THE AMERICAN CENTER FOR LAW AND JUSTICE

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Dear School Official:

We would like to be among the first to wish you a happy Easter. Often, during this holiday, questions arise concerning the lawfulness or propriety of celebrating and discussing the religious components of Easter. The purpose of this letter is to inform you of the rights of schools, students and the public at large to discuss and celebrate the religious heritage of Easter in the public arena.

By way of introduction, The American Center for Law and Justice is a not-for-profit public interest law and educational group. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of political and religious sentiments. The undersigned has served as lead counsel in two significant United States Supreme Court cases in this area: Lamb's Chapel v. Center Moriches School District, 508 U.S. 384 (1993) and Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990) and has submitted an amicus brief on behalf of the ACLJ in the United States Supreme Court decision in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995).

The following pages contain a discussion of the relevant law regarding the discussion or recognition of Easter in the classroom, the rights of students to celebrate Easter in Bible Clubs or Prayer Groups on their public school campuses, and the rights of citizens to display religious scenes during the Easter season.

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT SCHOOL OFFICIALS FROM RECOGNIZING THE EASTER HOLIDAY OR TEACHING ABOUT THE RELIGIOUS ASPECTS OF EASTER

The mention of religion and/or reading of the Bible has been largely misunderstood in the public school setting. Discussion of religious topics, such as the religious heritage of Easter and the use of the Bible, are permissible components of a public school curriculum as long as they are integrated within a secular program. Religion has played an important role in the development of civilization and of this country. As the Supreme Court stated in Zorach v. Clauson, 343 U.S. 306 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being." Id. at 313. Indeed, this country's independence was justified by reference to the explicitly religious idea "that all men are created equal, and that they are endowed by their Creator with certain inalienable Rights, that among these rights are Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added). A secular

education that does not teach about religion and its role in civilization, history, or any number of other subjects essentially is an incomplete education:

> The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity-both Catholic and Protestant-and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

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Merely allowing public schools to teach objectively about religion does not violate the Establishment Clause. The Supreme Court has never held that the Establishment Clause forbids all mention of religion in public schools. Indeed, the Court has specifically stated that the Bible and religion in general can be proper areas of study in public schools, "when presented objectively as part of a secular program of education . . . ." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963). See also Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985) ("literary or historic study of the Bible is not prohibited religious activity"). The Supreme Court clearly affirmed this position in Stone v. Graham, 449 U.S. 39, 42 (1980), when it stated that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Objective teaching about the role of religion in civilization, history, and the arts, or a study of comparative religion, serves the secular purpose of providing students a complete and balanced education. Properly implemented, objective teaching about religion does not have the primary effect of advancing religion.

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In 1995, the then-United States Secretary of Education, Richard W. Riley, issued a "statement of principles" verifying that the Establishment Clause does not prohibit all religious teaching in schools. In conjunction with then-Attorney General Janet Reno, Riley states:

> Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach

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The relevant case law, coupled with this "statement of principles," reaffirms that public schools are free to teach about religious holidays. Where a school's curriculum includes discussion of holidays or religion in general, instruction on the history and religious customs of Easter is appropriate material for the classroom.

Teachers may also allow students to perform and participate in Easter drama, music, and art that may contain religious themes. Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311 (8th Cir. 1980). The U.S. Supreme Court's recent decision in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), does not affect the constitutionality of performing Easter drama or music with religious themes at school events or in holiday programs because the Santa Fe Court did not address this issue. Rather, its holding was narrowly limited to the issue of school sponsored prayer based on the Court's factual determination that the Santa Fe Independent School District had taken affirmative steps to create a vehicle for a prayer to be delivered at a school assembly. Consequently, after Santa Fe, students may still perform Easter drama or music with religious themes.

