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REPLY TO FLORIDA

November 13, 2023

Via E-Mail Only
Jim Archambo, City Administrator
City of Wauwatosa
7725 W. North Ave.
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jarchambo@wauwatosa.net

RE: Ban on Christmas holiday symbols, decorations, and expression

Dear Mr. Archambo:

By way of brief introduction, Liberty Counsel is a national non-profit litigation, education, and public policy organization with an emphasis on First Amendment religious liberties. Liberty Counsel provides *pro bono* advocacy and assistance on a variety of issues within our mission, including the public celebration of traditional holidays such as Christmas. We have affiliated attorneys across the United States, including Wisconsin.

Liberty Counsel writes to demand the immediate retraction of the unconstitutional ban on Christmas holiday symbols, decorations, and expression that the City of Wauwatosa ("City") sent via email to City employees. Liberty Counsel cautions any City department from unlawful retaliation against any employee who declines this unlawful directive. The Christmas holiday ban violates the U.S. Constitution by showing hostility toward Christianity. The First Amendment does not permit the City to eliminate Christmas holiday symbols or expression in a misguided attempt to be "inclusive" by eliminating all traditional elements of expression regarding a federally and state recognized holiday.

The City's effort to comprehensively eliminate Christmas symbols is Orwellian. This anti-Christmas (read: anti-Christianity) purge utterly fails to consider the Supreme Court's recent decisions in *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583 (2022); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022); and *Groff v. DeJoy*, 600 U.S. 447 (2023). The City's entire legal foundation (such as it was) for its Christmas decoration ban has been overruled by these cases.

The City may not express hostility toward Christianity as it has here or discriminate against employees who seek to permissibly celebrate the Christmas holiday consistent with their faith by

decorating their work space, or celebrate Christmas or other official holidays by decorating common areas. Moreover, the Religion Clauses of the First Amendment protect public employees from being forced to violate or suppress their faith on the job. The Free Exercise Clause and the Establishment Clause, working in conjunction, not only protect the right of individual employees to practice their faith while at work, but also protects the employees from government hostility against their beliefs. *Kennedy*, 142 S. Ct. at 2407 ("The Constitution and the best of our traditions counsel **mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike**.") (emphasis added).

FACTS

The Christmas holiday and another holiday with deep religious significance to our country – Thanksgiving – are both recognized by the City *within the Wauwatosa Code of Ordinances*. The word "Christmas" appears multiple times in the Code, including within the context of "Christmas trees," as well as "**Christmas Day (December 25th, or** if on a weekend, **the day so designated by the city**)" (emphasis added).[1]

The City Manager's office has taken an opposite tack via email: "Mr. Archambo and [Melissa Cantarero Weiss] ask that you [City employees] **take some time to reflect on our commitment to create a welcoming and inclusive environment to all**" by censoring Christmas holiday symbols. (emphasis added). The directive continued: "Currently, **Christmas decorations are prevalent** throughout public counters at City Hall and perhaps other buildings as well" (emphasis added). "In our ongoing efforts to foster a more equitable and inclusive community…we kindly [sic] ask that departments **refrain from using religious decorations or solely associated with Christmas (such as red and green colors)** when decorating public spaces within city buildings. Instead, we encourage you to opt for more neutral and inclusive decorations that celebrate the season without favoring any particular faith belief system. Here are a few **suggestions**:"[2]

1. Winter wonderland – snowflakes, snow people [sic], and other **non-religious symbols associated with winter**.
2. Lights and greenery – festive lighting and greenery can create a warm and welcoming atmosphere **without specific religious connotations**.
3. Northern lights – draw inspiration from the aurora borealis and **incorporate colors like blue, green, and purple**.

Above all, our **goal** is to foster inclusivity and respect. Your creativity can play a significant role in helping is [sic] reach that **goal**. By embracing inclusive decorating practices, we can reinforce our commitment to being a more equitable and welcoming place for all people who live in Wauwatosa, do business in our community, and our co-workers. Your **cooperation** in helping meet this **goal** is appreciated. Together, we can make Wauwatosa's municipal buildings a place that everyone can feel comfortable visiting throughout the holiday season.

Thank you for your **dedication** to creating a more inclusive and equitable environment in the public spaces of our public buildings.

