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RUSSELL E. BROOKS II  
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May 28, 2014



Ms. Rebecca S. Markert, Esq.  
Freedom from Religion Foundation  
P.O. Box 750  
Madison, WI 53701

Dear Ms. Markert,

This letter is in response to your letter regarding our Christmas display at our Fire Station 4 on Shepherd Place.

I received a similar letter from the American Civil Liberties Union (ACLU) in 2007 which I made the Thomas Law Center aware of. I was advised by the Thomas Law Center that we were well within our rights to display our Christmas sign. In addition, they would support us, as well as any efforts from any organizations looking to prevent us from doing so. For your review, I have enclosed a copy of the memorandum from Richard Thompson, President and Chief Counsel of the Thomas More Law Center.

Sincerely,

Russell E. Brooks II  
Fire Chief

Enclosure







# MEMORANDUM

**TO:** Pro bono attorneys, Thomas More Law Center

**FROM:** Richard Thompson, President and Chief Counsel, Thomas More Law Center

**DATE:** November 25, 2008

**RE:** Christmas Celebrations and Nativity Displays

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## Introduction

It is that time of year again when most Americans are gearing up to celebrate the joyous Christmas holiday. Unfortunately, it is also that time of year when those with an anti-Christian agenda are pressing their efforts to remove all traces of Christmas from the public square. As in years past, we request your assistance with our annual Christmas campaign to thwart the efforts of those who want to destroy our National Holiday. Specifically, we ask that you help us to identify cases involving attacks on Christmas and bring them to our attention. We would also appreciate your help with implementing a proactive strategy by assisting in cases involving citizens who want to erect a Nativity display on public property.

This memorandum is intended to provide you general legal information and to outline various factors used to determine the legality of religious displays and expression during Christmas. As you know, each case must ultimately be evaluated on its own facts. TMLC attorneys are standing by to assist you.

**The point of contact for this Christmas campaign is Robert Muise. You may reach Mr. Muise by sending an email to [Christmas@thomasmore.org](mailto:Christmas@thomasmore.org) or calling 734-827-2001.**

Every Christmas holiday we celebrate our faith by erecting religious displays in the town square and singing Christmas carols in our public schools. The United States Supreme Court recognized several decades ago that "we are a religious people whose institutions presuppose a Supreme Being." Unfortunately, organizations like the ACLU and Americans United for the Separation of Church and State have systematically attempted to prevent us from expressing our religious faith and freedom.

The ACLU and its allied organizations have been actively challenging the public display of Nativity scenes. Their aim is to remove all references to religion from the public square. Such challenges often succeed because the city or town acquiesces to their demands. Typically, these municipalities are frightened by the threat of a lawsuit; they fear that a lawsuit will drain the public coffers. Even though the critics of holiday displays are few in number, they effectively use threats of legal action to impose their will on the will of the majority, often with great success.

During this time of year, the Thomas More Law Center also receives many calls from bewildered parents complaining that their child's Christmas celebration is being replaced with a "winter" celebration. Typically, at the first sign of conflict, public school officials are quick to disregard the vast and significant Christian underpinnings of the Christmas holiday to the detriment of its students in favor of a purely secular winter holiday celebration. Such actions by public school officials are not warranted by the Constitution.

The Thomas More Law Center wants to reverse this trend. It is important to us, and the clients we serve, that cities and towns across this nation continue to display traditional symbols of our culture and heritage. In fact, the removal of these traditional displays exhibits an impermissible hostility toward Christianity. As one federal court noted, "As our nation becomes overwhelmed with the tangible evidences of the year-end holiday spirit, the studied absence or even limitation of consistent celebrations within the school might well be interpreted by a student as governmental hostility to the celebrating religions." *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F.Supp. 929, 940 (D. N.J. 1993).

For years, the Thomas More Law Center has fought to defend Christmas from the many assaults brought against it. And we have successfully challenged municipal policies that have denied private citizens the right to display Nativity scenes on public property—a right protected by the First Amendment.