Moreover, school districts have the constitutional authority to close their schools on Good Friday if the district has a secular purpose for the closing. Several circuit courts have upheld the constitutionality of state statutes providing for a public holiday on the Friday before Easter. Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999); Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999); Granzeier v. Middleton, 173 F.3d 568 (6th Circuit 1999); Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991). In each of these cases, the respective courts applied the three-prong test for constitutionality set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

For the statute to pass the first prong of the test, it must have a "sincerely held, legitimate secular purpose," Cammack, 932 F.2d at 773 (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)). The statutes in the above cases were upheld for various legitimate secular purposes which included "bolster[ing] employees' efficiency and morale" and providing a break within a "vacation-vacant" season, Bridenbaugh, 185 F.3d at 799, as well as practicality because many families begin their vacations on that Good Friday, Granzeier, 173 F.3d at 574, and cost-effectiveness for schools because many students and teachers would take the day off anyway, Koenick, 190 F.3d at 266. The fact that the public holiday falls on a traditional day of Christian worship does not negate this secular purpose, see Bridenbaugh, 185 F.3d 796 at 800-02 (citing Lynch v. Donnelly, 465 U.S. 668, 675 (1984) and Allegheny v. American Civil Liberties Union, 492 U.S. 573, 600-02 (1989)).

The second prong of the Lemon test evaluates whether the statute primarily advances or inhibits religion, Lemon, 403 U.S. at 612-613. A statute primarily advances or inhibits religion when the

government itself endorses a certain religion by propagating it or by giving it special treatment. See Allegheny, 492 U.S. 573 (1989). However, if the statute incidentally benefits religion, this is not reason enough to declare the statute unconstitutional. E.g., Lynch, 465 U.S. at 683; Bridenbaugh, 185 F.3d at 800-02; Cammack, 932 F.2d at 765 (citing McGowan v. Maryland, 366 U.S. 420, 431-45 (1961)). In fact, the courts in Koenick, Bridenbaugh, Granzeier, and Cammack held that the statutes in question did not advance or inhibit religion simply because the statutes gave people time off on a traditional day of worship. Koenick, 190 F.3d at 267-68; Bridenbaugh, 185 F.3d at 801-02; Granzeier, 173 F.3d at 575-76; Cammack, 932 F.2d at 778-80. However, Good Friday statutes have failed this prong of the test when the statute clearly advanced Christianity: for example, a Connecticut statute prohibited the sale of liquor only on Good Friday, Griswold Inn, Inc. v. Connecticut, 183 Conn. 552 (1981), and a California executive order gave employees three hours off on Good Friday and encouraged them to use this time to worship, Mandel v. Hodges, 127 Cal. Rptr. 244 (1976); accord Freedom from Religion Found. v. Litscher, 920 F. Supp. 969 (1996); Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (holding also that the state did not introduce sufficient evidence that enough teachers and students took the day off to satisfy the first prong). In these cases, the statutes also lacked a secular purpose. The court in Granzeier, 173 F.3d at 576-77, did affirm that a sign on the courthouse displaying a picture of the Crucifixion and an explanation that the court would be closed "for observance of Good Friday" was an unconstitutional endorsement of religion, but the court was permitted to close for Good Friday nonetheless. Id.

The third prong of the Lemon test examines whether the statute provides for excessive government entanglement with religion, Lemon, 403 U.S. at 612-613. Generally, excessive entanglement exists when the government is required to monitor religious activity or make ongoing decisions about religious matters. See id. at 619 (1970); Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970); accord Lynch v. Donnelly, 465 U.S. 668, 684 (1984). Simply referring to an ecclesiastical calendar to determine the date of Good Friday does not constitute excessive entanglement. Cammack, 932 F.2d at 781.