[1] See https://library.municode.com/wi/wauwatosa/codes/code_of_ordinances.
[2] See https://www.foxnews.com/us/wisconsin-city-employees-instructed-avoid-religious-holiday-decorations-public-buildings-report

Melissa Cantarero Weiss, ICMA-CM
Deputy City Administrator / City of Wauwatosa
(Emphasis added).

Under the viewpoint expressed through this email, "**Christmas decorations are prevalent**" and a problem to be remedied. Decorations deemed "religious" by the City, including "religious decorations" or decorations "**solely associated with Christmas** (such as **red and green colors**)" must be eliminated. In the Christmas context, not even *colors* are safe from the City's heavy hand of censorship. Couched in "suggestions" and "encouragement," the email clearly sets forth the mandatory nature of its "**goal**" of eradicating Christmas through employee "**cooperation**" and "**dedication**." Note, however: the City's past practices with regard to the display of *other* colors and symbols and decorations – particularly those "associated with" divisive political causes or secular holidays – would be relevant if litigation becomes necessary to protect the rights of City employees to display decorations for the Christmas holiday.

LEGAL ANALYSIS

I. The Christmas Holiday is Part of the History and Traditions of America

Even under the misguided, ahistorical *Lemon v. Kurtzman*[3] regime, the U.S. Supreme Court long-ago rejected 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). In *Lynch*, the court also 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

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

> 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).

II. The *Lemon* Test Has Been Overruled and May Not Be Used to Censor Thanksgiving or Christmas.

In *Shurtleff* (brought by Liberty Counsel and decided by the Court in our client's favor, 9-0, resulting in attorney's fees for Liberty Counsel in an amount of more than $2,100,000) and in *Kennedy*, the Court rejected application of the *Lemon* test in the Establishment Clause context 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 *Kennedy* court noted that "in *Lemon* the Court attempted a 'grand unified theory' for assessing Establishment Clause claims." *American Legion v. American Humanist Assn.*, 139 S.Ct. 2067, 2101 (2019) (plurality opinion). That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612–613. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989); *id.*, at 630, (O'Connor, J., concurring in part and concurring in judgment); *Shurtleff*, 596 U. S., at ——, 142 S.Ct., at 1604–1605 (opinion of GORSUCH, J.). The opinion of the majority in *Kennedy* continued:

> What the 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); see also *Town of Greece v. Galloway*, 572 U.S. 565, 575–577, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). 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. *Pinette*, 515 U.S. at 768–769, n. 3, 115 S.Ct. 2440 (plurality opinion) (emphasis deleted). 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, 121 S.Ct. 2093, 150 L.Ed.2d 151 (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**. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (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, 125 S.Ct. 2854, 162 L.Ed.2d 607 (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; …142 S.Ct., at 1595 (ALITO, J., concurring in judgment); *id*., 142 S.Ct., at 1587, 1588–1589 (opinion of GORSUCH, J.).[4]
>
> **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*, 572 U.S. at 576, 134 S.Ct. 1811; see also *American Legion*, 139 S.Ct., at 2087 (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, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (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, 134 S.Ct. 1811; see *American Legion*, …139 S.Ct., at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (analyzing Sunday closing laws by looking to their "place ... in the First Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions). The 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).

III. City Employees May Decorate Their Spaces With Thanksgiving or Christmas Decorations and May Not Be Punished

City employees may not be punished by the City for decorating for the holidays with religious significance such as Thanksgiving and Christmas. *Shurtleff*, *Kennedy* and now, *Groff* foreclose this result. *Shurtleff* teaches that where the City has opened a forum for expression by employees, by encouraging employees to decorate spaces for other holidays or political causes at employee discretion, the City may not censor other holidays or decorations because they are or may be "religious." Moreover, *Kennedy* does not permit the City to provide 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 City employees may decorate their spaces for the Christmas holiday does not necessarily transform their speech into government speech, simply by the fact that it takes place at City Hall. And, under *Groff*, an employer such as the City, 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 City Manager] 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 v. DeJoy*, 600 U.S. 447, 472 (2023).

CONCLUSION

For these reasons, Liberty Counsel demands the immediate retraction of the unconstitutional ban on Christmas holiday symbols. **Please inform Liberty Counsel in writing by close of business on Friday, November 24, 2023, of how the City intends to proceed.** If the City fails to respond disavowing the directive, or ratifies it, Liberty Counsel will take additional action to prevent irreparable harm to cherished liberties. Thank you for your attention to this matter.

[redacted]

c.

Via Email:

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