



December 17, 2015

**Via Email and U.S. Mail**

John Clarkson  
Supervisor of the Town of Bethlehem  
Town Hall, Room 106  
445 Delaware Avenue  
Delmar, NY 12054  
Email: JClarkson@townofbethlehem.org

**Re: Removing the "Merry Christmas" Sign from Town Property**

Dear Mr. Clarkson:

It was brought to our attention by Dr. Elena Marcelle that you have decided to remove a "Merry Christmas" sign from Town of Bethlehem property because you are concerned that allowing the sign to stay might violate the United States Constitution. We write to inform you that, given the facts, allowing the Merry Christmas sign does not violate the Constitution.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious individuals are free to exercise their First Amendment right to speak and associate on an equal basis with other members of the community. As such, we regularly practice in the areas of Free Exercise, Free Speech, and Establishment Clause jurisprudence, and have over the years offered our legal opinion related to Christmas displays to many governmental entities.

The key facts, as we understand them, are as follows. Some time ago, the Town of Bethlehem allowed a local Jewish group to place a Menorah and a sign lettered with the words, "Happy Hanukkah" as a temporary display on Town property known as "the Four Corners." Subsequently, Dr. Marcelle purchased a sign lettered with the words, "Merry Christmas," which the Town placed on a tree, near the Hanukkah display. Dr. Marcelle requested that the Merry Christmas sign be placed in the display this year, as it was in past years. But, after consulting the Town Attorney, you decided that the Merry Christmas sign could not be placed on the Town's property, because you were concerned about potentially violating the Establishment Clause.

As this letter will explain, the Establishment Clause allows the Town to place the Merry Christmas sign on its property.

**The Town of Bethlehem Can Constitutionally Have A Holiday Display  
That Includes A Sign that States “Merry Christmas”**

As we understand the facts, the Town of Bethlehem has for several years displayed holiday greetings to its citizens and those who visit the Town. Just like the Establishment Clause allows the President to issue proclamations expressing Christmas greetings, and also allows Congress to proclaim Christmas to be a national public holiday, (*see* 5 U.S.C. § 6103(a)), the Establishment Clause allows the Town of Bethlehem to have a “Merry Christmas” sign, as part of a holiday display, for the secular purpose of acknowledging the celebration of Christmas. Simply put, if it is constitutional for the Town to display a crèche (a Nativity scene displaying Mary, Joseph, and the Baby Jesus in the Manger) —*and it is*— there can be no serious dispute over whether it is constitutional for the Town to display a sign saying “Merry Christmas.”

In a lawsuit known as *Lynch v. Donnelly*, 465 U.S. 668 (1984), the United States Supreme Court had to decide whether a city’s inclusion of a crèche in a holiday display, which the city itself erected, violated the Establishment Clause. The Court concluded that the inclusion of the crèche in this display did not violate the Constitution. Rather, the Establishment Clause allowed the city to include the crèche in its display, despite the crèche’s unmistakable religious significance.

In reaching its decision, the Supreme Court explained that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.” *Id.* at 674. The Court noted, for example, that many of our presidents had issued executive orders and official announcements proclaiming Christmas a national holiday, and that Congress statutorily prescribed “In God We Trust” as our national motto. *Id.* at 676. The National Gallery in Washington was also cited by the Supreme Court as another example of how the government acknowledges our religious heritage. The National Gallery is paid for by the federal government. Yet it exhibits paintings of the Last Supper, the Birth of Christ, the Crucifixion, and the Resurrection. *Id.* Another example the Court mentioned was the Supreme Court chamber where the Court sits for oral arguments. It is “decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments.” *Id.* at 677. Yet, none of these examples violate the Establishment Clause. *Id.*

If all these government displays honoring the nation’s religious heritage do not violate the Establishment Clause, the Town’s “Merry Christmas” sign certainly does not. In *Lynch*, the Court noted that “to forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings.” *Id.* at 686. It would be just as much a “stilted over-reaction” to bar a sign that says “Merry Christmas.” The Town ought to immediately reverse course and return the sign to its holiday display.

**The Town Can Constitutionally Erect Its Holiday Display and Refuse to Erect Others' Displays**

Besides the misplaced fear of violating the Establishment Clause, Town of Bethlehem officials may also fear violating the First Amendment if they refuse to erect other displays when people request them. The fear might be that the Four Corners will be overrun with signs and displays, or that someone will want to erect an offensive display. But that fear is unnecessary. The Constitution allows the Town to legally erect its own display and refuse to erect all other displays.

The Supreme Court already addressed this exact issue in 2009. In *Pleasant Grove City v. Summum*, a city allowed a Ten Commandments monument on government property and then rejected a request to erect a different monument from a private religious group. 555 U.S. 460 (2009). The private religious group in *Summum* said the city had to erect the requested monument or the city would violate the First Amendment. But the Supreme Court rejected that argument because monuments on government property typically speak for the government. *Id.* at 470. And because those monuments speak for the government, the city had the freedom to choose which monuments to erect and which to reject. *Id.* As other Supreme Court decisions have clarified, governments only have to accept displays from private parties when the government “intentionally” opens government property for public discourse. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015).

But no such intent is present in Bethlehem. So far as we are aware, the Town has not opened up its property to private expression but rather has incorporated a few private donations into its own holiday display. The Constitution allows the government to do that, and still maintain the freedom to reject all requests from private groups to erect displays. In fact, federal courts have reached this conclusion even in the holiday display context. *See, e.g., City of Warren*, 707 F.3d at 692 (allowing city to erect its own holiday display and reject atheist group’s request to display winter solstice display); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1137, 1143–44 (10th Cir. 2001) (allowing city to erect holiday display in front of city hall and to reject atheist group’s request to erect a sign saying, “The ‘Christ Child’ is a religious myth”).

The irony is not lost on us that your Town’s name is *Bethlehem*. Christians believe that, in the Bethlehem of old, there was no room in the inn for the Christ Child. We hope that Bethlehem, New York, will make room for a sign to wish those who drive by the Four Corners a “Merry Christmas” in recognition of the importance of this holiday to many of Bethlehem’s people. So, in light of the caselaw we have cited, we urge you to reconsider your decision to remove the Merry Christmas sign from Bethlehem. If you have any questions regarding the constitutionality of your current or future holiday displays or would like our assistance in

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responding to any legal action filed to challenge your holiday displays, we would be happy to discuss the situation with you further.

Sincerely,

ALLIANCE DEFENDING FREEDOM

By:

  
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Legal Counsel

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Dr. Elena Marcelle  
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