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Legal Memorandum on Public Celebration of Christmas and Religious Holidays

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Liberty Counsel is a national public interest law firm specializing in constitutional law, particularly in free speech, religious freedom, and church-state matters. This memorandum of law overviews current Supreme Court decisions relevant to public and private recognition of Christmas and other religious holidays, including how (A) the new "test" of "historical practices and understandings" of the First Amendment's Establishment Clause overrules and replaces the defunct "Lemon Test;" (B) how Christmas is part of America's history and tradition; (C) the right of employees to decorate their workspaces and common areas for Christmas; and (D) the impact of the new cases on (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.

Background on Recent Supreme Court Cases

On May 2, 2022, a 9-0 decision by the U.S. Supreme Court in *Shurtleff v. City of Boston* struck down censorship of Christian viewpoints within the public forum the City of Boston had created for flag raisings. This case was brought by Liberty Counsel and decided by the Court in our client's favor, resulting in attorney's fees for Liberty Counsel in an amount of more than $2,100,000. The High Court unanimously ruled that the City of Boston violated the Constitution by censoring a private flag in a public forum open to "all applicants" merely because the application referred to it as a "Christian flag." The High Court soundly rejected Boston's use of the 1971 case known as *Lemon v. Kurtzman,*[1] and its so-called "Lemon Test." The new "test" under the First Amendment is "historical practices and understandings" of the First Amendment Establishment Clause.

The *Shurtleff* case paved the way for the decision in *Kennedy v. Bremerton School District*, where Liberty Counsel argued in an amicus brief that the school could not suppress Coach Joe Kennedy's private religious speech to silently pray on the football field after games. We urged the Court to overrule the "Lemon Test," which the Court did. In 2023, the Supreme Court decided *Groff v. DeJoy*, 600 U.S. 447 (2023), involving religious discrimination under Title VII of the Civil Rights Act of 1964. **Now, the combined cases of *Shurtleff v. City of Boston*, 596 U.S. 243 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); and *Groff v. DeJoy* operate together to generally prohibit public and private employers from discriminating against Christmas and other holiday symbols, decorations, and expression.**

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

The City of Boston's discrimination against Christian religious symbols and its subsequent loss at the Supreme Court in *Shurtleff* is indeed a cautionary tale:

> How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to *Lemon* v. *Kurtzman*, 403 U. S. 602…(1971). Issued during a "'bygone era'" when this Court took a more freewheeling approach to interpreting legal texts, *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ——, ——, 139 S.Ct. 2356, 2364…(2019), *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. **That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, *Lemon* produced only chaos.** In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a more humble jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to follow *Lemon* anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts.

Shurtleff v. City of Boston, 596 U.S. 243, 276–77 (2022) (Gorsuch, J., concurring) (emphasis added). Under the "Lemon Test," "unreasonable" observers and officials acted to suppress Christmas scenes and other religious symbols, but now, no longer:

> Ultimately, *Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are **lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable**. To play, expose your avatar to the display and ask for his reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over.
>
> Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, **they sometimes felt they had to discriminate against religious speech and suppress religious exercises**. **But those actions, in turn, only invited liability under other provisions of the First Amendment.** The hard truth is, *Lemon*'s abstract and ahistoric test put "[p]olicymakers ... in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other." *Pinette*, 515 U.S. at 767–768, 115 S.Ct. 2440 (plurality opinion).

Shurtleff v. City of Boston, 596 U.S. 243, 279 (2022) (Gorsuch, J., concurring) (emphasis added).

> [O]ur history reveals, **"[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment."** Symbol Cases 107. For most of its existence, this country had an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch*, 465 U.S. at 674... In fact and as we have seen, it appears that, until *Lemon*, this Court had never held the display of a religious symbol to constitute an establishment of religion. See Brougher 1–2; Symbol Cases 91. **The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to "roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine."**

> *American Legion*, 588 U. S., at 2084-2085. Our Constitution was not designed to erase religion from American life; it was designed to ensure "respect and tolerance." *Id.*, at ——, 139 S.Ct., at 2090.
>
> To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. ***Lemon*** **ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.**

Shurtleff v. City of Boston, 596 U.S. 243, 287–88 (2022) (Gorsuch, J., concurring) (emphasis added).