This three-prong test applies to a school board's decision to recognize Good Friday as a school holiday even if there is no state statute declaring the day a public holiday. The school board should have a secular purpose in closing the schools; again, this purpose may be cost-effectiveness because many teachers and students will take the day off anyway, e.g., Koenick, 190 F.3d at 266. Under the analysis of Koenick, 190 F.3d 259, Bridenbaugh,185 F.3d 796, Granzeier, 173 F.3d 568, and Cammack, 932 F.2d 765, if the board does have the required secular purpose for the decision, the decision generally will not give the appearance of advancing or inhibiting religion and will not foster excessive entanglement with religion. Therefore, provided that the school board has such a legitimate secular purpose, it has the constitutional authority to close the school doors on the Friday before Easter.

II. STUDENTS HAVE A RIGHT TO CELEBRATE GOOD FRIDAY AND EASTER IN STUDENT BIBLE CLUBS

The Supreme Court has clearly established the right of students to organize and participate in Bible Clubs. In an 8 to 1 decision, the Supreme Court in Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990), upheld the constitutionality of the Equal

Access Act which allowed Bible Clubs or Prayer Groups to meet on public school campuses. Congress enacted the Equal Access Act to cure pervasive anti-religious sentiment exhibited by public secondary schools in the aftermath of the Supreme Court's school prayer cases. "[T]he Act was intended to address perceived widespread discrimination against religious speech in public schools." Mergens, 496 U.S. at 239.

Within these Bible Clubs, students may celebrate Good Friday or Easter. The Equal Access Act specifically protects the religious content of such meetings from regulation by school officials. Paragraph (a) of the Act states: "[Schools may not discriminate against] any students who wish to conduct a meeting . . . on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C.A. Sec. 4071(a).

Students also have a First Amendment right to engage in religious speech on public school campuses. The United States Supreme Court announced a landmark decision concerning students' free speech rights in 1969. In Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969), the Supreme Court held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Tinker Court emphasized that students' free speech rights apply "when [a student] is in the cafeteria, or on the playing field, or on campus during the authorized hours . . . ." 393 U.S. at 512-13. Under the Tinker standard, school administrators can only prohibit protected speech by students if it "materially and substantially interfere[s] with appropriate discipline." 393 U.S. at 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Attempts to stifle or restrict student expression about Easter cannot be justified by reference to the Establishment Clause. The private nature of student speech in the context of Bible clubs takes such speech out of the purview of the Establishment Clause. In Mergens, the Supreme Court noted a key distinction in this regard: "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." Mergens, 496 U.S. at 250. In fact, the Mergens Court further stated that "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Id. at 248 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978)).

The Supreme Court recently reaffirmed this government/private speech distinction and explained that not all religious speech "authorized by government policy. . . on government property at government-sponsored . . . events . . . is the government's own," Santa Fe, 530 U.S. at 302. In Santa Fe, however, the Court determined that the student's speech was not private, and the Establishment Clause was violated because the message was delivered "pursuant to a school policy that explicitly and implicitly encourage[d] public prayer . . . ." Id. at 310. Despite this, the Santa Fe Court did not question the protected status of genuinely private student religious speech. Consequently, the Santa Fe decision does not affect the right of students to engage in religious expression during school hours if it does not violate disciplinary standards or after school hours in a student Bible Club.

Under both the Equal Access Act and the First Amendment, students are free to celebrate Good Friday, Lent, and Easter without fear of interference by school officials, provided that the celebration does not substantially interfere with school discipline. In fact, school administrators are in danger of violating the Equal Access Act and the Constitution if they forbid, censor, or inhibit the Easter celebrations of Bible Clubs or Prayer Groups in any manner.

III. CITIZENS HAVE A RIGHT TO ENGAGE IN EASTER CELEBRATION ACTIVITIES IN PUBLIC FORA

The Constitution protects the rights of private citizens to erect Easter displays or sponsor Easter drama performances in a "public forum." The United States Supreme Court has identified three types of public property for First Amendment expressive purposes: the traditional public forum, the designated public forum, and the non-public forum. Perry Education v. Perry Local Educators Ass'n, 460 U.S. 37 (1983). There are certain government properties which are presumed to be traditional public fora such as streets, sidewalks, and parks. See United States v. Grace, 461 U.S. 171, 177 (1983). Traditional public fora are areas that have traditionally been opened to public discourse and debate:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. C.I.O., 307 U.S. 496, 515 (1939). In such a forum, the government can impose content-neutral, reasonable time, place, and manner restrictions. Content-based regulations, however, must demonstrate a compelling state interest and must be narrowly drawn to achieve that end. Perry, 460 U.S. at 45-46.

