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Reply to: Virginia

December 19, 2006

Commissioner Bernadette Castro  
NYS Office of Parks & Recreation and Historic Preservation  
Agency Building 1, 20<sup>th</sup> Floor  
Albany NY 12238

RE: Christmas trees

Dear Commissioner Castro:

Liberty Counsel is a nationwide public interest law firm with offices in Florida, Virginia and the District of Columbia and affiliate attorneys throughout the United States. Much of our work involves public policy and educational efforts related to religious expression in the public square. We have been contacted by Paul Kosowski of the Nassau County Civil Association, who is quite concerned about the renaming of “Christmas trees” to “holiday trees” in various Long Island state parks. He has asked us to write to you and to provide you with some information regarding the display of Christmas symbols on public property.

The United States Supreme Court has held that Christmas trees are secular symbols. *County of Alleghany v. ACLU*, 492 U.S. 572 (1989). Therefore, using the term “Christmas tree” does not create any connotation of religious observance by the state and would not subject the state to a claim that it is endorsing religion. In the balance of this letter I am attaching our legal memorandum about holidays on public property for your information and review. If you have any questions or require clarification, please let us know.

Sincerely,

Mary E. McAlister\*

cc: Paul Kosowski

\*Licensed in Florida and California

This memorandum of law has been prepared by Liberty Counsel in order to offer guidance to public officials and schools regarding the upcoming holiday celebrations. Liberty Counsel is a national public interest law firm specializing in constitutional law, particularly in free speech, religious freedom and church-state matters. We have presented many briefs before the United States Supreme Court, and we have argued before the High Court and in state and federal courts throughout the nation. Liberty Counsel has offices in Florida and Virginia. We have hundreds of affiliate attorneys in all 50 states.

This memorandum of law overviews (1) publicly and privately sponsored religious holiday displays, (2) religious holidays in public schools, and (3) the rights of public school students in the context of religious holidays.

### **Publicly and Privately Sponsored Religious Holiday Displays**

The display of nativity scenes and religious symbols takes on two forms: publicly sponsored and privately sponsored, both of which can be displayed on public property. A publicly sponsored scene is one that is erected and maintained by public officials. A privately sponsored scene is one that is erected and maintained by private citizens. Both are constitutional, and both can be displayed on public property. The main difference is that a publicly sponsored scene should have some form of secular display in the same context, while a privately sponsored scene need not have any secular symbols, but should probably have a sign indicating the display is privately sponsored.

#### *Publicly Sponsored Symbols*

An example of a publicly sponsored religious symbol is one that is erected and maintained by city officials on public property. A publicly sponsored holiday display containing a religious symbol should generally include secular symbols.<sup>1</sup> The secular and religious symbols should be within the same parameter of view. For example, a holiday display can include a nativity scene along with Santa Claus, reindeer or a Christmas tree.

What is true for publicly sponsored holiday displays on public property is also true for holiday displays in public schools. A teacher may decorate the classroom with or feature a display having both religious and secular symbols of the holiday.

#### *Privately Sponsored Symbols*

A privately sponsored religious symbol can also be displayed on public property. The main difference is that the display is sponsored by private citizens. Privately sponsored scenes are more common in public parks where citizens are allowed to engage in

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<sup>1</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The absence of a secular symbol does not mean the religious symbol is unconstitutional.

expressive activity.<sup>2</sup> In most public parks, citizens are allowed to hold gatherings and erect displays. To prohibit religious expression in a public forum where other expressive activity is permitted violates the Constitution.

In a privately sponsored scene, secular symbols are unnecessary. In order to clearly designate that the display is privately sponsored, a sign can be erected, similar to the following example: This display is privately sponsored by XYZ Company.<sup>3</sup> However, such a sign is not mandatory.<sup>4</sup> Private holiday displays of religious symbols on public property are permissible under the Free Speech Clause.<sup>5</sup>

### **Religious Holidays in Public Schools**

The former United States Secretary of Education once stated: "Our public schools must treat religion with fairness and respect . . ."<sup>6</sup> The United States Supreme Court has also observed: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>7</sup>

Teachers are both individuals *and* agents of the state. Consequently, the First Amendment serves to protect their freedom of speech and free exercise of religion and to prohibit them from establishing a religion. Since teachers are employees of the state, they are, in a sense, an extension of the state. As such, the First Amendment Establishment Clause, which prohibits the government from establishing a religion, places certain restrictions on teachers' activities in matters of religion. On the other hand, teachers do not lose their rights to free speech and freedom of religion simply because they are employees of the state.<sup>8</sup>

#### *Teaching About Religion*

Teachers may objectively overview religion as long as the overview is consistent

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<sup>2</sup> See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc).

<sup>3</sup> A disclaimer on a privately sponsored religious scene on public property is not necessary but may be helpful to alert the public that the display is, in fact, privately sponsored.

