protected speech. In *Doe v. Small*, the Seventh Circuit Court of Appeals held that the First Amendment protected the religious speech rights of private parties who sought to display paintings of Christ in a public park.<sup>93</sup> The court held that “the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.”<sup>94</sup> That is, the government may not discriminate against private speech in a public forum on account of the speaker’s religious views. “The Free Exercise Clause assures speakers whose message is religious no less access to public forums than that afforded speakers whose message is secular or sacrilegious.”<sup>95</sup> For the state to exclude an entire category of speech, i.e., a “content-based exclusion it must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>96</sup> Therefore, in a traditional public forum, individuals have the right to private religious expression.

**7. Do individuals have the right to private religious expression in a limited public forum, such as a public school opened for meetings of community groups on evenings or weekends?**

**Yes.** When public property is utilized by the government as a limited or designated forum, the First Amendment protects the right to private religious expression. A limited or designated forum means that “the state has opened [the property] for use by the public as a place for expressive activity.”<sup>97</sup> According to the Supreme Court, a limited or designated public forum is created only by “purposeful governmental action.”<sup>98</sup> As a result, the Court has stated that government officials do not create a limited forum merely “by inaction or by permitting limited discourse.”<sup>99</sup>

Once a forum has been opened, “the Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”<sup>100</sup> Therefore, government may not discriminate against individuals based on their desire to use a generally open forum to engage in religious speech, such as exhibiting a religious display, without meeting the constitutional standard.<sup>101</sup> To justify discrimination based on the religious content of speech, the government must demonstrate that the restriction is necessary to further a compelling state interest and that the restriction is narrowly tailored to achieve that interest.<sup>102</sup>

In *Kiesinger v. Mexico Academy & Central School*, a public school created a forum for the community to contribute bricks inscribed with personal messages for a school walkway

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<sup>93</sup> 964 F.2d 611, 618 (7th Cir. 1992) (en banc)

<sup>94</sup> *Id.* at 619.

<sup>95</sup> *Id.* at 629 (Easterbrook, J., concurring) (citations omitted).

<sup>96</sup> *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>97</sup> *Id.*

<sup>98</sup> *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1998).

<sup>99</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

<sup>100</sup> *Widmar*, 454 U.S. at 267-68.

<sup>101</sup> *Id.* at 269-70.

<sup>102</sup> *Id.*

project. The court held that the school engaged in unconstitutional viewpoint discrimination when it removed a brick containing a religious message.<sup>103</sup> If a school creates a forum that is open to the community for expressive purposes, it cannot exclude religious expression.<sup>104</sup> And if the forum is opened to the community, it would be of no legal significance if only religious speakers responded.<sup>105</sup> There was no compelling interest being served by the removal of the bricks and the court ordered the school to reinstall them.<sup>106</sup>

The Supreme Court has outlined additional guidelines for the operation of a limited or designated public forum. First, the Court has explained that “a state is not required to indefinitely retain the open character of the facility, [but] as long as it does so it is bound by the same standards as apply in a traditional public forum.”<sup>107</sup> In addition, government officials may continue to place reasonable time, place, and manner restrictions on the use of the limited public forum without offending the Constitution.<sup>108</sup>

## **8. May municipalities sponsor religious displays in public parks?**

**Yes.** Public officials may display religious symbols such as a crèche or nativity scene without offending the Constitution. To determine the constitutionality of municipal religious displays, lower courts evaluate whether the religious display passes the Supreme Court’s three-prong *Lemon* test.<sup>109</sup> Under the *Lemon* test, courts will inquire “whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”<sup>110</sup> In addition to the *Lemon* test, courts often look to the “endorsement test,” when reviewing municipal displays with religious components. This test asks whether a reasonable observer would believe that the municipal display constitutes an official endorsement of religion by the government.<sup>111</sup>

Employing the *Lemon* test, the Supreme Court has held that the display of a nativity scene is constitutional if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday.<sup>112</sup> Justice O’Connor’s concurrence in *Lynch*, found that the display did not violate the Establishment Clause by asking whether the city “endorsed Christianity by its display of the crèche.”<sup>113</sup> This “endorsement test” has become the standard of review for municipal seasonal displays.<sup>114</sup> Known as, “The Three Reindeer Rule,” it requires the inclusion of secular objects with the religious to pass constitutional muster.<sup>115</sup>

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<sup>103</sup> *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 201 (N.D.N.Y. 2006).

<sup>104</sup> *Id.*.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Perry Educ. Ass’n*, 460 U.S. at 46.

<sup>108</sup> *Id.*

<sup>109</sup> *Bridenbaugh*, 185 F.3d at 802.

<sup>110</sup> *Lynch*, 465 U.S. at 679 (citing *Lemon*, 403 U.S. at 612–13).

<sup>111</sup> *See Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002).

<sup>112</sup> *Lynch*, 465 U.S. at 681.

<sup>113</sup> *Lynch*, 465 U.S. at 690.

<sup>114</sup> *See, e.g., Freethought Soc’y of Greater Phila. v. Chester County*, 334 F.3d 247, 262 (3d Cir. 2003).

<sup>115</sup> *Id.* at 691.