In addition to these traditional public fora, governments often open other facilities for expressive activity, creating what is called a designated public forum. While the government can limit access to a designated public forum in ways that further the purpose of the forum, content-based restrictions are subject to the same compelling interest test applied in traditional public fora. Id. In other words, if government opens a facility or property for expressive activity of a certain type (e.g. concerts, performances, displays), it may not then selectively deny similar activity because of its religious nature or viewpoint (e.g. religious concert, religious performance, religious display). See Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384 (1993).

The U.S. Supreme Court decision in Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), is dispositive concerning issues of private expression in a public forum. In Pinette, the city opened a square near the Statehouse for private expressive activity. In this square, a private organization erected a cross. The Supreme Court ruled that because the religious display was erected by a private party as private expression in a public forum, it was therefore protected speech. Pinette, 515 U.S. at 770.

Several federal judicial circuits ruling on this issue within the last ten years have upheld the rights of private citizens to erect religious holiday displays in a public forum. See Chabad-

Lubavitch of Georgia v. Miller, 5 F.3d 1383 (11th Cir. 1993); Doe v. Small, 964 F.2d 611 (7th Cir. 1992); Kreisner v. City of San Diego, 1 F.3d 775 (9th Cir.1993); Ams. United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992).

Despite clear guidance from the United States Supreme Court, some individuals and special interest groups nevertheless attempt to persuade public officials that they must exclude private religious speech. These individuals or groups may often cite to two other Supreme Court creche cases, Lynch v. Donnelly, 465 U.S. 668 (1984), and County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), to support this position. However, any resort to these cases to justify prohibiting private citizens from erecting religious holiday displays in traditional or designated public fora is misleading and erroneous. Reliance on Lynch is misplaced because Lynch did not involve private speech but rather a city-erected creche which the Court held did not violate the Establishment Clause.

County of Allegheny v. American Civil Liberties Union, is likewise irrelevant to whether private citizens can erect religious displays in public fora because Allegheny did not involve a public forum. The creche in Allegheny was problematic because it occupied a prominent place in a government building, not open to the public. In Pinette, Justice Scalia expressly distinguished Allegheny "and made clear that if the staircase were available to all on the same terms, 'the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.'" Pinette, 515 U.S. at 764 (emphasis in original) (internal citations omitted).

Whether the property in question is considered a traditional public forum (a street, sidewalk, park, or plaza) or a designated public forum (perhaps a government building, community center or other state owned facility), the right of governing authorities "to limit expressive activities [such as Easter displays] are sharply circumscribed." Perry Educ. Ass'n, 460 U.S. at 45 (emphasis added). The government cannot censor speech in public fora based on religious content but it may impose content-neutral, reasonable time, place, and manner restrictions on expressive conduct.

> The government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177 (quoting Perry, 460 U.S. at 45) (additional citations omitted). Except for reasonable time, place and manner restrictions, state officials cannot censor Easter celebrations from public fora unless they demonstrate that such an exclusion is both necessary to serve a compelling government interest and narrowly tailored. Carey v. Brown, 447 U.S. 455, 461, 464 (1980).

Fear of violating the Establishment Clause is not a compelling state interest justifying exclusion of an Easter celebration from a public forum. Some officials mistakenly believe that the Constitution mandates that no religious activity can take place on public property-even when private citizens are involved. The Supreme Court, however, has repeatedly addressed this issue and has consistently ruled that the Establishment Clause does not require a state entity to exclude private religious speech from public property otherwise opened for expressive activity. It is, in fact, "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." Pinette, 515 U.S. at 763, 764.

