COMMONWEALTH of VIRGINIA

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August 20, 2010

The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 421
Manassas, Virginia 20108-0421

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether Loudoun County, under the U.S. and Virginia constitutions and our present statutes, is compelled to prohibit holiday displays – both religious and non-religious – on public property; and if not so compelled, under what conditions religious holiday displays, including those honoring the birth of Jesus Christ, are permitted.

Response

It is my opinion that a local governmental entity is never categorically compelled to prohibit holiday displays, including those incorporating recognizably religious symbols, because governments enjoy considerable discretion in accommodating the religious expression of their citizens and employees and in their own recognition of traditional seasonal holidays. It is further my opinion that displays depicting the birth of Jesus Christ are permissible provided the government ensures appropriate content and context.

Applicable Law and Discussion

The First Amendment to the Constitution of the United States declares that "Congress shall make no law respecting an establishment of religion."[1] Article I, § 16 of the Constitution of Virginia provides that

> the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.[2]

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[1] U.S. CONST. amend. I.

[2] VA. CONST. art. I § 16.

Turning first to the Virginia Constitution, the original meaning of the words "respecting an establishment of religion" is probably reflected in Chapter II of the October 1776 Acts of the General Assembly, which gives practical effect to § 16 of the Virginia Declaration of Rights of June 12, 1776. The October enactment partially disestablished the church of Virginia by striking down "several oppressive acts of parliament respecting religion."[3] It also freed dissenters from taxation that supported the church so that "equal liberty, as well religious as civil,"[4] would prevail. That act also ended statutory salaries for the Anglican clergy.[5] The types of laws "respecting religion" referenced were those designed to maintain a state church, including provisions requiring church attendance and prescribing modes of worship.[6]

The Virginia Establishment Clause adopted by the Convention of 1829-30[7] reflects an understanding that religious equality and denominational nondiscrimination lie at the core of establishment concerns and doctrine, along with prohibition of religious tests and taxation for the support of religion. Joseph Story contemporaneously wrote of the Federal Establishment Clause: "The real object of the amendment was ... to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[8]

Thus, viewed from a reasonable textualist and original understanding perspective, it is doubtful that the Virginia Establishment Clause limits holiday displays on public property. Instead, the Virginia Establishment Clause is implicated only by state action directly supporting or preferring a particular church. For purposes of the Virginia Constitution, then, Article I, § 16 does not forbid a display merely because of its religious content. This provision, however, does forbid religious favoritism toward a particular sect or denomination.[9]

Current Federal Establishment Clause doctrine, on the other hand, does address governmental displays with religious content. Unfortunately, the United States Supreme Court's contemporary Establishment Clause jurisprudence is "confusing and confused."[10] In analyzing Establishment Clause jurisprudence as it now exists two conclusions are nonetheless clear: (1) governmental accommodation of religion is constitutionally permitted, and in some circumstances is required; and (2) holiday displays erected by governments can be validly exhibited depending on content.

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[3] 9 Hening's Statutes at Large 164 (1776).

[4] *Id.*

[5] *Id.* at 165, 166.

[6] *See* 4 Hening's Statutes at Large 204-09 (1727).

[7] A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, Vol. I at 292 (Univ. Press of Va., Charlottesville 1974)

[8] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, VOL. III § 1871 (1833).

[9] The Supreme Court of Virginia has noted that it has "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [its] construction of Article I, § 16." Virginia Coll. Bldg. Auth. v. Lynn, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000). The Court has not held that the Virginia constitutional provision and the federal constitution's Establishment Clause are the same. The text and history of Article I, § 16 do not support a contention that the Clause prohibits displays on public property merely because of their religious content.

[10] Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 n.7 (5th Cir. 1993). *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (display of Ten Commandments at Texas State Capitol constitutional) (4-4 vote with Breyer, J., concurring in the judgment), *with* McCreary County v. ACLU, 545 U.S. 844 (2005) (display of Ten Commandments at Kentucky county courthouse unconstitutional) (5-4).

Constitutional accommodation of religion begins in the text itself and its history is deeply rooted. The oaths found at Article II, § I, cl. 8 and Article VI, cl. 3 permit affirmation as an alternative to swearing. This option is given to "known denominations of men, who are conscientiously scrupulous of taking oaths (among which is that pure and distinguished sect of Christians, commonly called Friends, or Quakers)."[11] Nondenominational Sunday church services were conducted in the chamber of the United States House of Representatives for a considerable period, and while President, Thomas Jefferson was in regular attendance. Likewise James Madison, the sponsor of the First Amendment in Congress, attended when he succeeded to the Presidency.[12]

The practice of governmental accommodation of religion also is embedded in case law and statutes. Applying the Establishment Clause to the States for the first time in *Everson v. Board of Education*, the Court recognized that the Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[13] Although *Everson* accepted the concept of a "wall of separation between church and state," taken from Jefferson's letter to the Danbury Baptist Association,[14] the Court explained in *Lynch v. Donnelly* that the "metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[15] That is so because "[i]t has never been thought either possible or desirable to enforce a regime of total separation . . . ."[16] Not only does the Constitution not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[17]

Applying these principles, Loudoun County must accommodate religious items within the personal space of employees under certain circumstances.[18] In addition, where the County already has provided a public forum or limited public forum, it will usually lack the right to exclude a religious display of reasonable duration based solely upon content.[19] Even where no such forum previously has been created, the County is free to create a nondiscriminatory forum for recognition of holidays, including Christmas, if it makes clear that the County itself is not communicating a religious message.[20]

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[11] STORY, *supra* note 4, § 1838.