These cases generally arise in the following areas: (a) when the government prevents a private person from erecting a holiday display in a public forum, (b) when the government erects its own holiday displays, and (c) when the government bans Christmas and Christmas displays in the public schools. In these areas, the distinction to keep in mind is the difference between "government speech" and "private speech" when it comes to religion. The United States Supreme Court has recognized that "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." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

#### A. Private Displays

**The display of a Nativity scene, as with any religious symbol, by a private person is religious speech that the First Amendment protects.** See, e.g., *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760-61 (1995). The First Amendment protects private speech most strongly in a traditional public forum, such as a public park, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1985), or in what is known as a designated public forum, which is public property the government has designated for public assembly and speech, *Cornelius v. NAACP Local Educators' Ass'n*, 473 U.S. 788, 802 (1985). In either type of forum, the government may not make content-based restrictions on private speech unless the restriction serves a compelling state interest and is narrowly drawn to accomplish that end. *Perry*, 460 U.S. at 45-46. Any time, place, and manner restrictions must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of information. *Id.*

When it comes to such public forums, the government may not prevent the private display of an unattended Nativity scene but may only impose reasonable time, place, and manner restrictions. And such private religious displays on public property are constitutional. *See, e.g., Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993) (upholding the constitutionality of a private display of a Nativity scene in a public park); *Jocham v. Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003) (upholding the constitutionality of a private display of a Nativity scene on a courthouse lawn, a public forum).

In fact, the government may not prevent a Christian from erecting a Nativity scene in a public forum, especially when the government is allowing another person or group to erect a religious or secular symbol on that same public property. For example, as commonly occurs each December, private religious groups such as Chabad-Lubavitch erect menorahs on public property to celebrate Chanukah. If the government allows Chabad-Lubavitch to erect its menorah, then the government must also allow a Christian to erect a Nativity scene on the same property; otherwise, the government would be violating the free speech rights of the Christian. *See, e.g., Snowden v. Town of Bay Harbor Islands*, 358 F. Supp. 2d 1178, 1196 (S.D. Fla. 2004) (granting a preliminary injunction to permit the private display of a Nativity scene on the same public property as a Jewish group displayed menorah).

### **B. Government Displays**

**A government body may constitutionally display a Nativity scene on public property so long as the entire display, when viewed through the eyes of an informed and objective observer, does not endorse religion.** Based on current precedent, the government violates the Establishment Clause when it promotes or endorses religion or when it disfavors or shows hostility toward religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Larson v. Valente*, 456 U.S. 228, 244 (1982). For example, in *Lynch v. Donnelly*, the Supreme Court upheld a city's annual holiday display that included a Nativity scene along with other holiday items, and the same result occurred in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), where the court upheld a government display that included a Nativity scene, a menorah, and a Christmas tree, which is a secular holiday symbol. *See also Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989) (upholding the constitutionality of a village's holiday display on the lawn of the village hall that included a Nativity scene).

Thus, government bodies should be encouraged to include Nativity scenes—the historical basis for the National Holiday—in their holiday displays and should be dissuaded from excluding them out of fear they will be violating the Constitution. In *Lynch*, the Supreme Court made the following relevant observation: “The crèche in the display depicts the historical origins of this traditional event [i.e., Christmas] long recognized as a National Holiday” and “[t]o forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings.”

Indeed, depending on the facts, the government may be found in violation of the Constitution if it refuses to include a Nativity scene in its holiday display. For example, should the government only display certain religious symbols to the exclusion of Christian religious symbols, the

government may be violating the constitution in that it is disfavoring or showing hostility toward the Christian religion. See *Lynch*, 465 U.S. at 673.

An additional factor to consider based on recent Supreme Court precedent involving religious displays is the history of the government's Christmas display; that is, whether it is a longstanding practice. This was a critical factor in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol. In his concurring opinion, which provided the narrowest grounds for the decision, Justice Breyer stated that "those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting" to an impermissible endorsement of religion. Justice Breyer also noted the following:

[The removal of the religious symbol], based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

The significance of the *Van Orden* decision has not gone unnoticed by the federal courts. For example, in *ACLU v. Mercer County*, 432 F.3d 624 (6<sup>th</sup> Cir. 2005), a recent Sixth Circuit case upholding the public display of the Ten Commandments in light of the *Van Orden* decision, the court stated, "Our concern is that of the reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." (quoting ACLU website).

The Sixth Circuit stated further:

[T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

In conclusion, it would be a "stilted over-reaction" contrary to our Nation's history and to Supreme Court precedent to exclude Nativity scenes from government holiday displays.

### C. Public Schools

Students inside a public school retain their First Amendment rights and may engage in religious speech during the school day so long as they do not cause a material disruption to the workings of the school. See *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The rules governing religion in the public schools are similar in many respects to those that govern religion outside the public schools. A public school, as a government body, may not promote or endorse religion and may not disfavor or show hostility toward religion. A

public school must remain neutral. See *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Thus, there should be no unreasonable prohibitions against public school students wishing each other "Merry Christmas," distributing Christmas cards, or wearing clothing displaying a religious message, assuming there is no policy requiring only school uniforms.

