PACIFIC JUSTICE INSTITUTE

CHRISTMAS Q&A

Every year, Pacific Justice Institute fields questions about constitutional rights in the workplace and in schools. Christians should not be silenced by political correctness during the Christmas season. Here are some detailed answers to frequently asked questions during Christmas. These principles are also applicable to holidays like Thanksgiving and Easter. This resource will address the following questions:

Q: What has the Supreme Court said about public Christmas celebrations?

A: Judicial interpretation of the First Amendment in the context of public Christmas celebrations is derived primarily from two Supreme Court decisions from the 1980s. Both considered celebrations by local governments, but one type of display was deemed constitutional while the other was not.

First, in *Lynch v. Donnelly*,[1] the U.S. Supreme Court considered a longtime display by the city of Pawtucket, Rhode Island. The display included a Christmas tree, Santa Claus house, Santa sleigh with reindeer, candy-striped poles, carolers, cut-outs of a clown, elephant and teddy bear, a "Seasons Greetings" banner, and a nativity scene. The Court could not see a meaningful difference between the City's Christmas display and the longstanding Thanksgiving and Christmas proclamations of both the

[1] 465 U.S. 668 (1984).

executive and legislative branches of government. Indeed, the Court noted the relatively minor expense to the City of purchasing and maintaining the display was far less than the vastly greater—and perfectly valid—annual expense to all levels of government from providing paid holidays for Christmas. The Justices therefore found that Pawtucket's desire to celebrate a long recognized national holiday through a depiction of the historical origins of that holiday was a legitimate secular purpose.

A few years later, in *Allegheny County v. ACLU*,[2] the Supreme Court considered two separate displays in Pittsburg, Pennsylvania—a nativity scene on the grand staircase inside the county courthouse, and an 18-foot menorah located outdoors near the City's official 45-foot Christmas tree. As described by the Court, the Allegheny County nativity scene included an overhead angel holding a banner with the phrase, "Gloria in excelsis Deo." The County used the nativity scene as the backdrop for performances by high school choirs invited to come during weekday lunchtimes.

Meanwhile, a block away, the City-County building had a large, 45-foot decorated Christmas tree. In recent years, the City had erected a large, 18-foot menorah next to the tree. The City also included a sign saluting liberty.

The Court focused on three things that it believed made the courthouse nativity scene unconstitutional. First, it pointed out that the message above the nativity scene, "Gloria in Excelsis Deo," translated as "Glory to God in the Highest," is a message of praise intended to be religious and not secular. Next, the majority noted that, unlike the various figures and items in Pawtucket, poinsettias and trees at the sides of the display served only to frame, not divert attention from, the nativity scene. Further, the Court found significant the nativity scene's placement at a focal point of the county building.

By contrast, a majority of the Justices did not have the same qualms about the large menorah, and its legality was upheld. Since the votes shifted for this half of the case, there is no clear majority view or analytical framework. From these splintered opinions of the Justices, it can be deduced that context, size, location, messages and variety of symbols all play a role in how the Court views Christmas displays.

Q: Is our public school required to omit the mention of Christmas and instead use a term like "winter break"?

A: Absolutely not. There is zero constitutional authority for the notion that we have to use euphemisms like "winter break" to avoid the reality that Christmas continues to be the most important celebration in the United States, and for that matter, for much of the history of Western Civilization.

In an analogous context, *Cammack v. Waihee,*[3] the Ninth Circuit Court of Appeals[4] ruled that Hawaii's statute declaring Good Friday to be a state holiday, a statute that had been in effect for half a century, was constitutional. The plaintiff complained that millions of dollars in state and local taxes were being spent on a religious observance. However, the Ninth Circuit ruled that the complainant did not have standing as a taxpayer to challenge the Hawaii statute, and the judges decided that the statute was impossible to view as "coercive" or "endorsing" of religion. The same can certainly be said for mentioning the true legal name of the most important legal holiday of the year. It is also worth noting

[2] 492 U.S. 573 (1989).

