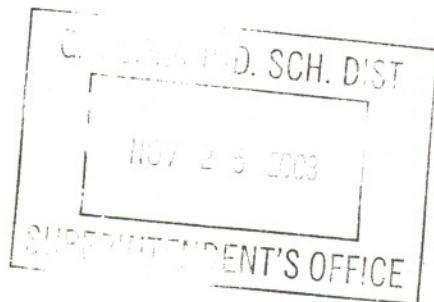


# BECHT LAW FIRM

Attorneys and Counselors at Law  
7410 Montgomery Blvd., NE - Suite 103  
Albuquerque, NM 87109  
Telephone 505-883-7311 - Fax 505-883-9010

November 20, 2003



Mr. Ronald Haugen  
Gadsden Independent Schools  
P.O. Drawer 70  
Anthony, NM 88021

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

Dear Mr. Haugen:

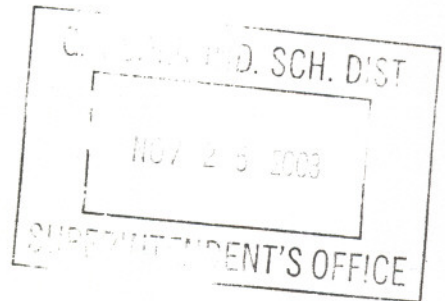
Historically, students and teachers across America have celebrated the Christmas season by decorating classroom bulletin boards and Christmas trees, learning songs for the annual Christmas program, and exchanging Christmas cards and gifts with classmates. In recent years, secular groups have spread misconceptions about legalities of Christmas celebrations within public schools. As a result, many school officials have mistakenly removed nearly all references to Christ from Christmas and, as a result, have begun a new "tradition" of violating the constitutional rights of students and teachers to seasonal religious expression within public schools.

While a recent poll indicates that ninety-six percent (96%) of Americans celebrate Christmas, some school officials prohibit students and teachers from celebrating any religious aspect of Christmas. Classroom decorations depicting snowmen and reindeer have replaced traditional decorations including nativity scenes and angels. In a New Jersey school, a third grade teacher canceled a class field trip to see the Broadway play "A Christmas Carol" because the ACLU contended that the play excluded certain aspects of the community. Some school officials have gone so far as to prohibit the common greeting "Merry Christmas" and instead insist that students and teachers say "Happy Holidays" and refer to the Christmas break a "Winter Break" or "Sparkle Season". In some districts, school administrators have even banned students from distributing religiously-themed gifts and singing religious Christmas carols.

By way of introduction, I am affiliated with the Alliance Defense Fund Law Center (ADFLC), a not-for-profit public interest law and educational group. ADFLC exists to educate the public and the government about important constitutional rights, particularly in the context of the expression of religious sentiments. When necessary, ADFLC litigates these issues. It is our hope that the following discussions will clarify this important area of the law and allow school districts and school officials to have a Merry Christmas without need-less and expensive litigation.

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**THE CONSTITUTION DOES NOT REQUIRE GOVERNMENT OFFICIALS TO  
CENSOR SEASONAL RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS**

The Constitution does not require school officials to obliterate religious observances and expression from public schools. 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 require?"

**THE FIRST AMENDMENT PROTECTS RELIGIOUS SPEECH**

It is a fundamental principle of constitutional law that school officials may not suppress or exclude the speech of private parties simply because the speech is religious or contains a religious perspective. *Good News Club v. Milford Cent. Sch. Dist.*, 533 US 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 US 384 (1993); *Widmar v. Vincent*, 454 US 263 (1981). Such religious speech cannot be suppressed without eviscerating essential First Amendment guarantees of free speech and religious freedom. As the Supreme Court has stated:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is 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 at religious speech that a free-speech clause without religion would be Hamlet without the prince.

*Capitol Square Review and Advisory Bd. v. Pinette*, 515 US 753, 760 (1995).

**THE "SEPARATION OF CHURCH AND STATE" DOCTRINE DOES NOT JUSTIFY  
OFFICIAL SUPPRESSION OF SEASONAL RELIGIOUS EXPRESSION**

Efforts to suppress Christmas celebrations demonstrate that many school officials mistakenly believe that allowing seasonal religious expression violates "the separation of church and state" - a doctrine often cited in connection with the Establishment Clause of the First Amendment. As a result, school officials across our free nation have denied students and teachers their constitutional rights of religious speech and expression under the guise that the Constitution requires them to do so. While many school officials are merely misinformed, some have purposefully sought to eradicate the celebration, observance, or even the acknowledgment of the religious aspects of Christmas from public schools.

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." *Lynch v. Donnelly*, 465 US 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). The Court has merely held that the Establishment Clause of the First Amendment 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. *Everson v. Bd. of Educ.*, 330 US 1, 18 (1947). In fact, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 US at 673. "State power is no more to be used to handicap religions, that it is to favor them." *Everson*, 330 US at 18.

