



December 17, 2009

VIA FACSIMILE, EMAIL AND U.S. MAIL

Leif Ahnell
City Manager
City Hall
201 W. Palmetto Park Road
Boca Raton, FL 33432

Re: Constitutionality of Nativity Displays

Dear Mr. Ahnell:

It has come to our attention that the City's libraries have Christmas displays that intentionally omit the nativity scene. By way of introduction, the Alliance Defense Fund is America's largest legal alliance defending religious liberty through strategy, training, funding, and litigation. ADF frequently assists municipalities in understanding their rights and responsibilities concerning seasonal religious expression, including holiday displays.

The purpose of this letter is to inform you that displaying the nativity scene along with other holiday displays is entirely constitutional, is consistent with the best of America's traditions, and is inclusive of the religious demographics of the community. But intentionally omitting the nativity scene from a holiday display sends a hostile message to people who adhere to that faith and is discriminatory. The better course of action for the City to take is to have a display that is inclusive of the nativity scene, along with the menorah and Christmas tree, and to not send a hostile message to people of that faith.

Historically, cities and towns across America have celebrated the Christmas season by decorating their buildings and parks with symbols of the season. In recent years, however, certain groups hostile to our Nation's traditions have spread misconceptions about the legality of municipal Christmas displays. While a 2005 Fox News/Opinion Dynamics poll reveals that ninety-five percent of Americans celebrate Christmas, many municipalities are in fear of decorating their buildings and parks with symbols of the Christmas season because they are not fully informed about the legality of celebrating the Christmas season.

I. MUNICIPALITIES MAY ALLOW RELIGIOUS HOLIDAY DISPLAYS

Municipalities may allow religious holiday displays in one of two ways: (1) they may put up their own public displays or (2) allow private individuals and groups to put up displays in a public forum. As discussed below, both are permissible under the U.S. Constitution.

A. Municipalities May Set Up Their Own Religious Holiday Displays.

Municipalities may display religious symbols such as a crèche or nativity scene without offending the Constitution if the display is accompanied by traditional secular holiday displays, like reindeer and snowmen. To determine the constitutionality of municipal religious displays, courts apply the three-prong *Lemon* test.¹ This test asks “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.”² Courts often also use the “endorsement test,” which asks whether a reasonable observer would believe that the municipal display constitutes a government endorsement of religion.³

In *Lynch v. Donnelly*, the Supreme Court applied the *Lemon* test and held that a municipality may display a crèche, if done for legitimate secular purposes, such as to celebrate the holiday or to depict the origins of the holiday.⁴ The city’s display in *Lynch* passed this test.⁵ It included a Santa Clause house, reindeer pulling Santa’s sleigh, a Christmas tree, colored lights, and a crèche, among other things. The Court found that the City was not promoting a specific religious message, but was simply recognizing a “significant historical religious event long celebrated in the Western World.”⁶

Justice O’Connor wrote a concurring opinion in *Lynch* where she applied the endorsement test, rather than the *Lemon* test. She said the “central issue” in *Lynch* was whether the city “endorsed Christianity by its display of the crèche.”⁷ Answering in the negative, Justice O’Connor found the contextual setting of the crèche amongst the other secular objects to be sufficiently secular to pass constitutional muster.⁸

The endorsement test has been cited in many other cases and has gained a wide degree of acceptance in evaluating the constitutionality of municipal religious displays.⁹ Thus, it is crucial for municipal holiday displays to include a sufficient number of secular objects in close enough proximity to the crèche to render the overall display sufficiently secular.

B. Religious Holiday Displays by Private Citizens

Municipalities may also open public forums for private holiday displays, including religious displays, without offending the Constitution.¹⁰ The most common

¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

² *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (citing *Lemon*, 403 U.S. at 612–13).

³ See, e.g., *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002).

⁴ 465 U.S. at 681.

⁵ *Id.*

⁶ *Id.*

⁷ *Lynch*, 465 U.S. at 690.

⁸ *Id.* at 691.

⁹ 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 (7th Cir. 1989).

¹⁰ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); see also *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993) (upholding constitutionality of city’s issuance of a permit to a private group to erect a biblical display in a public park during the Christmas season).

examples of this are when private citizens place a religious display in a public park or when a city opens a specific part of the downtown district to private citizens who want to put up holiday displays.

The Establishment Clause requires the state to be neutral in its relations with religious believers and non-believers; it does not require the state to suppress religion or religious expression: "State power is no more to be used so as to handicap religions, than it is to favor them."¹¹ Thus, the government must be neutral in what holiday displays are erected. If the state opens a forum for holiday displays, it may not discriminate against a participant based on their religious viewpoint.¹² Doing so would violate the First Amendment. As the Supreme Court has explained, "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."¹³

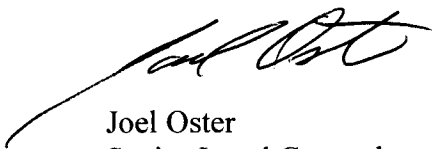
Municipalities need not fear violating the Constitution by opening a forum for private individuals and groups to erect holiday displays. The municipalities are not endorsing any message of the private speakers. If any fear lingers, municipalities can require an appropriate disclaimer on the displays.¹⁴

CONCLUSION

Municipalities may erect religious Christmas displays if such displays are accompanied by secular symbols of the season. Municipalities may also allow private citizens and groups to put up Christmas displays in public forums without violating the Constitution. Cities and towns across the nation should be encouraged by the ways in which the law protects their ability to celebrate Christmas.

We hope this information has been helpful in understanding the City's rights and its responsibilities to protect its citizens' rights to seasonal religious expression. If you would like more information or assistance about a particular situation, please contact the Alliance Defense Fund.

Sincerely,



Joel Oster
Senior Legal Counsel
Alliance Defense Fund

cc: Diana GrubFrieser, City Attorney

¹¹ *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

¹² *Capital Square*, 515 U.S. at 804.

¹³ *Mergens*, 496 U.S. at 250.

¹⁴ *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 201 (N.D.N.Y., 2006).