[3] 932 F.2d 765 (9th Cir. 1991).

[4] The U.S. Court of Appeals for the Ninth Circuit has jurisdiction over the federal district courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington State, as well as Guam.

that secularists sometimes demonstrate the fallacy of euphemisms by seeking to replace "Merry Christmas" with "Happy Holidays," when the latter is also a religious reference to a "holy day."

Q: If my child's school is using a euphemism like "winter break," can I make them change it back to "Christmas"?

A: Probably not. The government—including public school administrators—have discretion in the words they choose, even if we think they are making poor choices. At least one federal court has rejected a challenge brought by parents who were offended by the omission of Christmas and Christianity from a school's "winter holiday" program, while Chanukah and Kwanzaa were celebrated. S*echler v. State College Area School Dist*.[5] While one could certainly take exception with the court's conclusion, it demonstrates the difficulties of filing a suit designed to require the inclusion of Christmas songs or symbols at school.

You can, however, ensure that they are making their decisions based on accurate legal information, such as that presented in this memo, and not based on misinformation. You can urge them to reconsider and may even want to circulate a petition among other parents in your school or district. You might further urge your elected school board members to consider whether policy changes need to be made in order not to trade timeless traditions like Christmas for watered-down political correctness.

Q: Is it constitutional for students to sing Christmas songs in school performances?

A: Yes! Courts have recognized that sacred music is an indispensable part of Western civilization. These courts have noted that performances should not be comprised solely of sacred music but should also include secular tunes. Some schools also mistakenly believe that a singular focus on Christmas in a school event is illegal. Not so! When courts have discussed sacred vs. secular selections, they typically find no problems if, for instance, "Silent Night" is balanced with "Chestnuts Roasting on An Open Fire." The latter song would be deemed secular even though it mentions Santa and Christmas cards. A number of federal appellate courts have also held that songs with religious content may be sung both in class and at school programs, as part of introducing students to a variety of cultures and beliefs.

Among the oldest of these appellate decisions, cited by many other courts since, is *Florey v. Sioux Falls Sch. Dist.*[6] Roger Florey, the father of a kindergarten student within the Sioux Falls School District (SFSD), filed a complaint regarding the school's 1977 Christmas program in which the children were required to memorize and answer questions about Jesus' birth. In response to this charge, the School Board of SFSD formed a citizens' committee, which created a policy outlining the boundaries of school activities. Florey sued the SFSD, claiming that the adopted policy still allowed the promotion of a specific religion, but the district court and later the Eighth Circuit Court of Appeals[7] ruled that the policy did not advance or inhibit religion and did not foster an excessive government entanglement with religion. The Eighth Circuit explained, "[M]uch of the art, literature and music associated with traditional holidays, particularly Christmas, has 'acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage.'"

[5] 121 F.Supp.2d 439 (M.D. Pa. 2000).

[6] 619 F.2d 1311 (8th Cir. 1980).

[7] The Eighth Circuit has jurisdiction over the district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Beyond the holiday context, in *Bauchman v. West High School*,[8]the Tenth Circuit Court of Appeals[9] approved "The Lord Bless You and Keep You" for choral performance in public high schools. The Circuit Judges wrote, "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." This is in part due to the fact that a significant percentage of choral music is based on religious themes or text.

Q: Is it legal for a classroom, school office, or other government office to put up a Christmas tree?
A: Yes. In the last few years, we've heard that Christmas trees are somehow "religious" and thus must be excluded, renamed, or diluted in public spaces. Not true. In the Supreme Court's landmark *Lynch v. Donnelly* case, the Court's analysis of the city's holiday display regarded the tree as being a secular symbol. More recent claims to the contrary by secularists do not change reality.

In the *Allegheny County* case discussed at the beginning of this memo, a few of the Justices described the Christmas tree as a secular symbol of the holiday, erected in many non-religious homes, that they felt was different than a nativity scene.

Q: Can my children give their classmates religious-themed gifts and invitations?
A: Yes. There have been several court cases involving schoolchildren giving each other Christmas gifts with Christian messages. Most courts considering the issue have recognized the right for student expression, including gifts, not to be censored based on religious content.