In addition, the Constitution has no applicability to private religious expression. The Supreme Court has noted that "there 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." *Board of Educ. Of the Westside Cmty. Sch. v. Mergens*, 496 US 226, 249-50 (1990). 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 school-age children who sincerely want to share their faith with their friends. Public school officials can avoid violations if they understand a few basic rules about religious speech. The following spells out what federal courts have said on these Christmas questions and dispels the myths that have prompted school officials and others to mistakenly suppress religious expression.

## RELIGIOUS SPEECH IN PUBLIC SCHOOLS

### Activities in Public Schools

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

Religious Christmas carols may be sung in public schools without offending the Constitution. Religious Christmas carols may be sung by individual students or by a group of students during school activities such as choir, Christmas programs, and other events. Although challenges have been brought, public schools have successfully defended their students' constitutional right to sing Christmas carols. See, e.g., *Florey v. Sioux Falls Sch. Dist.*, 619 F2d 1311, 1319 (8<sup>th</sup> Cir. 1980).

No court has ever ruled that public schools must ban the singing of religious Christmas carols. Courts often look to whether the school had a secular purpose for initiating religious expression in determining whether the school's conduct is constitutional. For example, the Eighth Circuit focused its attention on the policy and rules adopted by the board of education. 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..." *id.* At 1314. Other courts have reached similar results concerning singing religious songs in public schools. See *Bauchman v. West High Sch.*, 132 F3d 542 (10<sup>th</sup> Cir. 1998); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F3d 402 (5<sup>th</sup> Cir. 1995). These decisions are supported by prior Supreme Court Rulings concerning religious expression. See, e.g., *McGowan v. Maryland*, 366 US 420, 445 (1961) (holding that government involvement in an activity of unquestionably religious origin does not violate the Establishment Clause if its present purpose and effect is secular).

#### SCHOOL OFFICIALS DO NOT VIOLATE THE CONSTITUTION BY CALLING 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, *Lynch*, 465 US at 676. For example, Congress has proclaimed Christmas to be a legal public holiday. 5 USCA Sec. 6103(a) (2003).

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

School officials do not violate the Constitution by closing on religious holidays such as Christmas and Good Friday. While constitutional challenges have been brought against state recognition of religious holidays, a state may successfully defend its conduct by demonstrating that its actions pass the Supreme Court's three-prong *Lemon* test. *Bridenbaugh v. O'Bannon*, 185 F3d 796, 802 (7<sup>th</sup> Cir. 1999), *cert. Denied*, 529 US 1003 (2000). 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." *Lynch*, 465 US at 679 (citing *Lemon v. Kurtzman*, 403 US 602, 612-13 (1971)).

In *Bridenbaugh*, the State of Indiana successfully defended its recognition of Good Friday as a legal holiday by asserting that its purpose was to provide state employees with a three-day spring weekend. *Bridenbaugh*, 185 F3d at 798. The Supreme Court explained that the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day. *Id.* at 801.

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

It is a common misconception that it is permissible to celebrate a particular religious holiday only if equal time is allowed for celebration of all other religious holidays. But no Court has ever held that celebrating Thanksgiving or 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. *Lynch*, 465 US at 683. Government recognition of a holiday, which incidentally coincides with a religious holiday, is not unconstitutional. *Brindenbaugh*, 185 F3d at 801.

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

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.

WILLIAM J. FEDERER, THE HISTORY OF SAINT NICHOLAS & CHRISTMAS HOLIDAY TRADITIONS 116 (2002).

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

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.

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.

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

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.

#### **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." *Tinker v. Des. Moines Indep. Cmty. Sch. Dist.*, 393 US 503, 506 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech). Under the direction of former President Clinton, U.S. Secretary of Education Richard Riley issued guidelines concerning religious discussion 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." U.S. Dept. of Educ., *Religion and Public Schools*, Archived Information, Guidelines, available at <http://www.ed.gov/Speeches/08-1995/religion.html> (last modified Jan. 26, 2001).

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. See *School Dist. Of Abington v. Schempp*, 374 US 203 (1963). Saying a simple greeting that people commonly use in December does not rise to a state endorsement of religion.

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

The religious origins of Christmas may be studied in the classroom without offending the Constitution. The Supreme Court has stated that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Gramh*, 449 US 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). 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." *Florey*, 619 F2d at 1316. Therefore, school officials may constitutionally present Christmas passages from the Bible, such as Matthews 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." *School Dist. Of Abington*, 374 US at 225. 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. *Id.*

#### **PUBLIC SCHOOLS MAY EXHIBIT RELIGIOUS SYMBOLS**

Public school officials may display religious symbols such as crèche or nativity scenes 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 if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday. *Lynch*, 465 US at 681. Lower federal courts have also allowed public schools to include religious and Christian symbols in Christmas displays, school calendars, and holiday programs. See, e.g., *Sechler v. State Coll. Area Sch. Dist.*, 121 Fsupp2d 439 (M.D.Pa. 2000); *Clever v. Cherry Hill Township Bd. of*