<sup>4</sup> *Capitol Square Review*, 515 U.S. at 753.

<sup>5</sup> See, e.g., *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999); *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993); *Americans United*, 980 F.2d at 1538. See *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993). See also *Chabad-Lubavitch of Georgia*, 5 F.3d at 1383.

<sup>6</sup> Richard W. Riley, U.S. Secretary of Education, *Statement on Religious Expression*, <http://www.ed.gov/Speeches/08-1995/religion.html>.

<sup>7</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>8</sup> In addition to having constitutional rights and obligations, teachers are public employees and therefore have rights under state and federal employment laws. See MATHEW D. STAYER, *ETERNAL VIGILANCE: KNOWING AND PROTECTING YOUR RELIGIOUS FREEDOM* 439-451 (2005).

with the subject matter being taught.<sup>9</sup> Academic freedom is “the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.”<sup>10</sup> According to the Supreme Court, academic freedom is “a special concern of the First Amendment.”<sup>11</sup> No subject can be thoroughly taught without some discussion of religion.<sup>12</sup>

The Supreme Court stated that study of the Bible or religion, when presented objectively as part of a secular program of education, is consistent with the First Amendment.<sup>13</sup> The United States Department of Education has issued Guidelines on Religious Expression in Public Schools, noting that the Bible may be taught in school and that a teacher may instruct the class about religious influences relevant to the subject matter being discussed.<sup>14</sup>

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<sup>9</sup> See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380, (9th Cir. 1994) (“[A] reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.”)

<sup>10</sup> *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987).

<sup>11</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>12</sup> The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences derived from paganism, Judaism, Christianity – both Catholic and Protestant – and other faiths accepted by a large part of the world’s peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.” *McCullum*, 333 U.S. at 236 (Jackson, J., concurring).

<sup>13</sup> *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

<sup>14</sup> The Guidelines, first released in 1995 and then again in 1999, state:

Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies.

*Symbols, Music, Art, Drama and Literature*

The constitutional principle regarding symbols, music, art, drama, or literature, whether in public school or in association with other public entities, is simple – mix the secular and the sacred. In other words, if a public entity, or a teacher as an agent of that entity, displays or presents a secular aspect or purpose along with the religious symbol, music, art, drama, or literature, then the display or the presentation is considered constitutional. A nativity scene in the classroom follows the same guidelines as a publicly sponsored nativity scene on public property. A school-sponsored Christmas concert on a public school campus which contains only Christian music and where the concert was directed and the music selected by the school would be unconstitutional, but Christian Christmas songs mixed with secular songs of the holiday make the presentation constitutional.<sup>15</sup> On the other hand, if the students are permitted to select their own songs as part of a student performance, then their songs would not need to include secular themes.

Probably the best illustration of the permissibility for the use of symbols, music, art, drama, and literature within the public school system is the school board policy of Sioux Falls School District in Sioux Falls, South Dakota. This policy has been court tested and serves as an example to other schools.<sup>16</sup> The policy states, in part, the following:

Music, art, literature, and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday. . . . The use of religious symbols such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions or other symbols that are part of a religious holiday [are] permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick=s Day, Thanksgiving and Halloween.<sup>17</sup>

“[T]o allow students only to study and not to perform (religious art, literature and music, when) such works . . . have developed an independent secular and artistic significance, would give students a truncated view of our culture.”<sup>18</sup> It would be literally impossible to develop a public school curriculum that did not in some way affect the

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<sup>15</sup> See *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 524 U.S. 953.

<sup>16</sup> *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1319 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

<sup>17</sup> *Id.* at 1319-20.

<sup>18</sup> *Abington Township*, 374 U.S. at 225 (quoting *Florey v. Sioux Falls Sch. Dist.* 49-5, 464 F. Supp. 911 (D.S.D. 1979)).

religious or nonreligious sensibilities of some of the students or their parents.<sup>19</sup> The court also rejected the argument that singing Christian carols would entangle the school with religion.<sup>20</sup> Certainly, “[m]usic without sacred music, architecture minus the Cathedral, or painting without the Scriptural themes would be eccentric and incomplete, even from a secular point of view.”<sup>21</sup>

In *Doe v. Duncanville Independent School District*,<sup>22</sup> a federal court held that a public high school choir’s adoption of the song, *The Lord Bless You and Keep You*, as its theme song did not violate the Establishment Clause and was constitutional. In *Doe*, the song was sung every Friday during practice, at the end of some performances and choral competitions, and on the bus to and from performances, which the students were required to sing.<sup>23</sup>

In *Bauchman v. West High School*,<sup>24</sup> another federal court held that singing songs with Christian lyrics, including *The Lord Bless You and Keep You* and *Friends*, was constitutional even in settings such as graduation ceremonies and concerts at churches.<sup>25</sup> The Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion.<sup>26</sup> “Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally.”<sup>27</sup>

Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of sacred choral music, like any piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression.). *Plausible secular reasons also exist for performing school choir concerts in churches and other venues associated with religious institutions.* Such venues often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate seating. Moreover, by performing in such venues, an instructor can showcase his choir to the general public in an atmosphere conducive to the performance of serious choral music.<sup>28</sup>

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<sup>19</sup> *Id.* at 1317.