In the 2003 case *Westfield LIFE Club v. Westfield High School*,[10]a group of students, who had formed a religious club on school property, filed a lawsuit against city and school officials for imposing unconstitutional school speech policies. The students were subjected to in-school suspensions and were prohibited from distributing religious literature to fellow students between class time. The students asked the school administration for permission to distribute candy canes with a religious message during the Christmas season. Although denied permission, the students handed out candy canes and were subsequently suspended. The Court sided with the students, since school officials could not point to any form of disorder or disruption caused by the distribution during non-instructional times.

In *Morgan v. Swanson*,[11] an en banc panel (comprised of many judges and not just the three judges usually assigned to a case in the Court of Appeals) the Fifth Circuit Court of Appeals[12] sided with young students who had been denied several opportunities to share their faith. The Morgans' children had sought to give classmates "Jesus pencils," invite them to church events and give them gift bags with candy canes and the Christian story behind the candy cane. The principal had stopped these efforts, even though other students were allowed to do similar things like exchange gifts. The majority of the judges held that, since the gifts and invitations were clearly not school-sponsored, there was no reasonable risk that religious speech would have been attributed to the government, and it therefore should have been allowed.

In another case from Texas, *Pounds v. Katy Independent School District*,[13] several parents of students challenged the school's decision to black out one of twelve preset messages on an order form

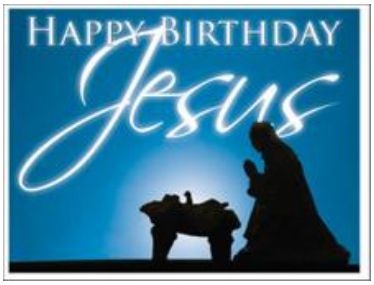
[8] 132 F.3d 542 (10th Cir. 1997).
[9] The Tenth Circuit has jurisdiction over the district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
[10] 249 F.Supp.2d 98 (D. Mass. 2003).
[11] 659 F.3d 359 (5th Cir. 2011) (en banc).
[12] The Fifth Circuit has jurisdiction over the district courts in Louisiana, Mississippi, and Texas.
[13] 730 F.Supp.2d 636 (S.D. Tex. 2010).

sent home with the children as a fundraising project. The form, which allowed parents to order a third-party vendor's holiday art cards featuring their child's artwork, included preset messages—the only option blacked out was a Bible verse from the New Testament. A district court in Texas determined that the school's viewpoint discrimination was unjustified.

Meanwhile, in *K.A. v. Poconoe Mt. Sch. Dist.,*[14] a fifth-grade student was prohibited from distributing invitations to her classmates to a Christmas church party. Her father filed suit on K.A.'s behalf, alleging that the School District had violated her First and Fourteenth Amendment rights. The Third Circuit Court of Appeals[15] found no evidence that distribution of the invitations would threaten a "substantial disruption" of the school environment or interfere with the rights of others and affirmed the district court's decision in K.A.'s favor.

Q: If I work for the government, can I decorate my desk or cubicle with sayings like, "Happy Birthday Jesus"?

A: It may depend on where you live and who you interact with.



In *Berry v. Dept. of Social Services, Tehama County*,[16] Daniel Berry, an employee of the Department of Social Services since 1991, was denied the freedom to display his Bible on his desk and his "Happy Birthday Jesus" sign on the wall during Christmas, while other employees were permitted to put up Christmas decorations. Berry filed a complaint with the Equal Employment Opportunity Commission, asserting that he was a victim of religious viewpoint discrimination. The Ninth Circuit ruled that the Department's restrictions on religious displays was necessary for avoiding an appearance of government endorsement of religious messages, especially since Berry's cubicle is accessible to clients. The Court stated, "We also recognized that materials posted on the walls of the corridors of government offices may be interpreted as representing the views of the state." The Court explained that Berry must keep his Bible in his desk drawer and can only read it when a client is not present. Note that courts in other jurisdictions might not follow this restrictive reasoning, and the same Ninth Circuit held in *Tucker v. Cal. Dept. of Educ.* that public employees have greater reason to express their faith in their cubicles when they do not interact with the general public.[17]

Q: Is it considered workplace discrimination or harassment if our office puts up a Christmas tree?