A. The "Lemon Test" Has Been Overruled and May Not Be Used To Censor Christmas

In *Shurtleff* and in *Kennedy*, the Court emphasized its rejection of the "Lemon Test" and noted that it had "instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings'." *Kennedy* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). The High Court continued:

> What the [School] District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U. S., at —— – ——, 139 S.Ct., at 2079–2081 (plurality opinion); … The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. ... This Court has since made plain, too, that **the Establishment Clause does not include anything like a "modified heckler's veto, in which ... religious activity can be proscribed" based on "perceptions" or "discomfort."** *Good News Club v. Milford Central School*, 533 U.S. 98, 119 … (2001) (emphasis deleted). **An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech**. ... *Mergens*, 496 U.S. 226, 250 … (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 … (2005) (BREYER, J., concurring in judgment). **In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*,** 142 S.Ct., at 1587–1588;…1595 (ALITO, J., concurring in judgment); *id*., 142 S.Ct., at 1587, 1588–1589 (opinion of GORSUCH, J.).
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> **In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."** *Town of Greece*…see also *American Legion*…(plurality opinion). "[T]he line that courts and governments 'must draw between the permissible and the impermissible'" has to "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." *Town of Greece*, 572 U.S. at 577…(quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294

> […](1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "exception within the Court's Establishment Clause jurisprudence." 572 U.S. at 575 […]; see *American Legion*… The [School] District and the Ninth Circuit erred by failing to heed this guidance.

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (emphasis added; some internal citations omitted).

B. Christmas Is Part of the Historical Practices, Understandings and Traditions of America

Even under the misguided, ahistorical *Lemon v. Kurtzman* case, the U.S. Supreme Court never accepted the idea that all Christmas holiday symbols must be purged from public life. *See Lynch v. Donnelly,* 465 U.S. 668 (1984) (holding that a nativity scene was permissible to display on public property). Now, after *Shurtleff*, *Kennedy*, and *Groff* such symbols *may not* be purged or forbidden by any public employers and many private employers. In *Lynch*, the court noted with approval the practice of public schools "taking note of the season with Christmas hymns and carols," in its discussion of how everything about Christmas is influenced by faith:

> Of course the crèche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause. See, *e.g., McGowan, supra; Marsh, supra.* It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so "taint" the City's exhibit as to render it violative of the Establishment Clause. To 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. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.
>
> The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. *Everson, supra,* 330 U.S., at 8, 67 S.Ct., at 508. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. **Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.** *Lynch v. Donnelly*, 465 U.S. 668, 685-86, (1984). (Emphasis added.)

The Supreme Court has even rejected the argument that singing Christian Christmas carols would entangle government schools with religion: "[**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**." *Illinois ex rel. McCollum v. Board. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). (Emphasis added).

C. Public Employees May Generally Decorate for the Christmas Holiday

Public employees may not be generally prohibited from decorating for holidays with religious significance (such as Thanksgiving and Christmas). *Shurtleff*, *Kennedy,* and now *Groff,* foreclose this result. *Shurtleff* teaches that where a government employer has opened a forum for expression by employees, by encouraging employees to decorate spaces for other holidays or political causes at employee discretion, the government employer may not censor other holidays or decorations because they are or may be "religious." Moreover, *Kennedy* does not permit a government employer to use an **"excessively broad job descriptio[n]" "by treating everything [government employees] say in the workplace as government speech subject to government control.** *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951." *Kennedy* at 2411. The fact that government employees may decorate their office spaces for the Christmas holiday does not necessarily transform their speech into government speech, simply by the fact that it takes place on government property. And, under *Groff,* an employer (including a private employer) which fails to accommodate (let alone which discriminates against) a religious employee and fails to provide an accommodation "has a defense only if the hardship is 'undue,' **and a hardship that is attributable to employee [or other] animosity to a particular religion [like Christianity and Christmas], to religion in general, or to the very notion of accommodating religious practice cannot be considered 'undue**.' If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Groff,* 600 U.S. at 472.

D. The Impact of *Shurtleff* and Subsequent Cases on Publicly and Privately Sponsored Religious Holiday Displays

The "Lemon Test" had been cited by courts more than 7,000 times. It has been used to censor religious speech, songs, Christmas cards, symbols, displays and even our National Motto — "In God We Trust." Now that *Lemon* is finally gone, it is a new day for the display of Nativity scenes and religious symbols. These displays take 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. Pre-*Shurtleff,* it was generally recommended that a publicly sponsored scene have some form of secular display in the same context, while it was recommended that 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 is unquestionably constitutional if it includes secular symbols.[2] 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. This was permitted prior to 2022 under *Lemon*, and it remains true today after *Shurtleff-Kennedy-Groff.*

[2] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The absence of a secular symbol does not mean the religious symbol is unconstitutional.

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 expressive activity.[3] In most public parks, citizens are allowed to hold gatherings and erect displays. *Shurtleff* held that a prohibition on 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. However, such a sign is not mandatory.[4] Private holiday displays of religious symbols on public property are permissible under the Free Speech Clause.[5] Government officials should be aware that a limited open forum for privately sponsored displays may risk a challenge if another private sponsor requests permission to make a display against the relevant religious holiday in that location and is then denied. A constitutional public holiday display by the government itself, on the other hand, may exclude requests for offensive, anti-holiday displays, as it is government speech.

