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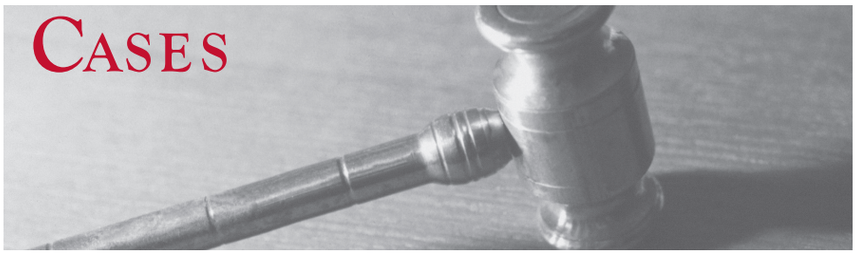

by Erich R. Eiselt, Assistant General Counsel

First Amendment: City Hall "Holiday Display" is Protected Governmental Speech

The Freedom From Religion Foundation requested that the City of Warren, Michigan remove a nativity scene from the City's annual winter holiday display in the atrium of its civic center. The City refused, leaving the nativity scene among the other secular and religious symbols in the display—a lighted tree, a snowman, a nutcracker, a "Welcome Winter" sign and so on.

In 2011, the Foundation changed its stance. It requested the right to place "an attractive sandwich board" in the middle of the holiday display, bearing the following message:

At this season of
THE WINTER SOLSTICE
may reason prevail.
There are no gods, no devils, no angels, no Heaven or hell.
There is only our natural world,
Religion is but myth and superstition
That hardens hearts
And enslaves minds.

Placed by the Freedom From Religion Foundation
On Behalf of its State Members
frff.org

State/Church
KEEP THEM SEPARATE
Freedom From Religion Foundation
frff.org

The City's Mayor declined, responding in a lengthy letter. He pointed out that the proposed sign "is antagonistic to all religions and would serve no purpose during this holiday season except to provoke controversy and hostility..." He added "Everyone has a right to believe or not believe...but no organization has the right to disparage the beliefs of Warren and U.S. citizens. . . ."

The Foundation sued, alleging that allowing a nativity scene while rejecting the Foundation's sign violated the Establishment, Free Speech and Equal Protection clauses. The district court granted summary judgment for the defendants, finding that as a matter of law, hosting the holiday display and refusing the Foundation's sign did not violate the Constitution.

On appeal, the Sixth Circuit affirmed: the City did not violate the Establishment Clause by including a nativity scene in a holiday display or by refusing to allow the anti-religion sign.

The First Amendment prohibits any law "respecting the establishment of religion." There are two general safe harbors to this rule. First, a government may allow a benefit to faith-based entities so long as the same benefit is available to secular entities. Second, a government may invoke the divine through words and symbols if they have religious *and* historical meanings or faith-based *and* solemnizing effects, and offer at most incidental benefits to a faith.

These tests have produced a clear answer in the holiday display context, beginning with *Lynch v. Donnelly*, 465 U.S. 668 (1984). There the Court found that a Pawtucket, Rhode Island winter display which included a crèche and many other secular items including a clown, teddy bear and Santa Claus House was permissible. In the context of all the components of the display, the crèche was not an endorsement of religion but merely "depicts the historical origins of this event long recognized as a National Holiday." Five years after *Lynch*, the Court again applied the test, this time to uphold a combined religious and secular mix of symbols in one public area while prohibiting a stand-alone nativity scene in another public space. (*Cnty of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

The Sixth Circuit relied on *Lynch* and *Allegheny*. It also cited a long-standing Supreme Court maxim, more than sixty years old, to defend the language in the Mayor's letter, which the Foundation alleged was an implicit promotion of religion, "We are a religious people, whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 346 U.S. 306, 313 (1952).

The Circuit Court disagreed with the Foundation's Free Speech argument. "As the Foundation reads the First Amendment, it requires the City, having opted to create a holiday display, to include competing messages and viewpoints. As we read the First Amendment, it does not." The Sixth Circuit outlined the parameters of "governmental speech." The City, and every government in the nation, is free to promote its own messages, so long as they are not otherwise constitutionally flawed, without having to grant exposure to contrary views. "When the government speaks, 'it is entitled to say what it wishes and to 'favor or disfavor' all kinds of policies or points of view." (citations omitted).

The critical element is that "governmental speech" must truly be the expression of the government. In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) the City had installed in a public park various monuments depicting the City's heritage. This included a Ten Commandments monument. Although many of the monuments had been privately-donated, the City had selected them and desired to convey the messages associated with them. It therefore did not need to allow a Gnostic Christian sect to include its own monument in the same park. And where a federal campaign promoting beef consumption was initiated by the Department of Agriculture, with every word of the promotion being approved by the Agriculture Secretary, there was no requirement to give equal time to opposing views merely because private industry representatives had participated in producing the ad. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

Here, the City had fully controlled the content of the holiday display. So long as it did not violate the Establishment Clause, the display was governmental speech, not requiring access by competing viewpoints. *Freedom From Religion Foundation, Inc. v. City of Warren*, No. 12-1858 (6th Cir. Feb. 25, 2013).