A: Not at all. The federal agency that oversees workplace anti-discrimination laws, the Equal Employment Opportunity Commission (EEOC), has clarified that it is not discrimination or harassment to put up Christmas decorations. The EEOC's Compliance Manual,[18] Section 12, Example 52, provides:

> Employer Holiday Decorations
> Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday

[14] 710 F.3d 99 (3d Cir. 2013).
[15] The Third Circuit has jurisdiction over district courts in Delaware, New Jersey, and Pennsylvania.
[16] 447 F.3d 642 (9th Cir. 2006).
[17] 97 F.3d 1204 (9th Cir. 1996).
[18] https://www.eeoc.gov/laws/guidance/compliance.cfm.

decorations associated with other religions. The result under Title VII on these facts would be the same whether in a private or government workplace.[208]

Footnote 208: Although it is beyond the scope of Title VII enforcement, we note for the sake of completeness that the U.S. Supreme Court has held that wreaths and Christmas trees are "secular" symbols, akin to items such as lights, Santa Claus, and reindeer, and thus that government display of these items does not violate the establishment clause of the First Amendment. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (stand-alone crèche on county courthouse steps violated establishment clause, but display elsewhere of Christmas tree next to a menorah and a sign proclaiming "liberty" did not); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that government-sponsored display of crèche did not violate establishment clause because it was surrounded by various secularizing symbols, thus precluding a perception of government endorsement of religion); *Federal Workplace Guidelines*, *supra* n.11 at Section D (example (b)). For a discussion of both Title VII and establishment clause claims arising from holiday decorations in federal government employment context, *see, e.g., Spohn v. West*, 2000 WL 1459981 (S.D.N.Y. Oct. 2, 2000). In the private sector, establishment clause constraints would not apply. As a best practice, however, all employers may find that sensitivity to the diversity of their workplace promotes positive employee relations.

Q: Does our church have the right to put up a nativity scene in a local park?

A: Your church has the right to be treated equally and not discriminated against on account of its faith. In some cases this may require local government to include the church.

In the *Capitol Rev. & Advisory Bd. v. Pinette*[19] case, a group attempted to place an unattended cross on Capitol Square, the state-house plaza in Columbus, Ohio, during the 1993 Christmas season. Ohio law makes Capitol Square a traditional public forum for public activities and gives the Advisory Board responsibility for regulating access to the square. The Board denied the application to erect the cross on Establishment Clause grounds. However, the Supreme Court ruled that the display was private religious speech that "is as fully protected under the Free Speech Clause as secular private expression." In the 7 to 2 decision, the Justices explain that the Board can only regulate expression in the plaza if a restriction is necessary and narrowly drawn to serve a compelling state interest.

A few years later, in *Calvary Chapel Church, Inc. v. Broward County*,[20] the federal court sided with a Florida church that had been excluded from the County's Holiday Fantasy of Lights. The County only wanted whimsical, non-serious entries and rejected church entries that included messages such as "Remember Him" and "Jesus is the Reason for the Season." The court deemed this to be unconstitutional viewpoint discrimination.

Note that there have been occasions where atheists have succeeded in shutting down an entire forum so that no one—including religious groups—is allowed to put up displays during Christmas. This happened in *Santa Monica Nativity Scene Cmt. v. City of Santa Monica*.[21] In that case, the grinches won in court while the rest of the community lost out. But when a local government opens up a forum such as a park or public property for different types of

[19] 515 U.S. 753 (1995).

[20] 299 F.Supp.2d 1295 (S.D. Fla. 2003).

[21] 784 F.3d 1286 (9th Cir. 2015).

temporary displays, they can't keep to a church or religious group for fear that a nativity scene will offend someone.