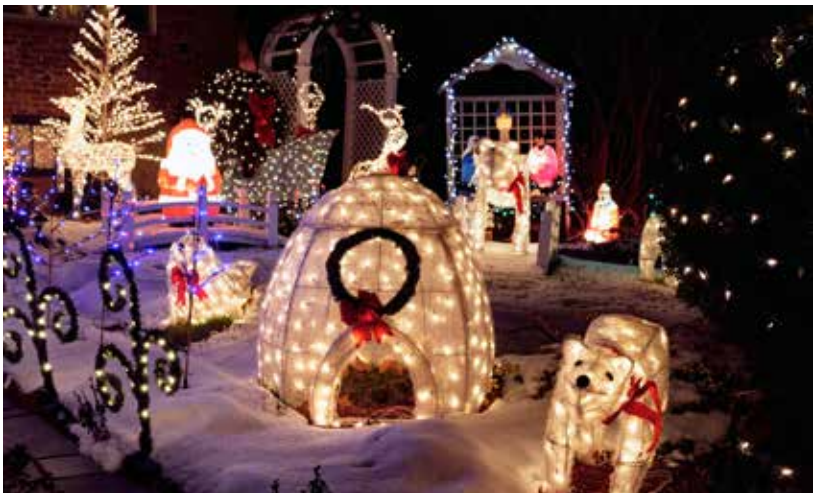
Religious Displays At City Hall



City officials should use caution when placing or allowing religious displays of any type on public property. Although this topic can be troublesome all year long, the issue always seems to come to the forefront during the holiday season. Even well-intentioned religious displays may run afoul of the Establishment Clause of the United States Constitution that reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … " This prohibition against governmental advancement or inhibition of religion is more commonly known as the "separation of church and state," and it applies to all governmental entities: federal, state and local.

The "separation of church and state" does not mean that government agencies are entirely barred from recognizing or celebrating holidays or events that have religious connections. City holiday displays that are limited to more secular images, like Santa Claus and Christmas trees, will generally survive a constitutional challenge. According to the Supreme Court in *Allegheny County v. Greater Pittsburgh ACLU*, the government may acknowledge Christmas as a cultural phenomenon, but it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. Thus, a snowman and an angel displayed at a city are more justifiable as signals that Christmas is a time for peace on earth and good will toward men.

It is unclear whether a religious symbol, like a Nativity scene, can lawfully be displayed by a city or on city property. There is no federal or state statute covering this topic. Moreover, the case law provides very few hard and fast rules for such displays. As United States Supreme Court Justice Clarence Thomas observed, the Supreme Court's Establishment Clause "jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess. . . ." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from the denial of cert.) Therefore, it is difficult to formulate a specific set of rules to ensure that a given display is constitutionally permissible if it has religious symbols in it.

The Supreme Court has held that a Hanukah menorah has both religious and secular connotations and may properly be displayed if the context presented is an overall holiday setting rather than the endorsement of religion. In *Alleghany County*, the Supreme Court found constitutionally permissible a holiday display that consisted of a menorah next to a larger Christmas tree that was the "predominant element" of the display, and less significantly, a sign saluting liberty.

Part of the difficulty in determining whether a given holiday display will survive an Establishment Clause challenge is that the United States Supreme Court has adopted a very fact-specific approach to dealing with this issue. The best way to summarize the Court's approach is that, if the dominant theme of a holiday display seems to be an endorsement of a particular religion, or if someone could believe that the dominant theme of the display is religious, then the

display might not survive a challenge. For instance, a manger scene mixed in with a Santa figure, a snowman, a menorah, and a Christmas tree will be more likely to survive an Establishment Clause challenge than a manger scene alone. However, if the manger scene is the centerpiece of the larger display, and the other figures are much smaller than the manger or placed in such a way that the manger scene is the dominant theme of the display, then the display will probably not survive a challenge.

In what has been described as the leading case on the topic of city Christmas displays, the United States Supreme Court upheld the authority of a Rhode Island city to erect a Christmas display in a park owned by a nonprofit organization. The scene included such objects as a Santa Claus house, a Christmas tree, a banner that reads "Seasons Greetings," and a Nativity scene. *Lynch v. Donnelly*, 465 U.S. 668 (1984). Focusing on the context of the Christmas season, the Court found that the City had a secular purpose for including the Nativity scene as one component of its holiday display that did not impermissibly advance religion or create an excessive entanglement between religion and government. According to the Court, any benefit to one faith or religion or to all religions by the inclusion of the Nativity scene in the display is *indirect, remote and incidental*, and is no more an advancement or endorsement of religion than the exhibition of religious paintings in governmentally supported museums. See also *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1821 (2014) (explaining why legislative prayer does not have to be generic or nonsectarian).

In 2005, the United States Supreme Court decided two cases that provide further guidance for city officials. Both cases concerned the display of the Ten Commandments on public property. The cases applied the same law but yielded contrary results. In *Van Orden v. Perry*, the Texas Capitol was allowed to keep a large stone monument bearing the Commandments. On the other hand, in *McCreary County v. ACLU of Kentucky*, two Kentucky county courthouses lost their framed copies of the mandates entrusted to Moses. In both cases, the Supreme Court was asked to decide the legality of nearly identical texts erected on government property. Both cases forced the Court to review previous cases in an effort to balance the *religious* and *historical* significance of the Commandments. So, why different outcomes?