Thus, in parks, town squares, plazas, and even government buildings which have been opened for general use by the public, citizens, civic groups, and churches, may erect Easter displays and sponsor Easter drama performances without running afoul of the Establishment Clause. It makes no difference whether the Easter displays are inanimate, such as a cross, or whether they are live performances. The very nature of an open forum allows for private citizens to express their views, including raising concerns that the government is somehow violating the Establishment Clause.

Similarly, private citizens can take advantage of designated public fora, areas which "the state has opened for use by the public as a place for expressive activity, Perry Education Ass'n, 460 U.S. at 45 (emphasis added). For example, a city may open a town square or public plaza, such as the acreage surrounding the Statehouse in Columbus, Ohio, at issue in Pinette, where the annual folk life festival, music concerts or political rallies are held. Perhaps a city has opened community centers where local groups would hold their weekly meetings, food drives, or charity bazaars, such areas are considered to be "open or designated public" fora. It is in these areas that private citizens are permitted to engage in Easter celebration activities, subject only to content-neutral, reasonable time, place, and manner restrictions.

In a public forum, citizens who wish to celebrate Easter may do so on the same terms as any other citizen who engages in private expression in that forum. The fact that an Easter celebration may contain religious content does not disqualify the celebration from a public forum. Neither the Establishment Clause, nor any other law, may serve to treat religious speech as "subversive of American ideals and therefore subject to unique disabilities." Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (citing McDaniel v. Paty, 435 U.S. 618, 641 (1978)).

CONCLUSION

It is imperative that the rights of schools, students, and citizens to discuss, observe, and celebrate the religious foundations of Easter be respected by school and government officials. The American Center for Law and Justice is committed to defending the rights of Christians in the public arena. Because of our commitment, we are available to answer any questions you might have concerning these issues. Please feel free to copy and share this letter with your superintendent, your school board, or your local government officials.

Sincerely,

AMERICAN CENTER
FOR LAW AND JUSTICE

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For the statute to pass the first prong of the test, it must have a "sincerely held, legitimate secular purpose," Cammack, 932 F.2d at 773 (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)). The statutes in the above cases were upheld for various legitimate secular purposes which included "bolster[ing] employees' efficiency and morale" and providing a break within a "vacation-vacant" season, Bridenbaugh, 185 F.3d at 799, as well as practicality because many families begin their vacations on that Good Friday, Granzeier, 173 F.3d at 574, and cost-effectiveness for schools because many students and teachers would take the day off anyway, Koenick, 190 F.3d at 266. The fact that the public holiday falls on a traditional day of Christian worship does not

negate this secular purpose, see Bridenbaugh, 185 F.3d 796 at 800-02 (citing Lynch v. Donnelly, 465 U.S. 668, 675 (1984) and Allegheny v. American Civil Liberties Union, 492 U.S. 573, 600-02 (1989)).