Religious Holidays in Public Schools

The former United States Secretary of Education once stated: "Our public schools must treat religion with fairness and respect . . . ."[6] 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."[7]

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, has historically been interpreted as placing 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.[8]

Teaching About Religion

Teachers may objectively overview religion as long as the overview is consistent with the subject matter being taught.[9] 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

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[3] *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).
[4] *Capitol Square Review*, 515 U.S. at 753
[5] *Capitol Square Review*, 515 U.S. at 753; See, *e.* g., *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384.
[6] Richard W. Riley, U.S. Secretary of Education, *Religious Expression in Public Schools: A Statement of Principles*.
[7] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[8] In addition to having constitutional rights and obligations, teachers are public employees and therefore have rights under state and federal employment laws. See Staver, Mathew D., *Eternal Vigilance: Knowing and Protecting Your Religious Freedom* (2005), 439-451.
[9] 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.")

judgment."[10] According to the Supreme Court, academic freedom is "a special concern of the First Amendment."[11] No subject can be thoroughly taught without some discussion of religion.[12]

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.[13] 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.[14]

Symbols, Music, Art, Drama and Literature

The easiest way to ensure the constitutionality of religious 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 (or crèche) 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 may have historically been considered unconstitutional, but Christian Christmas songs mixed with secular songs of the holiday make the presentation constitutional.[15] 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.

One of the better illustrations of a policy allowing the permissible use of symbols, music, art, drama, and literature within the public school system is the pre-*Shurtleff* 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.[16] 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

[10] *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987).
[11] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).
[12] "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." *McCollum v. Board of Education*, 333 U.S. at 236 (1948) (Jackson, J., concurring).
[13] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).
[14] 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." http://www.ed.gov/Speeches/08-1995/religion.html and http://www.ed.gov/inits/ religionandschools/.
[15] See *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), cert. denied, 524 U.S. 953.
[16] *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1319 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980)

> 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. [17]

"[T]o allow students *only* to study and *not* to perform works [religious art, literature and music] when they have developed an independent secular and artistic significance, would give students a truncated view of our culture."[18] It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents.[19] The court also rejected the argument that singing Christian carols would entangle the school with religion.[20] 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."[21]

In *Doe v. Duncanville Independent School District*,[22] 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.[23]

In *Bauchman v. West High School*,[24] 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.[25] The Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion.[26] "Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally."[27]

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.[28]

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[17] *Id.* at 1319-20.
[18] *Abington Township*, 374 U.S. at 225 (quoting *Florey v. Sioux Falls Sch. Dist. 49-5*, 464 F. Supp. 911 (D.S.D. 1979)).
[19] *Id.* at 1317.
[20] *Id.*
[21] *Illinois ex rel. McCollum v. Board. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).
[22] 70 F.3d 402 (5th Cir. 1995)
[23] *Id.* at 404, 407
[24] 132 F.3d 542 (10th Cir. 1997).
[25] *Id.* at 547.
[26] *Id.* at 553
[27] *Id.* at 554.
[28] *Id.* (emphasis added).

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."[29] 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.[30] 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.[31] "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[32] The Supreme Court in "*Tinker* made clear that school property may not be declared off limits for expressive activity by students. . . ."[33]

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."[34] "It is axiomatic that written expression is pure speech."[35] 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."[36] "From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty."[37] The right of free speech includes the right to distribute literature.[38] In fact, the distribution of *printed* material is considered pure speech.[39] Students can therefore distribute religious Christmas cards and greet one another by saying, "Merry Christmas." If the school 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 particularly where 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.

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[29] *Tinker*, 393 U.S. at 506.
[30] *Id.* at 512-13.
[31] The students in *Tinker* included an eight-year-old second grader; an 11-year-old fifth grader; a 13-year-old eighth grader; and two 11th graders, 15 and 16 years old. 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.
[32] *Id.* at 508.
[33] *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). "*Tinker* provides the standard for restricting student free speech on campus that is not part of a school-sponsored program." *Clark*, 806 F. Supp. at 119.
[34] *ISKCON v. Lee*, 505 U.S. 672, 702-03 (1992).
[35] *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288 (E.D. Pa. 1991).
[36] *Id.*
[37] *Paulsen v. County of Nassau*, 925 F.2d 65, 66 (2d Cir. 1991).
[38] *Martin v. City of Struthers*, 319 U.S. 141 (1943).
[39] *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.")

Conclusion and Summary

Publicly sponsored Nativity scenes on public property are constitutional under the "history and traditions" test now recognized by the U.S. Supreme Court. Such displays are also constitutional, where 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 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, particularly where 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.

Finally, public schools may not prohibit employees from using the word "Christmas" or derivatives, like the use of the phrase "Merry Christmas." This includes use of the word or phrase from staff to other staff or students, by students to one another, as well as within other written or textual contexts, such as decorations on school walls, statements on school websites or calendars, coloring or art projects, or in other contexts. A public school's prohibition of "Merry Christmas" (or other phrases like "Happy Thanksgiving" or "God Bless You") is unconstitutional viewpoint censorship.

If you would like additional information or legal assistance, please do not hesitate to contact us at 407-875-1776, or via the legal assistance link at https://lc.org/legal-help. Liberty Counsel offers its assistance free of charge.