*Educ.*, 838 Fsupp 929 (D.N.J. 1993). In a recent case, a court held that the school's holiday display and song program, which contained religious symbols, books and songs, did not violate the Establishment Clause. *Sechler*, 121 FSupp2d at 453. The court noted that the display "sends a message of inclusion and celebrates freedom to choose one's own beliefs." *Id.*

**STUDENTS HAVE A CONSTITUTIONAL RIGHT TO BE EXEMPT  
FROM ACTIVITIES WITH A RELIGIOUS COMPONENT**

All students have a constitutional right to opt out of activities, such as a Christmas program or a concert with a religious song, which conflicts with the individual beliefs of the students or their parents. See *Wisconsin v. Yoder*, 406 US 205 (1972) (holding that parents and guardians have a constitutional right to direct the upbringing and education of their children). Where the religious activity does not violate the Establishment Clause, as explained above, the school is not required to prohibit the activity even though it creates conflict with or offends some students or parents. *Florey*, 619 F2d at 1318. However, the school may not force "any person to participate in an activity that offends his religious or nonreligious beliefs." *Id.* A student with an objection to some school activity containing religion (e.g., a school concert containing a religious song or a field trip to a museum containing religious art) does not empower the student to censor the expression or block the activity. The Constitution permits the student to opt out of participation not to silence others.

**Rights of Students and Other Individuals to Religious Expression**

**THE CONSTITUTION DOES NOT REQUIRE GOVERNMENT OFFICIALS  
TO SILENCE SOMEONE FOR TALKING ABOUT HIS OR HER FAITH  
IN GOD AND RELIGIOUS BELIEFS**

It is well established that the Constitution protects the religious speech of private individuals under the First Amendment. See, e.g. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 US 640 (1981); *Niemotko v. Maryland*, 340 US 268 (1951); *Saia v. New York*, 334 US 558 (1948). Because of this, the Constitution prohibits governmental entities from suppressing or excluding the speech of private individuals solely because their speech is religious or contains a religious perspective. *Id.*

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

The private religious speech of students is protected under the First Amendment. *Widmar v. Vincent*, 454 US 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). Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 US at 506. 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..." *Id.* at 512-513. The Supreme Court 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 obligation 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. *Id.* at 511.

**THE CONSTITUTION DOES NOT REQUIRE SCHOOL OFFICIALS  
TO PERMIT DISRUPTIVE SPEECH WHEN IT IS RELIGIOUS**

While the First Amendment protects students' religious speech rights, school officials may prevent student speech that creates a material and substantial disruption to the school's ability to fulfill its educational goals. *Id.* This is a narrow limitation, however, because the mere fear of apprehension of a disruption is not sufficient to enable the school to prohibit speech. *Id.* at 508.

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

The First Amendment protects the right to express ideas through the distribution of literature. *Lovell v. City of Griffin*, 303 US 444 (1938) (holding that a city ordinance prohibiting the distribution of literature without city permission violated the rights of freedom of speech and press). Because the Supreme Court has stated that the constitutional rights of students accompany them throughout the school day, students have the right to express ideas through the distribution of literature while at school. *Tinker*, 393 US at 506; see, e.g., *Westfield Sch. L.I.F.E. Club*, 249 FSupp2d 98, 114 (D. Mass. 2003).

Specifically, students have a right to distribute religious materials at school on the same terms as they are permitted to distribute other material. See *Mergens*, 496 US 226, 247-249; but see *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F3d 271 (3<sup>rd</sup> 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). The Supreme Court has noted that First Amendment rights must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 US at 506. Therefore, school officials may continue "to establish reasonable time, place and manner regulations" on the exercise of students' free speech rights. *Widmar*, 454 US at 276.

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

First Amendment rights, such as the rights of freedom of speech and expression, accompany each student throughout the school day both inside and outside the classroom, *Tinker*, 393 US at 512-13. In addition, the Supreme Court has held that the Constitution "affirmatively mandates, accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 US at 673. "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Abington*, 374 US at 225 [citing *Zorach v. Clauson*, 343 US 306, 314 (1952)].

School officials must permit students to convey religious sentiments through their school assignments, selection of reading materials, and clothing that conveys a religious message through words or symbols. *Tinker*, 393 US at 512-13, cf. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US 260, 273 (1988) (school officials may exercise editorial control over student newspaper supervised by journalism teacher).

**Conclusion**


The Constitution does not require government officials to obliterate religious observances and expression from public schools. It is my hope and that of the Alliance Defense Fund that this letter will dispel the myths about the Establishment Clause that have prompted tragic and unnecessary acts of government censorship of religious speech.



If you have any questions or require further information please do not hesitate to contact me. Alternatively, you may contact Ms. Sumi Thomas of the Alliance Defense Fund at 480-444-0020.

A Very Merry Christmas to Everyone!

Very truly yours,



PAUL F. BECHT  
PFB:tan