The second prong of the Lemon test evaluates whether the statute primarily advances or inhibits religion, Lemon, 403 U.S. at 612-613. A statute primarily advances or inhibits religion when the government itself endorses a certain religion by propagating it or by giving it special treatment. See Allegheny, 492 U.S. 573 (1989). However, if the statute incidentally benefits religion, this is not reason enough to declare the statute unconstitutional. E.g., Lynch, 465 U.S. at 683; Bridenbaugh, 185 F.3d at 800-02; Cammack, 932 F.2d at 765 (citing McGowan v. Maryland, 366 U.S. 420, 431-45 (1961)). In fact, the courts in Koenick, Bridenbaugh, Granzeier, and Cammack held that the statutes in question did not advance or inhibit religion simply because the statutes gave people time off on a traditional day of worship. Koenick, 190 F.3d at 267-68; Bridenbaugh, 185 F.3d at 801-02; Granzeier, 173 F.3d at 575-76; Cammack, 932 F.2d at 778-80. However, Good Friday statutes have failed this prong of the test when the statute clearly advanced Christianity: for example, a Connecticut statute prohibited the sale of liquor only on Good Friday, Griswold Inn, Inc. v. Connecticut, 183 Conn. 552 (1981), and a California executive order gave employees three hours off on Good Friday and encouraged them to use this time to worship, Mandel v. Hodges, 127 Cal. Rptr. 244 (1976); accord Freedom from Religion Found. v. Litscher, 920 F. Supp. 969 (1996); Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (holding also that the state did not introduce sufficient evidence that enough teachers and students took the day off to satisfy the first prong). In these cases, the statutes also lacked a secular purpose. The court in Granzeier, 173 F.3d at 576-77, did affirm that a sign on the courthouse displaying a picture of the Crucifixion and an explanation that the court would be closed "for observance of Good Friday" was an unconstitutional endorsement of religion, but the court was permitted to close for Good Friday nonetheless. Id.

The third prong of the Lemon test examines whether the statute provides for excessive government entanglement with religion, Lemon, 403 U.S. at 612-613. Generally, excessive entanglement exists when the government is required to monitor religious activity or make ongoing decisions about religious matters. See id. at 619 (1970); Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970); accord Lynch v. Donnelly, 465 U.S. 668, 684 (1984). Simply referring to an ecclesiastical calendar to determine the date of Good Friday does not constitute excessive entanglement. Cammack, 932 F.2d at 781.

This three-prong test applies to a school board's decision to recognize Good Friday as a school holiday even if there is no state statute declaring the day a public holiday. The school board should have a secular purpose in closing the schools; again, this purpose may be cost-effectiveness because many teachers and students will take the day off anyway, e.g., Koenick, 190 F.3d at 266. Under the analysis of Koenick, 190 F.3d 259, Bridenbaugh,185 F.3d 796, Granzeier, 173 F.3d 568, and Cammack, 932 F.2d 765, if the board does have the required secular purpose for the decision, the decision generally will not give the appearance of advancing or inhibiting religion and will not foster excessive entanglement with religion. Therefore, provided that the school board has such a legitimate secular purpose, it has the constitutional authority to close the school doors on the Friday before Easter.

II. STUDENTS HAVE A RIGHT TO CELEBRATE GOOD FRIDAY AND EASTER IN STUDENT BIBLE CLUBS

The Supreme Court has clearly established the right of students to organize and participate in Bible Clubs. In an 8 to 1 decision, the Supreme Court in Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990), upheld the constitutionality of the Equal Access Act which allowed Bible Clubs or Prayer Groups to meet on public school campuses. Congress enacted the Equal Access Act to cure pervasive anti-religious sentiment exhibited by public secondary schools in the aftermath of the Supreme Court's school prayer cases. "[T]he Act was intended to address perceived widespread discrimination against religious speech in public schools." Mergens, 496 U.S. at 239.

Within these Bible Clubs, students may celebrate Good Friday or Easter. The Equal Access Act specifically protects the religious content of such meetings from regulation by school officials. Paragraph (a) of the Act states: "[Schools may not discriminate against] any students who wish to conduct a meeting . . . on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C.A. Sec. 4071(a).

Students also have a First Amendment right to engage in religious speech on public school campuses. The United States Supreme Court announced a landmark decision concerning students' free speech rights in 1969. In Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969), the Supreme Court held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Tinker Court emphasized that students' free speech rights apply "when [a student] is in the cafeteria, or on the playing field, or on campus during the authorized hours . . . ." 393 U.S. at 512-13. Under the Tinker standard, school administrators can only prohibit protected speech by students if it "materially and substantially interfere[s] with appropriate discipline." 393 U.S. at 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Attempts to stifle or restrict student expression about Easter cannot be justified by reference to the Establishment Clause. The private nature of student speech in the context of Bible clubs takes such speech out of the purview of the Establishment Clause. In Mergens, the Supreme Court noted a key distinction in this regard: "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." Mergens, 496 U.S. at 250. In fact, the Mergens Court further stated that "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Id. at 248 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978)).