The endorsement test has been cited in many other cases and has gained a wide degree of acceptance as the determining factor for municipal religious displays.<sup>116</sup> Thus, a crucial consideration for municipal seasonal displays is the secular context in which the crèche is placed. Simply stated, “The Three Reindeer Rule” requires a municipality to place a sufficient number of secular objects in close enough proximity to the crèche to render the overall display sufficiently secular and communicate to the reasonable observer that the government is not endorsing religion.

The *Lemon* test and the endorsement test have proven to be burdensome to government authorities seeking to exhibit Christmas displays. To avoid the burden, some municipalities leave the matter of erecting seasonal displays to private individuals or groups who are not required to “neutralize” the religious aspect of their display with the inclusion of secular figures or objects.<sup>117</sup>

## **9. May the government sponsor religious displays inside and around governmental buildings?**

**Yes.** The Supreme Court has noted that there are countless illustrations of the “Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”<sup>118</sup> For example, the Court pointed out that the Supreme Court chamber “is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.”<sup>119</sup>

In spite of our heritage of governmental religious expression, federal courts across the country are currently grappling with cases concerning the constitutionality of governmental exhibition of religious displays inside and around governmental buildings. Even though courts have relied on similar factors in analyzing these cases, courts have inconsistently decided factually similar cases.<sup>120</sup> But the Supreme Court has recently instructed that government should not make itself an indifferent adversary to religion but should respect the peoples’ spiritual nature and needs:

[W]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups ... [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and

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<sup>116</sup> See, e.g., *Adland*, 307 F.3d 471; *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997); *Mather v. Village of Mundelein*, 864 F.2d 1291 (2d Cir. 1989).

<sup>117</sup> See *Mergens*, 496 U.S. at 250.

<sup>118</sup> *Lynch*, 465 U.S. at 677.

<sup>119</sup> *Id.*

<sup>120</sup> See e.g., *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Adland*, 307 F.3d 471; *Sumnum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766 (7th Cir. 2001); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).

to throw its weight against efforts to widen the effective scope of religious influence.<sup>121</sup>

In *Van Orden v. Perry*, the Supreme Court found that a display of the Ten Commandments on the grounds of the Texas state capitol did not violate the Establishment Clause of the First Amendment because the display was part of the political and legal history of the state.<sup>122</sup> But in a case decided in the same term, *McCreary County v. A.C.L.U.*, the Court found that a county's display of the Ten Commandments was unconstitutional because the county did not have a secular purpose in erecting the display.<sup>123</sup> The county intended to celebrate the religious significance of the Ten Commandments and found the entire context of the display "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction."<sup>124</sup> *Van Orden* and *McCreary* emphasize that displays must be motivated by secular purposes and fair better if they represent historical traditions.

An additional factor that courts may consider is whether the government's religious display is permanent or temporary. In the public school context, courts tend to favor temporary displays rather than permanent displays. In *Stone v. Graham*, the Supreme Court held that a state law requiring the permanent posting of the Ten Commandments in public school classrooms was unconstitutional.<sup>125</sup> The *Stone* court noted, "This is not a case in which the Ten Commandments are integrated into the school curriculum."<sup>126</sup> Relying on *Stone*, a lower federal court held that "a school's permanent display of religious symbols is constitutionally suspect."<sup>127</sup>

In the context of religious displays in other governmental buildings, the length of time the symbol has been in use or the length of time the display has been exhibited often weighs in favor of the government display. In *King v. Richmond County, Georgia*, the Eleventh Circuit Court of Appeals noted that the clerk's seal, which included an outline of stone tablets, had been in use for at least 130 years.<sup>128</sup> Relying on *King*, the Third Circuit Court of Appeals in *Freethought Society of Greater Philadelphia* held that the age and history of a Ten Commandments plaque, which was displayed by itself, "provide[d] a context which changes the effect of an otherwise religious plaque."<sup>129</sup> In reaching its decision, the Third Circuit looked to the Supreme Court decision in *County of Allegheny v. ACLU*, in which Justice O'Connor in her concurrence stated; "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."<sup>130</sup>

## Conclusion

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<sup>121</sup> *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 2859 (2005).

<sup>122</sup> *Id.* at 2864.

<sup>123</sup> 545 U.S. 844, 125 S.Ct. 2722 (2005).

<sup>124</sup> *Id.* at 2739.

<sup>125</sup> 449 U.S. 39, 41 (1981).

<sup>126</sup> *Id.* at 42.

<sup>127</sup> *Clever*, 838 F. Supp. at 929, 937.

<sup>128</sup> 331 F.3d 1271, 1286 (11th Cir. 2003).

<sup>129</sup> 334 F.3d at 264.

<sup>130</sup> *Id.* (citing *County of Allegheny*, 492 U.S. at 630).

Although the *Lemon* test, the endorsement test, and time-based factors provide a measure of guidance for lower courts, inconsistent decisions reached by some lower courts and misinformation from anti-religious groups have caused confusion concerning governmental exhibition of religious displays inside and around governmental buildings. The Constitution, however, does not require government officials to obliterate religious observances and expression from public schools or the public square. The Alliance Defense Fund trusts that this booklet will help dispel the myths about the Establishment Clause that have prompted tragic and unnecessary acts of government censorship of religious expression. In response to this censorship, the Alliance Defense Fund and its allies stand ready and willing to defend the right to display religious messages on public property.

We wish you a Merry Christmas!