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Reply to: Virginia

November 18, 2011

Via U.S. Mail and Facsimile (843) 792-9456

Andrew S. Kraft, MD, Director
Hollings Cancer Center
86 Jonathan Lucas St
Charleston, SC 29425

RE: Unconstitutional Restrictions on Christmas Decorations

Dear Dr. Kraft:

I write on behalf of employees of the Hollings Cancer Center, as well as concerned citizens, to request an immediate reversal of the position of HCC set forth by Strategic Communications Director Vicky Agnew to ban and remove from HCC buildings all Christmas holiday decorations deemed religious, whether public or private in origin, while permitting secular decorations on HCC property. Such a directive constitutes viewpoint discrimination in violation of the Free Speech Clause of the First Amendment of the United States, and is by no means required by the Establishment Clause of the First Amendment.

By way of brief introduction, Liberty Counsel is an international civil liberties, legal defense and educational organization with offices in Virginia, Florida, Texas, Washington, D.C., and Jerusalem, Israel, as well as hundreds of affiliated attorneys throughout the country. Much of our work deals with First Amendment rights and the religious rights of individuals. We have had great success in defending and vindicating those rights.

I understand the following facts to be true: Like many public employers, Hollings Cancer Center decorates common areas, and permits its employees to decorate office spaces for various holidays. In addition to the Christmas decorations every year, a volunteer from the local community has dressed up as Santa Clause and has been available for interaction and the spread of holiday cheer to patients, particularly children. Recently, a decision was made to ban Santa Claus from HCC, because, in the words of Ms. Agnew, anonymous "folks complained that they felt excluded – or that their beliefs didn't line up with this." Ms. Agnew further stated that HCC would "downplay" the Santa

presence this year, in an effort to “honor as many of the cultural and ethnic beliefs that we see here in South Carolina.” In addition to banning Santa, HCC prohibited any Nativity displays or other displays of religious aspects of Christmas.

Santa Claus was initially determined by HCC to be “religious” in nature, but the center changed its mind calling Santa Claus a “tradition” that is not affiliated with any specific religion. After two days of public outrage on these issues, HCC partially reversed, reinstating Santa, but sticking to its position that any displays acknowledging the religious nature of Christmas would be forbidden. Ms. Agnew stated that bases for this position was the apparent diversity of population in Charleston consisting of folks who “celebrate the season differently” or “don’t celebrate it” and the fact that HCC was a “state institution [which couldn’t] do that anyway.” Ms. Agnew added further that “At the heart of any decision we made is really what we hope will be beneficial to the patients – their health and their emotional well-being.” She added that the banning of Santa Clause, nativity scenes, and other holiday symbols was the hospital’s “attempt to try and be non-controversial and have folks who come here for treatment maybe not be distracted.” Unfortunately, this attempt, while seemingly well-intentioned, has created the potential for serious consequences and unnecessary liability to attach to HCC.

The banning of decorations deemed “religious” evidences hostility toward religion and the preference for things secular or non-religious. As you might imagine, any employees who had hoped to provide decorations that are now deemed “religious” and banned from display as unfit, will have the feeling that their contributions are somehow less worthy. It is clear that the position of HCC is driven by the religious content of proposed displays. There is no constitutional principle which requires anything religious to be removed from “state institutions.”

The advent of the Christmas season has once again raised concerns regarding the proper role of state entities in accommodating and recognizing Christmas. The most obvious accommodation is, of course, the recognition of Christmas as a legal holiday at every level of government. Beyond that, government entities are not free to sponsor *solely* religious displays or participate in solely religious celebrations of Christmas. However, courts have uniformly supported the government’s ability to recognize and commemorate secular aspects of Christmas, as well as religious aspects of Christmas when combined with secular aspects of Christmas so as to serve an overall secular purpose. Commemorating and recognizing Christmas as a national holiday of significance to a great number of its citizens is a legitimate secular governmental purpose, according to the courts. Such actions do not constitute a violation of the Establishment Clause as they do not sponsor or endorse any religion. The Hollings Cancer Center itself can constitutionally sponsor holiday displays that include religious elements.

The United States Supreme Court has repeatedly stated that “The Establishment Clause proscribes [governments] from ‘conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred’.” *Lee v. Weisman*, 505 U.S. 577, 604-605 (1992); *HCC of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). The Constitution requires accommodation, not merely tolerance, of all religions and forbids hostility toward any religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The United States Supreme Court passed on the constitutionality of a publicly sponsored Christmas displays in the case of *Lynch v. Donnelly*, 465, U.S. 668 (1984) and found that a publicly-sponsored religious symbol erected and maintained by city officials as part of a Christmas holiday display, together with secular symbols, is fully constitutional and in no way violates the Establishment Clause. The religious element of the display in *Lynch* was a government-erected nativity scene, otherwise known as a crèche. The crèche was part of a larger Christmas holiday display in which there was a variety of secular symbols, including a Santa Claus, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, lights and a banner reading “Season’s Greetings.” The Court held that, viewed in the proper context of the Christmas holiday season, inclusion of a crèche in the display merely depicts the significant historical religious event long-celebrated in the Western world and the historic origins of an event long-recognized as a national holiday. Any benefit to religion is indirect, remote and incidental, no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself or its annual commemoration as a legal holiday by governments at every level.