The sole point upon which all nine justices agreed was that the Ten Commandments communicate both a secular *moral* message and a Judeo/Christian *religious* message. The Court reminded us that the purposes of the Constitution's "Religion Clauses" are to ensure religious liberty and tolerance for all, to avoid religious divisiveness, and to maintain the separation of church and state. The Court wrestled with two competing principles for applying the Establishment Clause:

(a) the strong role religion and religious traditions have played throughout our nation's history; and

(b) that government intervention in religious matters can itself endanger religious freedom.

In *McCreary County*, the Court continued to rely on the three-part test of *Lemon v. Kurtzman*, a 1971 decision that questioned whether:

(1) the government activity in question has a secular purpose;

(2) the activity's primary effect advances or inhibits religion; and

(3) the government activity fosters excessive entanglement with religion.

While the Court did not employ the *Lemon* test in the Texas case, in both the Texas and Kentucky cases, the Court focused on the "secular purpose" of the monuments by looking at the context of the displays. (The *Lemon* test has increasingly been criticized by the Court and replaced by a historical approach.) Were the Commandments there to communicate a religious message? Or did they merely show a moral and historical basis for our governments?

Although the Court did not specifically organize its analysis in the following manner, these were the factors carefully considered by the justices in both the Texas and Kentucky cases:

• **Initiative:** Erection of the monument in Texas was initiated by the Fraternal Order of Eagles, a national civic, social and patriotic organization, that strives to reduce juvenile delinquency. County officials initiated the courthouse displays in Kentucky.

• **Funding:** The Fraternal Order of Eagles donated the Texas monument. The Eagles also paid the cost of erecting the monument. The displays in Kentucky were paid for by the counties.

• **Approvals:** Evidence from the legislative journal entries in Texas indicated an acceptance of the donation by the state legislature. The Historic Preservation Commission recommended the actual site for the monument. The displays in the Kentucky courthouses were ordered to be installed by each county's judge and later ratified by the legislative body of each county. The Court has also looked for evidence of governmental contact with church authorities concerning the content or design of the exhibit prior installation.

• **Ceremonies:** The dedication of the monument in Texas was presided over by two state legislators. The ceremony opening the display in one Kentucky county was presided over by the county judge and included a clergyman who "testified to the certainty of the existence of God."

• **Location:** The Texas monument is located outside on 22 acres. According to the state's brief, its "location and orientation make it one of the least conspicuous monuments on the grounds." The displays in Kentucky were located inside on the walls of high-traffic hallways frequently used by the public on a daily basis.

• **Surroundings:** The monument in Texas is one of 22 monuments and 17 historical markers, including tributes to soldiers and peace officers. Initially, the Commandments in Kentucky were alone. The county expanded the display twice, after the initial suit was filed – first to include similarly framed county resolutions stating that the Commandments were "the precedent legal code" and referring to Jesus Christ as the "Prince of Ethics," and second (after the counties changed lawyers) to include framed copies of the Magna Carta, Mayflower Compact, Bill of Rights, Declaration of Independence, and the lyrics of the "Star Spangled Banner."

• **Intensity:** The placement of the monument on the Texas State Capitol grounds was found to be "far more passive" than other examples previously considered by the Court. The displays in Kentucky were posted in the courthouses in a "high traffic area," those being hallways "readily visible to … county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, and to register cars, to pay local taxes and to register to vote."

• **Duration:** The Texas monument had existed at that location for more than 40 years before being challenged by the plaintiff, who had first encountered the monument six years prior to filing suit. Kentucky erected the courthouse displays in the summer of 1999 and suit was brought that fall.

The differing results handed down by the Court demonstrate that context is crucial when determining a secular purpose. In Kentucky, even though other historic documents hung on the two county courthouse hallways separate from and in addition to the display at issue, the majority of the Supreme Court characterized the display (as a whole) as a "solo exhibit," stating that when "the government initiates an effort to place this [religious] statement *alone* in public view, a religious object is unmistakable."

The "fact-based" nature of any religious display case means that a set of standard guidelines is difficult to cultivate. For example, two lower courts held that if the County had erected the third expanded display in *McCreary* (which included the Magna Carta and other documents) first, it most likely would have withstood scrutiny. A case in the 10th Circuit, *Green v. Haskell County Board of Commissioners*, also dealt with a Ten Commandments display. In that case, unlike in Van Orden, the court concluded that the display had a primarily religious effect because two of the three county commissioners made statements, attended events and generally supported the monument in their capacity as commissioners. Further, the monument was challenged in the same year it went on display, like the display in McCreary County. Thus, the court found that the display was unconstitutional.

What if a private entity, with the city's consent, places a religious holiday display on public property? City attorneys advise that a city may diminish the likelihood that such a display is unconstitutional by placing a sign disclaiming any city endorsement or participation in the display, or views depicted by the display. But that's not always the case. For instance, in *Felix v. City of Bloomfield*, the court found certain restrictions on religious displays bind even private entities. 841 F.3d 848 (10th Cir. 2017), cert. denied. In *Felix*, the 10th Circuit found a Ten Commandments display unconstitutional even though, it was created and donated by a private party; was accompanied by several secular monuments; was erected pursuant to a public-forum policy; and included a sign disclaiming any government endorsement of religion. These cases demonstrate that, while cities can look to precedent for guiding principles, ultimately the outcome in any given case may not be predictable.

Because the law in this area is not black-and-white, the only way to ensure safety from litigation would be for cities to make sure their holiday displays are strictly secular in nature. Of course, many cities will decide to include certain religious imagery as a part of their holiday or other displays. In these cases, remember that religious symbols should not generally form the main theme of the display and be sure to contact your city attorney to determine if the display will run afoul of the Establishment Clause.

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