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Dear School Official:

The American Center for Law and Justice wishes everyone a happy holiday season. Undoubtedly, students in school districts all over the country are celebrating the holidays in a variety of creative and entertaining ways. We are aware that some of these celebrations may be hindered by questions of what is permitted or prohibited by the United States Constitution. Consequently, the purpose of this letter is to assist local school district officials in understanding and protecting the right of student participation in Christmas observances in public schools.

The American Center for Law and Justice (ACLJ) 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 religious sentiments. The undersigned served as lead counsel in three significant United States Supreme Court cases in this area: *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) and *Board of Education v. Mergens*, 496 U.S. 226 (1990) and 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).

Although court decisions permit holiday observances in public schools, it is my concern that some national public interest groups have been pressuring local school districts to censor religious expressions during Christmas. This bulletin provides answers for those questions which are most commonly asked regarding the rights of students and teachers to participate in these observances.

**Are students allowed to sing Christmas carols with religious themes at school events or in holiday programs?**

**YES.** No court has ever banned the singing of religious Christmas carols by public school choirs. A case that addressed this specific issue *upheld* the singing of religious Christmas carols in public schools. In *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied* 449 U.S. 987 (1980), the United States Court of Appeals for the Eighth Circuit held that the study and performance of religious songs, including Christmas carols, is constitutional if the purpose of the study and performances is the “**advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for**

**students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.”** *Id.* at 1314 (emphasis added).

The *Florey* court held that religious songs and symbols can be used in public schools if they are presented in a **“prudent and objective manner and only as part of the cultural and religious heritage of the holiday.”** *Id.* at 1317 (emphasis added). It is important to note that the *Florey* decision was based on two U.S. Supreme Court cases that permit the study of the Bible in public schools. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Supreme Court stated, **“It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”** *Id.* at 225 (emphasis added).

In *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), a student sued the school because, among other things, the school choir performed religious songs. The court dismissed the lawsuit, noting that “the Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion.” *Id.* at 553 (citations omitted). Furthermore, the court recognized that “a significant percentage of serious choral music is based on religious themes or text. . . . Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs.” *Id.* at 554 (internal citation omitted).

The U.S. Supreme Court’s recent decision in *Santa Fe Independent School District v. Doe* does not affect the constitutionality of singing Christmas carols with religious themes at school events or in holiday programs. 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 sing Christmas carols with religious themes at school events or in holiday programs.

### **Can schools teach about the biblical origin of the Christmas holiday?**

**YES.** In *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Supreme Court stated, **“the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”** *Id.* at 42 (citation omitted). Therefore, it would be constitutional for a public school teacher to have students study the Biblical passages that relate to Christmas (e.g., Matthew 1:18 - 2:22 and Luke 2:1-20) if the purpose was to study the historical or literary significance of the passages. The *Santa Fe* decision did not address or affect the Court’s holding in *Stone*.

The *Florey* court defined what activities are considered a part of the word “study” by stating, “We view the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.” *Florey*, 619 F.2d at 1316. The *Florey* court went on

to quote the lower court with approval by stating that “(t)o allow students only to study and not to perform (religious art, literature and music when) such works . . . have developed an independent secular and artistic significance would give students a truncated view of our culture.” *Id.* (citation omitted). Of course, any student that had ideological or religious objections should be excused from the assignment.

In addition, it is important to note that President Clinton expressed concern that some school officials and community members incorrectly assume that schools must be religion free zones. To clarify this issue, President Clinton requested the Secretary of Education, Richard W. Riley, to issue guidelines which address the extent religious expression and teaching are allowed in our nation's public schools. In response, the United States Department of Education provided guidelines to the nation's school superintendents stating that “[p]ublic schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture. . . . Similarly, it is permissible to consider religious influences on art, music, literature, and social studies.” Richard W. Riley, United States Department of Education Guidelines (Guidelines), p.5-6 (Revised May 1998) <<http://www.ed.gov/Speeches/08-1995/religion.html>. The guidelines further state that “public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of the holidays. . . .” *Id.* at 6. In addition, “[t]eachers and administrators . . . are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging anti-religious activity.” *Id.* at 5. The guidelines clearly establish that students and teachers may celebrate the Christmas holiday without fear of running afoul of the Establishment Clause.

### **Are students permitted to write about the origin of Christmas and the birth of Jesus or other religious sentiments in school assignments?**

**YES.** Some educators have been misinformed by special interest groups that school officials must ban all religious speech in the public schools because of the doctrine of the “separation of church and state.” It is well settled, however, that private religious speech is protected by the First Amendment. In *Pinette*, the Court stated:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

515 U.S. at 760 (internal citations omitted). In *Mergens*, the Court held: “[t]here 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 (plurality opinion).

The *Santa Fe* Court reaffirmed this distinction; however, in that case the Court determined that the student’s speech was not private, and the Establishment Clause was violated, because the

message was delivered “over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourage[d] public prayer . . . .” *Id.* at 2279. 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 where students are otherwise already free (within broad parameters of relevance) to select the content and viewpoint of their expression (e.g., talent shows, class assignments, show-and-tell, oratorical competitions, message-bearing clothing or jewelry). Students have the free speech right to “express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious contents of their submissions.” Guidelines at 6.

**May schools continue to refer to the winter vacation as “Christmas” break?**

**YES.** School districts are under no constitutional obligation to rename “Christmas vacation” as “Winter Vacation” or some similar name. The Supreme Court itself has acknowledged with approval that Congress gives federal employees a paid holiday on December 25 and Congress calls it “Christmas.” *See Lynch v. Donnelly*, 465 U.S. 668, 675, 680 (1984).

I hope this letter helps clarify the legal issues. The American Center for Law and Justice is committed to defending the constitutional rights of students on their public school campus. We are also committed to ensuring that the rights of citizens in your community are protected. Because of our commitment, we are available to answer any questions you might have concerning this letter. Please feel free to share this information with your school board and its attorney, staff, and principals.

Sincerely,

**AMERICAN CENTER FOR LAW & JUSTICE**

Jay Alan Sekulow

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