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of the 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 prayer 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.

465 U.S. at 686. When the government sponsors a stand-alone display that solely focuses on the religious aspects of a holiday, however, it violates the Establishment Clause. *Allegheny County v. Pittsburg ACLU*, 492 U.S. 573 (1989) (stand-alone crèche/nativity impermissible; stand-alone Christmas tree permissible). In short, a

government's celebration of public holidays which have cultural significance, even if they also have religious aspects, is a legitimate secular purpose. Even if Hollings Cancer Center nativity displays were considered government-sponsored, in full context, the inclusion of arguably religious elements with the secular elements would not transform the displays into statements of government endorsement of religion any more than including a crèche among secular elements of a Christmas display in *Lynch v Donnelly*.

The Establishment Clause also prohibits government from being hostile to religion. Selecting one legal holiday – Christmas - for negative treatment and special restrictions, solely because it has some religious aspect clearly demonstrates hostility to religion in general, and Christianity in particular, thereby violating the Establishment Clause. The Establishment Clause of the Constitution does not require the Cancer Center to *suppress* all private religious speech. The only requirement of the Establishment Clause is that the HCC be neutral, neither endorsing nor showing hostility to religion. Far from being neutral or accommodating, HCC's apparent position is to aggressively attempt to excise any religious content from displays on HCC property, despite the contrary wishes of employees participating in the limited decoration forum. Permitting various displays in public facilities cannot be said to constitute a government endorsement of all the viewpoints expressed by the displays. Denying employees with religious decorations access to the spaces available for employee-sponsored holiday decorations actually violates the Establishment Clause rather than upholding it. The Establishment Clause simply may not be used as an excuse for excising religion from public spaces.

Further, where the Hollings Cancer Center opens up a forum for display of holiday decorations in offices, it need only keep the forum open for those employees providing decorations relating to the public holiday being commemorated. If it does so, the HCC has opened up a limited public forum for employee expression within those display areas. Once that has been done, the HCC may not then go in and censor the content with any religious yardstick. The removal of the religious elements of any holiday displays set up by employees is blatant unconstitutional censorship and viewpoint discrimination. The government, through, its employee actors, cannot favor one speaker over another or discriminate against speech because of its message. Limiting a forum to only non-religious use discriminates amongst potential users because of their religious viewpoints and thus violates the First Amendment's prohibition against viewpoint discrimination by governmental bodies. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). When government opens up a limited forum, it must treat all persons and groups seeking to use the forum equally, regardless of their viewpoint. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1996); *Good News Club v. Milford Central School Dist.*, 533 U.S. 98 (2001). The position of the Hollings Cancer Center sends the unmistakable message that employees who would display decorations of religious symbols do not have worthwhile displays and those with non-religious viewpoints are deemed worthy by the HCC. Such

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action to censor religious content by private parties (even on public property) violates the First Amendment.

Liberty Counsel stands ready to defend the legal rights of Hollings Cancer Center employees. The statements of Ms. Agnew have unnecessarily exposed the HCC to liability for civil rights violations. We write to demand that you take immediate steps on behalf of Hollings Cancer Center to reverse that position. Liberty Counsel also stands ready to assist with the formulation of a balanced and constitutional holiday decoration policy.

I am enclosing a legal memorandum that generally addresses religious matters in connection with Christmas in public places. Based on the authorities cited in the memorandum and this letter, we ask that the Hollings Cancer Center remedy this situation by permitting a balanced approach to all official holidays, and to stop treating the religious symbols of Christmas with special disdain. On behalf of concerned HCC employees, we are asking you to respond to this letter within thirty (30) days with assurances that the directive of HCC against nativity scenes has been rescinded and that employee holiday displays in the Hollings Cancer Center will no longer be subject to a censorship procedure which eliminates the display of decorations with some religious significance. If I do not receive such a response, we will conclude that the above outlined positions taken by Ms. Agnew accurately represent the position of the Hollings Cancer Center, and will take further steps to prevent irreparable harm.

I look forward to your prompt response.

Sincerely,

LIBERTY COUNSEL

Richard L. Mast, Jr.†

Enclosure

cc: **Via Email:**

† Licensed in Virginia

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Vicky Agnew_Director, Strategic Communications
Anita Harrison, MPA Associate Director of Administration
Heather Woolwine, MUSC, Media Director
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Via US Mail

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Via Facsimile (843) 792-4975:

Thomas L. Stephenson, Esq., Chairman, (Fourth District) Greenville
Dr. James E. Wiseman, Jr., Vice Chairman, (Fifth District) Prosperity

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Dr. Charles B. Thomas, Jr., (Fourth District) Greenville
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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.¹ 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

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

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 expressive activity.² 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.³ 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

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, 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.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

² 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).

³ 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.

⁴ *Capitol Square Review*, 515 U.S. at 753.

⁵ 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.

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

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 MATHEW D. STAVER, *ETERNAL VIGILANCE: KNOWING AND PROTECTING YOUR RELIGIOUS FREEDOM* 439-451 (2005).

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 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.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.

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.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

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.” *McCullum*, 333 U.S. at 236 (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.

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

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.¹⁷

“[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.”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

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. McCullom 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).

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.”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 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 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.

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 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.

³² *Id.* at 508.

³³ *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.

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 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.

Sincerely,

Liberty Counsel