[12] JAMES H. HUTSON, THE FOUNDERS ON RELIGION at xii (Princeton University Press 2005).

[13] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[14] *Id.* at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

[15] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

[16] *Id.* (citing Comm. for Pub. Educ. & Religious Liberty v. Nyguist, 413 U.S. 756, 760 (1973)).

[17] *Id.* (citing Zorach v. Clauson, 343 U.S. 306, 314, 315 (1952); Illinois ex rel. McCollum v. Bd. of Education, 333 U.S. 203, 211 (1948)). *See also* 42 U.S.C. § 2000e-2(a)(1) (2006) (Civil Rights Act requires employers to reasonably accommodate religion); 42 U.S.C. §§ 2000e–2000e-17 (2006) (ministerial exception to Civil Rights Act); 42 U.S.C. § 2000cc-1 (2006) (Religious Land Use and Institutionalized Person Act); 50 U.S.C. Appx. § 456(J) (conscientious objectors).

[18] Warnock v. Archer, 380 F.3d 1076, 1082 (8th Cir. 2004) (display of personal Bible and framed scriptural quotation by school district superintendent in his office were constitutionally protected and did not violate Establishment Clause).

[19] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1990); Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1387-92 (11th Cir. 1993) (*en banc*).

[20] ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir. 1995) (rustic stable without figures on capitol grounds did not violate Establishment Clause because prominently displayed notice stated that the area was a public forum available to all citizens and that the display neither was constructed with public funds nor constitutes endorsements by the state of any religion or religious doctrine). *See also* Capitol Square Review and Adv. Bd. v. Pinette, 515 U.S. 753 (1995) (although unable to agree on a rationale, Court holds that the government may not refuse on Establishment

Moreover, irrespective of religious accommodation, the County is free to communicate its own recognition of holidays, including Christmas, as long as overtly Christian symbols are balanced with other religious and secular ones in a way that communicates to reasonable, informed observers that the County is not making a religious statement.[21] Because secular symbols can insulate innately religious symbols from constitutional attack, decoration of public buildings with such secular items as lights, candy canes, wreaths, poinsettias, fir trees, snowflakes, and red and green ribbons should raise no serious constitutional objection.[22]

In adjudicating public display cases, the Fourth Circuit employs a combination of the *Lemon* and government endorsement tests.[23] The *Lemon* three-prong test seeks to determine whether a governmental action (1) has a secular purpose, (2) whether its principal or primary effect is one that neither advances or inhibits religion, and (3) whether the action threatens excessive governmental entanglement with religion.[24] Although *Mellen* initially identified *Lemon* and governmental endorsement as competing tests,[25] it then merged the governmental endorsement test into the second prong of *Lemon* by holding that state action which "suggests to the reasonable, informed observer that [government] is endorsing religion," demonstrates that the challenged action has the principal or primary effect of advancing religion.[26] Although the inquiry is necessarily fact-specific, a holiday display that is not exclusively religious and one that is a part of a broader celebration of the holiday season would satisfy the *Lemon* test.[27]

In sum, although it is certainly possible for a locality to violate the Establishment Clause by exhibiting or authorizing Christmas and other holiday displays,[28] such displays are not *per se* impermissible provided that the County is careful with respect to content and context.

Clause grounds to display religious symbol when nature of the public forum is known or publicly announced). *Pinette* effectively overrules Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) (private club may not display religious holiday symbols on public property because public may mistakenly interpret private display as a public one, notwithstanding disclaimer that display was erected by private club).

[21] *See Lynch*, 465 U.S. at 685.

[22] *See* ACLU v. Schundler, 168 F.3d 92, 95 (3d Cir. 1999) (display containing crèche, Menorah, Christmas tree, figures of Santa Claus and Frosty the Snowman, sled, Kwanzaa symbols, and signs stating that the display was one of series put up by city throughout year to celebrate its residents' cultural and ethnic diversity did not violate Establishment Clause); Mather v. Mundelein, 864 F.2d 1291, 1292-93, *reh'g denied*, 869 F.2d 356 (7th Cir. 1989) (nativity scene in park near City Hall did not violate Establishment Clause because it was located in midst of other secular symbols of season).

[23] Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) ("'[U]ntil the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause'"(citations omitted)).

[24] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[25] *Mellen*, 327 F.3d at 370.

[26] *Id.* at 374-75. *See also* Lambeth v. Bd. of Comm'rs, 407 F.3d 266 (4th Cir. 2005) (applying same test to the motto "In God We Trust" on county building).

[27] *See* Elewski v. City of Syracuse, 123 F.3d 51 (2nd Cir. 1997) (applying *Lemon* test and holding that manger scene and menorah display did not violate the Establishment Clause when considered alongside Christmas tree and other secular symbols such as lights, greenery, wreaths, a snowman and a reindeer).

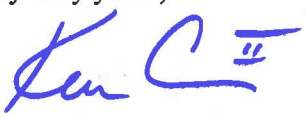
[28] ACLU v. Birmingham, 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986) (city-owned and city-sponsored nativity scene, standing alone as only clearly identifiable symbol chosen by city to mark its holiday celebration, violates Establishment Clause).

Conclusion

Accordingly, it is my opinion that a local governmental entity is never categorically compelled to prohibit holiday displays, including those incorporating recognizably religious symbols, because governments enjoy considerable discretion in accommodating the religious expression of their citizens and employees and in their own recognition of traditional seasonal holidays. It is further my opinion that displays depicting the birth of Jesus Christ are permissible provided the government ensures appropriate content and context.

With warmest regards, I am

Very truly yours,



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