The Supreme Court recently reaffirmed this government/private speech distinction and explained that not all religious speech "authorized by government policy. . . on government property at government-sponsored . . . events . . . is the government's own," Santa Fe, 530 U.S. at 302. In Santa Fe, however, the Court determined that the student's speech was not private, and the Establishment Clause was violated because the message was delivered "pursuant to a school policy that explicitly and implicitly encourage[d] public prayer . . . ." Id. at 310. Despite this, the

Santa Fe Court did not question the protected status of genuinely private student religious speech. Consequently, the Santa Fe decision does not affect the right of students to engage in religious expression during school hours if it does not violate disciplinary standards or after school hours in a student Bible Club.

Under both the Equal Access Act and the First Amendment, students are free to celebrate Good Friday, Lent, and Easter without fear of interference by school officials, provided that the celebration does not substantially interfere with school discipline. In fact, school administrators are in danger of violating the Equal Access Act and the Constitution if they forbid, censor, or inhibit the Easter celebrations of Bible Clubs or Prayer Groups in any manner.

III. CITIZENS HAVE A RIGHT TO ENGAGE IN EASTER CELEBRATION ACTIVITIES IN PUBLIC FORA

The Constitution protects the rights of private citizens to erect Easter displays or sponsor Easter drama performances in a "public forum." The United States Supreme Court has identified three types of public property for First Amendment expressive purposes: the traditional public forum, the designated public forum, and the non-public forum. Perry Education v. Perry Local Educators Ass'n, 460 U.S. 37 (1983). There are certain government properties which are presumed to be traditional public fora such as streets, sidewalks, and parks. See United States v. Grace, 461 U.S. 171, 177 (1983). Traditional public fora are areas that have traditionally been opened to public discourse and debate:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. C.I.O., 307 U.S. 496, 515 (1939). In such a forum, the government can impose content-neutral, reasonable time, place, and manner restrictions. Content-based regulations, however, must demonstrate a compelling state interest and must be narrowly drawn to achieve that end. Perry, 460 U.S. at 45-46.

In addition to these traditional public fora, governments often open other facilities for expressive activity, creating what is called a designated public forum. While the government can limit access to a designated public forum in ways that further the purpose of the forum, content-based restrictions are subject to the same compelling interest test applied in traditional public fora. Id. In other words, if government opens a facility or property for expressive activity of a certain type (e.g. concerts, performances, displays), it may not then selectively deny similar activity because of its religious nature or viewpoint (e.g. religious concert, religious performance, religious display). See Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384 (1993).

The U.S. Supreme Court decision in Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), is dispositive concerning issues of private expression in a public forum. In Pinette, the city opened a square near the Statehouse for private expressive activity. In this square, a private organization erected a cross. The Supreme Court ruled that because the

religious display was erected by a private party as private expression in a public forum, it was therefore protected speech. Pinette, 515 U.S. at 770.

Several federal judicial circuits ruling on this issue within the last ten years have upheld the rights of private citizens to erect religious holiday displays in a public forum. See Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383 (11th Cir. 1993); Doe v. Small, 964 F.2d 611 (7th Cir. 1992); Kreisner v. City of San Diego, 1 F.3d 775 (9th Cir.1993); Ams. United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992).

Despite clear guidance from the United States Supreme Court, some individuals and special interest groups nevertheless attempt to persuade public officials that they must exclude private religious speech. These individuals or groups may often cite to two other Supreme Court creche cases, Lynch v. Donnelly, 465 U.S. 668 (1984), and County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), to support this position. However, any resort to these cases to justify prohibiting private citizens from erecting religious holiday displays in traditional or designated public fora is misleading and erroneous. Reliance on Lynch is misplaced because Lynch did not involve private speech but rather a city-erected creche which the Court held did not violate the Establishment Clause.

