ALLIANCE DEFENSE FUND
*Defending Our First Liberty*
1-800-TELL-ADF

**MEMORANDUM**

DATE: Christmas 2011

FROM: Alliance Defense Fund

RE: Constitutional Rights of Students, Teachers, and Public Schools to Seasonal Religious Expression

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The Alliance Defense Fund is America's largest legal alliance defending religious liberty through strategy, training, funding, and litigation. The Alliance Defense Fund frequently assists students, teachers, and public schools in understanding their rights and responsibilities concerning seasonal religious expression. Each legal situation differs, so the information provided below should only be used as a general reference and should not be considered legal advice.[1] If you think your rights have been violated as a result of a restriction on your religious expression at a public school or if you represent a public school whose rights are being attacked, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1-800-TELL-ADF, or visit our website at www.telladf.org and select the "Legal Help" button to submit a request for legal assistance.

Historically, students and teachers across America have freely celebrated the Christmas season by decorating classroom bulletin boards and Christmas trees, learning traditional carols for the annual Christmas program, and exchanging Christmas cards and gifts with classmates. In recent years, certain groups opposed to public religious expression have spread misconceptions – through fear, intimidation, and disinformation – about the legalities of celebrating Christmas in public schools. As a result, many school officials have removed nearly all religious references to Christmas and replaced them with secular symbols. While many do so unknowingly, school officials have begun a new "tradition" of violating the constitutional rights of students and teachers to seasonal religious expression in our public school system.

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A 2005 Fox News/Opinion Dynamics poll revealed that ninety-five percent of Americans celebrate Christmas. And our Constitution acknowledges that people of faith have a right to openly express their beliefs in the public square. But many school officials attempt to prohibit students and teachers from expressing any religious aspect of Christmas. Classroom decorations depicting snowmen and reindeer have replaced decorations such as nativity scenes and angels. Even the "Christmas Tree" has often been degraded into a "holiday" or "diversity" tree. Some school officials have gone so far as to prohibit the common greeting "Merry Christmas" and, instead, insist that teachers and students merely say "Happy Holidays" and refer to the Christmas break as "Winter Break" or "Sparkle Season."

## THE CONSTITUTION PROTECTS RELIGIOUS SPEECH IN PUBLIC SCHOOLS

The First Amendment to the United States Constitution says "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…"[2] This Amendment restricts the government's ability to suppress speech and expressive activity – including religious expression. No court has ever ruled that the Constitution demands school officials to censor Christmas carols, eliminate all references to Christmas, or silence those who celebrate Christmas. This leads one to ask, "What does the Constitution protect?"

## THE FIRST AMENDMENT PROTECTS RELIGIOUS SPEECH

It is firmly established that school officials may not suppress private speech simply because it is religious or contains a religious perspective.[3] As the Supreme Court eloquently explained:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.[4]

## THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE DOES NOT REQUIRE SCHOOL OFFICIALS TO SUPPRESS SEASONAL RELIGIOUS EXPRESSION

The First Amendment's Establishment Clause states that "Congress shall make no law respecting the establishment of religion."[5] This provision is often misunderstood as prohibiting seasonal religious expression in public schools. Many school officials mistakenly believe such expression would violate the so-called "separation of church and state" – a phrase not found in the Constitution, but often misused in connection with the Establishment Clause. As a result,

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[2] U.S. Const. amend. I.

[3] *Good News Club v. Milford Cent. Sch. Dist*., 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

4 *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

[5] U.S. Const. amend. I.

school officials across our nation – whether intentionally or from being misinformed – have denied students and teachers their constitutional rights of religious speech and expression under the guise that the Constitution requires them to do so.

To dispel this notion, it is important to realize that the Supreme Court has never held that the Constitution "require[s] complete separation of church and state."[6] In fact, a federal appellate court recently explained that the notion of a "wall of separation between church and state" is an "extra-judicial construct [that] has grown tiresome," and is not required by the First Amendment.[7]

The Court has merely held that the Establishment Clause requires the state to be neutral in its relations with religious believers and non-believers; it does not require the state to oppose religion or religious expression.[8] In fact, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[9]

The Establishment Clause only restricts government speech. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[10] Therefore, it is unconstitutional for public officials to deny individuals the right to religious speech and expression by imposing on them a limitation intended for the government.

Needless acts of censorship violate the Constitution and hurt students who sincerely want to share their faith with their friends. Public school officials can avoid violating the Constitution if they understand a few basic rules about religious speech. The following discussion spells out what the Supreme Court and federal courts have said on these Christmas questions and dispels the myths that have sadly prompted school officials and others to suppress religious expression unnecessarily.