**Likewise, a public school may permit religious music during the holiday season.** For example, in *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980), the court upheld a school district's policy that permitted the study and performance of religious songs in its public schools, finding that the policy promoted the legitimate educational goal of "advance[ing] the students' knowledge of society's cultural and religious heritage." And in *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), the court held that selecting explicitly Christian religious music and Christian religious sites for performance of the high school choir did not violate the Establishment Clause and noted that "it is recognized that a significant percentage of serious choral music is based on religious themes or text."

**Thus, unlike prayer, courts have held that singing or listening to songs with religious content is not an explicit religious exercise.** Songs with religious content are not ipso facto the equivalent of prayer, and they are permissible in public schools. See *Bauchman*, 132 F.3d at 552, n.8 ("[W]e do not believe the singing of religious songs alone constitutes prayer.").

In *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929 (D. NJ 1993), the court upheld the constitutionality of a school district policy requiring classrooms to maintain calendars depicting a variety of national, ethnic, and religious holidays and permitting seasonal displays containing religious symbols. In doing so, the court noted that the exclusion of certain religious symbols during the holiday season is not warranted and such exclusion itself could be inconsistent with the Constitution. The court acknowledged that "the studied absence or even limitation of consistent celebrations within the school might well be interpreted by a student as governmental hostility to the celebrating religions." Moreover, the court stated, "We learn this lesson [i.e., understanding and respect for the right of all individuals regarding their beliefs, values, and customs] not by being offended or threatened by the religious symbols of others, but by understanding the meaning of those symbols and why they have the capacity to inspire intense emotions."

Thus, despite the current trend of replacing "Christmas" with "Winter Holiday," Christmas music and Christmas traditions are constitutionally permissible in the public schools. As the courts have stated, such traditions promote a student's understanding of our society's cultural and religious heritage. Meanwhile, the systematic exclusion of such traditions during the holiday season is not warranted and such exclusion itself could be inconsistent with the Constitution.

#### **D. What You Can Do**

This year, like many years past, the Thomas More Law Center will continue its efforts to defend Christmas and its true meaning from those who seek to pervert and destroy it. You can help us by keeping watch in your cities, towns, and public schools for instances of anti-Christian bias and by referring to us cases in which Christmas is under attack.



## E. General Rules

1. Private citizens, organizations, and churches have a constitutional right to erect Christmas displays, including Nativity scenes, on government property, including public parks if:

a. The government has allowed the property to be used for a wide variety of expressive conduct (i.e., the property is a traditional or designated public forum).

b. The private entity has obtained permission, if required, through an existing application process on the same terms as any secular organization.

c. The private entity follows any reasonable, content-neutral, time, place, and manner restrictions.

2. The government itself may erect Christmas holiday displays either on public or private grounds if the display is accompanied by other secular symbols of the holiday, such as Christmas trees, reindeer, Santa Claus, and candy canes. The courts have held that such displays do not convey an impermissible message of endorsement of religion. The history of the government's display is also a critical factor.

3. Where a citizen wants to ask his or her town to allow a Nativity display, the following information should be obtained:

a. The citizen's name, address, telephone numbers, and email address.

b. The name of the town in which the Nativity is to be displayed.

c. A description of the displays, if any, the town has erected on the property in the past. Indicate the items, symbols, and objects that have been displayed and the year(s) in which the display(s) was/were erected.

d. A description of the displays, if any, the town has allowed private individuals and private groups to erect on the property in the past. Indicate the items, symbols, and objects that have been displayed and the year(s) in which the display(s) was/were erected.

e. Determine whether the citizen wants to ask the government to erect a Nativity scene on the property or whether he or she wants the government to permit a private individual or private group to display the Nativity scene on the property.

## Suggestions

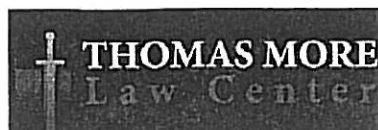
1. Obtain a copy of the written government rules, regulations, and application procedure(s) required to erect displays on the property in question.

2. Fill out any required application form(s).

3. If the application is denied, seek specific reasons why it was denied.



In conclusion, I would like to personally thank you for your support of our work and may God bless you in all of your endeavors. We look forward to hearing from you. Merry Christmas!


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Christmas Memo to Pro-Bono Attorneys - Memorandum to Allied Attorneys Regarding Christmas Celebrations, etc.  
(Tue Nov 25 2008)

### Memorandum to Allied Attorneys of the Thomas More Law Center

**From:** Richard Thompson


**Date:** November 25, 2008

**Re:** Christmas Celebrations and Nativity Displays 

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 [Click here to download a PDF version of the 2008 memorandum published by the Thomas More Law Center for the use of our allied pro-bono attorneys.](#)

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