County of Allegheny v. American Civil Liberties Union, is likewise irrelevant to whether private citizens can erect religious displays in public fora because Allegheny did not involve a public forum. The creche in Allegheny was problematic because it occupied a prominent place in a government building, not open to the public. In Pinette, Justice Scalia expressly distinguished Allegheny "and made clear that if the staircase were available to all on the same terms, 'the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.'" Pinette, 515 U.S. at 764 (emphasis in original) (internal citations omitted).

Whether the property in question is considered a traditional public forum (a street, sidewalk, park, or plaza) or a designated public forum (perhaps a government building, community center or other state owned facility), the right of governing authorities "to limit expressive activities [such as Easter displays] are sharply circumscribed." Perry Educ. Ass'n, 460 U.S. at 45 (emphasis added). The government cannot censor speech in public fora based on religious content but it may impose content-neutral, reasonable time, place, and manner restrictions on expressive conduct.

> The government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177 (quoting Perry, 460 U.S. at 45) (additional citations omitted). Except for reasonable time, place and manner restrictions, state officials cannot censor Easter celebrations

from public fora unless they demonstrate that such an exclusion is both necessary to serve a compelling government interest and narrowly tailored. Carey v. Brown, 447 U.S. 455, 461, 464 (1980).

Fear of violating the Establishment Clause is not a compelling state interest justifying exclusion of an Easter celebration from a public forum. Some officials mistakenly believe that the Constitution mandates that no religious activity can take place on public property-even when private citizens are involved. The Supreme Court, however, has repeatedly addressed this issue and has consistently ruled that the Establishment Clause does not require a state entity to exclude private religious speech from public property otherwise opened for expressive activity. It is, in fact, "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." Pinette, 515 U.S. at 763, 764.

Thus, in parks, town squares, plazas, and even government buildings which have been opened for general use by the public, citizens, civic groups, and churches, may erect Easter displays and sponsor Easter drama performances without running afoul of the Establishment Clause. It makes no difference whether the Easter displays are inanimate, such as a cross, or whether they are live performances. The very nature of an open forum allows for private citizens to express their views, including raising concerns that the government is somehow violating the Establishment Clause.

Similarly, private citizens can take advantage of designated public fora, areas which "the state has opened for use by the public as a place for expressive activity, Perry Education Ass'n, 460 U.S. at 45 (emphasis added). For example, a city may open a town square or public plaza, such as the acreage surrounding the Statehouse in Columbus, Ohio, at issue in Pinette, where the annual folk life festival, music concerts or political rallies are held. Perhaps a city has opened community centers where local groups would hold their weekly meetings, food drives, or charity bazaars, such areas are considered to be "open or designated public" fora. It is in these areas that private citizens are permitted to engage in Easter celebration activities, subject only to content-neutral, reasonable time, place, and manner restrictions.

In a public forum, citizens who wish to celebrate Easter may do so on the same terms as any other citizen who engages in private expression in that forum. The fact that an Easter celebration may contain religious content does not disqualify the celebration from a public forum. Neither the Establishment Clause, nor any other law, may serve to treat religious speech as "subversive of American ideals and therefore subject to unique disabilities." Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (citing McDaniel v. Paty, 435 U.S. 618, 641 (1978)).

CONCLUSION

It is imperative that the rights of schools, students, and citizens to discuss, observe, and celebrate the religious foundations of Easter be respected by school and government officials. The American Center for Law and Justice is committed to defending the rights of Christians in the public arena. Because of our commitment, we are available to answer any questions you might

have concerning these issues. Please feel free to copy and share this letter with your superintendent, your school board, or your local government officials.

Sincerely,

AMERICAN CENTER FOR LAW AND JUSTICE
Jay Alan Sekulow - Chief Counsel