## RELIGIOUS SPEECH IN PUBLIC SCHOOLS

### Activities of Public Schools

### PUBLIC SCHOOLS MAY HAVE STUDENTS SING RELIGIOUS CHRISTMAS CAROLS

Students may sing religious Christmas carols during school activities such as choir, Christmas programs, and other events, without offending the Constitution.[11] In *McGowan v. Maryland*, the Supreme Court held that some government involvement with religion does not

[6] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the display of a nativity scene by a city was constitutional because the city's conduct was supported by a legitimate secular purpose).
[7] *American Civil Liberties Union of Kentucky v. Mercer County*, 432 F.3d 624, 638 (6th Cir. 2005) .
[8] *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).
[9] *Lynch*, 465 U.S. at 673
[10] *Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).
[11] *See, e.g., Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1319 (8th Cir. 1980); *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993).

violate the Establishment Clause if it has a secular purpose and effect.[12] Thus, no lower court has ever ruled that public schools must ban the singing of religious Christmas carols. In *Florey v. Sioux Falls School District,* for example, the Eighth Circuit Court of Appeals held that schools may observe religious holidays without violating the Establishment Clause if doing so furthers a secular program of education.[13] The court approved the school's stated purpose of advancing "the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama...."[14] Other federal appeals courts have reached similar results concerning singing religious songs in public schools.[15]

## SCHOOL OFFICIALS MAY CALL A SCHOOL BREAK "CHRISTMAS VACATION"

School officials may refer to the school break in December as "Christmas Vacation" without offending the Constitution. The Supreme Court has acknowledged with approval the fact that government has long recognized holidays with religious significance such as Christmas.[16] For example, Congress has proclaimed Christmas to be a legal public holiday.[17]

## PUBLIC SCHOOLS MAY CLOSE ON RELIGIOUS HOLIDAYS, SUCH AS CHRISTMAS AND GOOD FRIDAY

School officials do not violate the Establishment Clause by closing on religious holidays such as Christmas and Good Friday. States have successfully defended attacks on such closures.[18] Currently, the Court uses the test set out in *Lemon v. Kurtzman* to review Establishment Clause claims.[19] Under the *Lemon* test, courts will inquire "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion."[20]

In *Koenick v. Felton*, a school board in Maryland successfully defended a Maryland statute providing for public school holidays on Good Friday through the following Monday by demonstrating a secular purpose—a high rate of absenteeism on those days.[21] The court also found that the holidays did not advance or inhibit religion because they gave students and teachers the day off to use as they like and did not entangle government with religion.[22]

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[12] 366 U.S. 420, 445 (1961).
[13] 619 F.2d at 1329.
[14] *Id.* at 1314.
[15] *See Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).
[16] *Lynch*, 465 U.S. at 676.
[17] 5 U.S.C.A. § 6103(a) (2006).
[18] *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 802 (7th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000); *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999).
[19] 403 U.S. 602 (1971)
[20] *Lynch*, 465 U.S. at 679 (citing *Lemon*, 403 U.S. at 612-13 (1971)).
[21] *Koenick*, 190 F.3d at 266.
[22] *Id*. at 267-68.

## PUBLICLY ACKNOWLEDGING CHRISTMAS DOES NOT REQUIRE PUBLIC OFFICIALS TO RECOGNIZE ALL RELIGIOUS HOLIDAYS

Another common misconception is that it is only permissible to celebrate one religious holiday if equal time is allowed for all other religious holidays. But no Court has ever held, for example, that celebrating Thanksgiving and Christmas as religious holidays requires recognition of all other religious holidays. The Supreme Court has explained that governmental action is not unconstitutional merely because it confers an indirect, remote, and incidental benefit to one faith or religion, or to all religions.[23] Government recognition of a holiday, which incidentally coincides with a religious holiday, is not unconstitutional.[24]

Throughout our Nation's history, United States presidents have uniquely recognized religious holidays such as Thanksgiving and Christmas. On December 24, 1944, President Franklin D. Roosevelt addressed the Nation during a time of war:

> Here, at home, we will celebrate this Christmas Day in our traditional American way-because of its deep spiritual meaning to us; because the teachings of Christ are fundamental in our lives; and because we want our youngest generation to grow up knowing the significance of this tradition and the story of the coming of the immortal Prince of Peace and Good Will.[25]

President George W. Bush has also recognized Christmas as a Christian holiday. In his December 21, 2002 radio address to the Nation, President Bush stated:

> At this time of year, we appreciate all the blessings that fill our lives, especially the great blessing that came on a holy night in Bethlehem. The Christmas story speaks to every generation. It is the story of a quiet birth in a little town on the margins of an indifferent empire. Yet that single event set the direction of history and still changes millions of lives.
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> For over two millennia, Christmas has carried the message that God is with us, and because he is with us we can always live in hope. The world we live in is very different from the world of ancient Bethlehem. Our need for that hope is still unchanged. In all the challenges and dangers of our day, we still seek the promise of peace on Earth.[26]

If the President of the United States may publicly acknowledge Christmas as a Christian holiday, without similarly acknowledging Ramadan and the Buddhist holiday Hana Matsuri, public schools may do so as well. The Constitution imposes no "equal time" provision on public schools.

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[23] *Lynch*, 465 U.S. at 683

[24] *Bridenbaugh*, 185 F.3d at 801.

[25] William J. Federer, The History of Saint Nicholas & Christmas Holiday Traditions 116 (2002).

[26] The White House, *Radio Address by the President to the Nation*, (Dec. 21, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/20021221.html.

## FREE SPEECH INCLUDES THE RIGHT TO SAY "MERRY CHRISTMAS"

School districts may not ban teachers and students from saying "Merry Christmas." The Supreme Court has stated that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[27] Under the direction of President Clinton, U.S. Secretary of Education Richard Riley issued guidelines concerning the religious discussions of students, which stated, "Students therefore have the same right to engage in . . . religious discussion during the school day as they do to engage in other comparable activity."[28]

Teachers also have the right to greet students with the words "Merry Christmas," in spite of their role as agents of the state. In order to violate the Establishment Clause, a teacher would have to use her authority to promote religion to impressionable youth.[29] Saying a simple greeting that people commonly use in December does not rise to a state endorsement of religion.

## STUDENTS MAY STUDY THE RELIGIOUS ORIGINS OF CHRISTMAS AND READ THE BIBLICAL ACCOUNTS OF THE BIRTH OF CHRIST IN PUBLIC SCHOOLS

Students may study the religious origins of Christmas in the classroom without offending the Constitution. The Supreme Court held in *Stone v. Graham* that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." [30] A federal appeals court has defined "the term 'study' to include more than mere classroom instruction; public performance may be a legitimate part of secular study."[31] Therefore, school officials may constitutionally present Christmas passages from the Bible, such as Matthew 1:18-2:22 and Luke 2:1-20, with a variety of teaching methods.

In addition, the Supreme Court has noted, "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."[32] The Supreme Court has explained that the "study of the Bible or of religion, when presented objectively as part of a secular program of education," is constitutional under the First Amendment.[33]

## PUBLIC SCHOOLS MAY EXHIBIT RELIGIOUS SYMBOLS

Public school officials may include in their display religious symbols such as a crèche or nativity scene without offending the Constitution if they have an educational reason for doing so. The Supreme Court has held that the display of a nativity scene is constitutional when displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the

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[27] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech).
[28] U.S. Dept. of Educ., *Religious Expression in Public Schools*, Archived Information, Guidelines, *available at* http://www.ed.gov/Speeches/08-1995/religion.html (last modified Jan. 26, 2000).
[29] *See School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).
[30] 449 U.S. 39, 42 (1981) (holding that a state statute requiring the permanent posting of the Ten Commandments in public school classrooms violated the First Amendment because the legislature did not have a secular purpose).
[31] *Florey*, 619 F.2d at 1316.
[32] *School Dist. of Abington*, 374 U.S. at 225.
[33] *Id.*

holiday.[34] Lower federal courts have also allowed public schools to include religious and Christian symbols in Christmas displays, school calendars, and holiday programs.[35] In a recent case, a court held that the school's holiday display and song program, which included religious symbols, books, and songs, did not violate the Establishment Clause.[36]

## Rights of Students and Other Individuals To Religious Expression

### STUDENTS HAVE A CONSTITUTIONAL RIGHT TO EXPRESS THEIR FAITH AND RELIGIOUS IDEAS IN A PUBLIC SCHOOL

The First Amendment protects the private religious speech of students both on and off the school campus.[37] The Supreme Court has stated that a student's free speech rights apply "when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours."[38] And it has warned school officials not to trample the rights of students in public schools:

> [S]tate-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[39]

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[40] School officials, however, are not required to allow speech that creates a material and substantial disruption to the school's ability to fulfill its educational goals.[41] But the mere fear and apprehension of disruption is not sufficient to enable the school to prohibit the speech.[42]