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

<sup>21</sup> *Illinois ex rel. McCullom v. Board. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

<sup>22</sup> 70 F.3d 402 (5th Cir. 1995).

<sup>23</sup> *Id.* at 404, 407.

<sup>24</sup> 132 F.3d 542 (10th Cir. 1997).

<sup>25</sup> *Id.* at 547.

<sup>26</sup> *Id.* at 553.

<sup>27</sup> *Id.* at 554.

<sup>28</sup> *Id.* (emphasis added).

## Public School Students in the Context of Religious Holidays

The Supreme Court has declared that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>29</sup> The Court recognized that when a student is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions.<sup>30</sup> Students may exercise their constitutional right to free speech while on public school campuses before and after school, between classes, in the cafeteria, or on the playing field.

When students walk on the premises of any public school, kindergarten through college, they carry with them the First Amendment protection of free speech and free exercise of religion.<sup>31</sup> “Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>32</sup> The Supreme Court in *Tinker* made clear that school property may not be declared off limits for expressive activity by students.

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The Supreme Court has long recognized “that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment.”<sup>34</sup> “It is axiomatic that written expression is pure speech.”<sup>35</sup> Well-settled constitutional law confirms “that the guarantee of freedom of speech that is enshrined in the First Amendment encompasses the right to distribute peacefully.”<sup>36</sup> “From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty.”<sup>37</sup>

The right of free speech includes the right to distribute literature.<sup>38</sup> In fact, the distribution of *printed* material is considered pure speech.<sup>39</sup> Students can distribute religious Christmas cards and greet one another by saying, “Merry Christmas.” If the school

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<sup>29</sup> *Tinker*, 393 U.S. at 506.

<sup>30</sup> *Id.* at 512-13.

<sup>31</sup> The students in *Tinker* included an eight-year-old second grader, an eleven-year-old fifth grader, a thirteen-year-old eighth grader, and a fifteen- and sixteen-year-old in the eleventh grade. The students in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), attended public secondary school. Public secondary schools, depending on state law, include middle schools and/or junior high schools and high schools. The students in *Widmar v. Vincent*, 454 U.S. 263 (1981), involved college students. Although the latter two cases pertained to student clubs within a public secondary school or college, these cases were based on student free speech rights.

<sup>32</sup> *Id.* at 508.

<sup>33</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). “*Tinker* provides the standard for restricting student speech on campus that is not part of a school-sponsored program.” *Clark*, 806 F. Supp. at 119.

<sup>34</sup> *ISKCON v. Lee*, 505 U.S. 672, 702-03 (1992).

<sup>35</sup> *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288 (E.D. Pa. 1991).

<sup>36</sup> *Id.*

<sup>37</sup> *Paulsen v. County of Nassau*, 925 F.2d 65, 66 (2d Cir. 1991).

<sup>38</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>39</sup> *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”)

does not have a policy requiring the students to dress in uniform, then the students can wear clothing with religious symbols or words or religious jewelry.

As already noted above, students may sing religious Christmas carols. If the songs are part of a school choral performance, then religious songs are permissible so long as the performance also includes some secular songs. Such a performance is equivalent to a publicly sponsored nativity scene. However, if the students are permitted to select their own songs without direction from school personnel, then they can sing whatever songs they choose. No secular component is necessary. This is similar to the privately sponsored nativity scene.

### **Conclusion and Summary**

Publicly sponsored nativity scenes on public property are constitutional so long as there is a secular symbol of the holiday in the general context. Privately sponsored nativity scenes or religious symbols are also permissible on public property that has been opened to the general public for expressive activity. No secular symbol is necessary. A sign indicating the private sponsorship may be helpful.

Public schools are not religion-free zones. Classroom discussion of the religious aspects of the holidays is permissible. A holiday display in a classroom may include a nativity scene or other religious imagery so long as the context also includes secular symbols. A choral performance may include religious songs. Indeed, the majority of the songs may be religious so long as the performance also includes secular holiday songs. If the students select their own songs independent of the direction of school officials, then there is no requirement that the songs include secular numbers.

Students may distribute religious Christmas cards to their classmates during noninstructional time, before or after school or between classes. If the students are not required to dress in uniform, then they may wear clothing with religious words or symbols or don religious jewelry.

If you would like additional information or representation, please do not hesitate to contact us. Liberty Counsel offers its representation free of charge.