Schools may even create a public forum open to community expression that can include religious symbols and speech.[43] In *Kiesinger v. Mexico Academy and Central School*, the district court held that once a school invited community members to contribute bricks containing

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[34] *Lynch*, 465 U.S. at 681.
[35] *See, e.g., Sechler v. State Coll. Area Sch. Dist*., 121 F. Supp. 2d 439 (M.D. Pa. 2000); *Clever v. Cherry Hill Township Bd. of Educ*., 838 F. Supp. 929 (D.N.J. 1993).
[36] *Sechler*, 121 F. Supp. 2d at 453.
[37] *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a University that has opened its facilities for use by student groups cannot exclude groups because of the religious content of their speech).
[38] *Tinker*, 393 U.S. at 512-13.
[39] *Id*. at 511.
[40] *Id* at 506.
[41] *Id.*
[42] *Id.*at 508.
[43] *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 201 (N.D.N.Y., 2006).

personal messages to a school walkway, it could not prohibit a message because it expressed a religious viewpoint.[44] And it should be noted that once a forum is opened for expression, it is of no legal significance if only the religious speakers respond.[45] In summary, student expression may not be censored by school officials simply because it is religious.

## STUDENTS HAVE THE RIGHT TO DISTRIBUTE RELIGIOUS MATERIALS SUCH AS CHRISTMAS CARDS CONTAINING BIBLE VERSES IN PUBLIC SCHOOLS

The First Amendment protects the right to express ideas through the distribution of literature.[46] Because students carry their constitutional rights to school, they may express ideas and sentiments through the distribution of literature while at school.[47] Therefore, students may distribute Christmas cards containing religious messages at school on the same terms as non-religious material.[48]

In *Morgan v. Swanson*, for example, the Fifth Circuit upheld an elementary school student's right to distribute "candy-cane shaped pens" and "a laminated card entitled the 'Legend of the Candy Cane,'" which "explained the Christian origin of candy canes," to the same extent other students were allowed to distribute gifts to classmates at the class' annual "winter break" party.[49] The Fifth Circuit, in its en banc opinion, explained that "discrimination against student speech solely on the basis of religious viewpoint" "strikes at the very heart of the First Amendment,"[50] which "protects all students from viewpoint discrimination" based on "private, non-disruptive, student-to-student speech."[51] Students, regardless of grade level, thus have "the First Amendment[] right … to express a religious viewpoint to another student without fear."[52]

## STUDENTS HAVE THE RIGHT TO EXPRESS RELIGIOUS VIEWPOINTS IN SCHOOL ASSIGNMENTS, READING MATERIALS AND CLOTHING

School officials may not prohibit students from conveying religious sentiments through their school assignments or the selection of reading materials based on the religious viewpoint as long as it falls within the educational scope of the assignment.[53] For example, if an assignment charges the student with writing an essay on the most influential person in their lives, that

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[44] *Id.*
[45] *Id.*
[46] *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding that a city ordinance prohibiting the distribution of literature without city permission violated the rights of freedom of speech and the press).
[47] *Tinker*, 393 U.S. at 506; *see, e.g*., *Westfield Sch. L.I.F.E. Club*, 249 F. Supp. 2d 98, 114 (D. Mass. 2003).
[48] *See Mergens*, 496 U.S. 226, 247-249; *but see Walz v. Egg Harbor Twp. Bd. of Educ*., 342 F.3d 271 (3rd Cir. 2003) (holding that the First Amendment was not violated when school prevented elementary school student from distributing candy canes with attached religious message *in the classroom* because school had a valid educational purpose).
[49] *Morgan v. Swanson*, 659 F.3d 359, 398 (5th Cir. 2011) (en banc).
[50] *Id.* at 396 (quotation omitted).
[51] *Id.* at 412
[52] *Id.* at 396; *see also id.* (holding that "private, non-disruptive, student speech" is "protected from viewpoint discrimination under the First Amendment, and that [this] right extends to elementary-school students").
[53] *Tinker*, 393 U.S. at 512-13, *cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school officials may exercise editorial control over student newspaper supervised by journalism teacher).

student is free to write an essay on the influence of Jesus Christ. Likewise, school officials may not prohibit students from wearing clothing that conveys a religious message through words or symbols due to the religious viewpoint expressed on the clothing.

## Conclusion

We hope this information has been helpful in understanding student rights to express their religious beliefs at school and the responsibilities of school officials. If you would like more information or assistance about a particular situation, please contact the Alliance Defense Fund.