

## Religious Displays: what you should know.

The goal of the ACLU's work on freedom of religion and belief is to guarantee that all are free to follow and practice their faith – or no faith at all – without governmental influence or interference.

<https://www.aclu.org/religion-belief> We are frequently asked questions about religious displays during holiday times. We hope the following guide will be helpful in answering those questions.

The First Amendment grants two important rights relating to religion. First, the Free Exercise Clause commands the government not to interfere with religious freedom. This is not an absolute right; the government may restrict practices, as opposed to beliefs, if they interfere with the public good. Second, the Establishment Clause prohibits the government from favoring one religion over another, or from favoring religion over non-religion generally.<sup>1</sup> This guide explains these rights in the context of religious displays.

Religious displays, from bumper stickers to works of art, are an important part of religious expression. However, when the government participates, religious expression can become religious favoritism. People who do not practice a favored religion may feel unwelcome to participate fully in the government. People who do practice a favored religion may feel that the government is trivializing their religion.<sup>2</sup> Courts often use the “endorsement test” to determine which religious displays are constitutional.<sup>3</sup> This test asks if an ordinary person would view the display as government endorsement or disapproval of religion. If so, the display is unconstitutional and must be removed.<sup>4</sup> Here's how the endorsement test has been applied in the most common circumstances:

### Privately-Owned Religious Displays on Private Property

The Free Exercise Clause of the First Amendment protects the right of private parties to place religious displays on private property. Individuals and religious organizations have the right to make religious statements through symbolic displays or other means. However, the government cannot use this private right as a loophole for religious endorsement. For example, the government cannot, in most cases, “donate” a small part of a public park to a private owner in order to erect a religious display there.<sup>5</sup> The First Amendment protects only truly private religious expression.

### Privately-Owned Religious Displays on Public Property

The government may permit a private organization to place a religious display on public property under certain circumstances. These displays raise concerns under the Establishment Clause because they can give viewers the impression that government is endorsing (or even funding) a religious message. Private religious displays are permissible only if they meet the following conditions:

- The government must allow all groups, religious or otherwise, equal access to the property.<sup>6</sup> It is unconstitutional for the government to favor religious expression over other expression.<sup>7</sup>
- The owner of the display should take steps to minimize confusion over the ownership of the display. Usually, a simple message indicating that the display is privately owned is enough.<sup>8</sup>

Private groups may display overtly religious symbols, like crosses or menorahs, on public grounds if the government maintains a neutral role and if other non-religious displays are also allowed.<sup>9</sup> However, the same symbols would be unconstitutional if the government's role is – or appears to be – religiously motivated.

## Publicly-Owned Religious Displays

Religious displays that the government owns, funds, or organizes are often seen as endorsements of religion. Because of this, the government cannot use a religious symbol to support a religious (or anti-religious) viewpoint.<sup>10</sup> However, according to the Supreme Court, some religious symbols also have secular meanings.<sup>11</sup>

The government can include religious symbols in a public display under limited circumstances:

- The display must have a distinct secular purpose. For example, a public museum can display religious paintings, because it provides a cultural and artistic benefit to the public.<sup>12</sup> Even a religious symbol like the Ten Commandments has a distinct historical significance as an early code of laws.<sup>13</sup> However, purely religious symbols, such crosses, will rarely be permissible in a publicly-owned display.<sup>14</sup>
- The context must emphasize the secular meaning of the symbol.<sup>15</sup> The Ten Commandments may be appropriate at a statehouse, where their historical legal meaning is clear,<sup>16</sup> but would not be appropriate in a school.<sup>17</sup> The history of a display is an important part of context too. Courts have ruled that a 40-year-old religious monument donated to the state by a private group does not create the impression of religious favoritism.<sup>18</sup> A brand new display specifically commissioned by the government does.<sup>19</sup>
- A symbol's meaning is defined by the other symbols around it. A nativity scene may be permissible as a small part of a larger secular winter holiday Christmas display, but would be unconstitutional on its own or with only token secular elements.<sup>20</sup> Similarly, a combination of symbols from different religions is permissible if the display clearly promotes tolerance and diversity, and not religion.<sup>21</sup>

The ACLU often urges governments to avoid including religious symbols in official holiday displays. In an effort to make the displays constitutional, governments often add secular elements – trees, lights, “Santazilla,” snowmen, and so on. In many cases, this practice demeans the importance of the religious symbols while failing to disguise their religious message. The end result is a display that offends believers and non-believers alike.

For more information, go to <https://www.aclu.org/religion-belief>.

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<sup>1</sup> Cnty. of Allegheny v. ACLU, 492 U.S. 573, 590 (1989).

<sup>2</sup> Lynch v. Donnelly, 465 U.S. 668, 711-12 (1984) (Brennan, J., dissenting).

<sup>3</sup> Boyajian v. Gatzunis, 212 F.3d 1, 6 (1st Cir. 2000); Amancio v. Town of Somerset, 28 F. Supp. 2d 677, 680-81 (D. Mass. 1998).

<sup>4</sup> Allegheny, 492 U.S. at 592-93.

<sup>5</sup> Freedom from Religion Found., Inc. v. City of Marshfield, Wis., 203 F.3d 487, 495 (7th Cir. 2000).

<sup>6</sup> Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 775 (1995) (O'Connor, J., concurring); Americans United For Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1546-49 (6th Cir. 1992).

<sup>7</sup> McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 867-68 (2005).

<sup>8</sup> For example, in Capitol Square, 515 U.S. at 776, Justice O'Connor emphasized the importance of the disclaimers which “help[] remove doubt about state approval of [owner’s] religious message”. Grand Rapids, 980 F.2d 1538, concerned a privately-owned menorah that the town had allowed to be displayed in a public square. The Court found that a sign on the menorah, indicating that it was privately owned, eliminated the impression of government endorsement. Id. at 1549.

<sup>9</sup> See, e.g., Capitol Square 515 U.S. at 772-83 (O'Connor, J. concurring) (Latin cross); Grand Rapids, 980 F.2d at 1549 (menorah); Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth., 63 F.3d 581, 592 (7th Cir. 1995) (menorah).

<sup>10</sup> Allegheny, 492 U.S. at 593.

<sup>11</sup> For an unusual example, see Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017 (10th Cir. 2008). Here, the Court decided that the city seal of Las Cruces, NM – which included three crosses – would be understood as a reference to the city’s name, rather than the Christian religion.

<sup>12</sup> Lynch, 465 U.S. at 683.

<sup>13</sup> Van Orden v. Perry, 545 U.S. 677 (2005).

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<sup>14</sup> In Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011) cert. denied, 132 S. Ct. 2535, (U.S. 2012), the Ninth Circuit found that a publicly-owned war memorial “dominated” by a Latin cross violated the Establishment Clause. However, the court left open the possibility that crosses could be included in memorials in a more clearly secular context. Id. at 1125.

<sup>15</sup> For example, the roadside crosses at issue in Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) conveyed an endorsement of religion, despite the state’s purpose of honoring fallen troopers. The Court noted that the biographical information on the crosses was too small for passing drivers to notice, and thus did not create a secular context. Id. at 1121.

<sup>16</sup> Van Orden, 545 U.S. at 690.

<sup>17</sup> Stone v. Graham, 449 U.S. 39, 41-42 (1980).

<sup>18</sup> Van Orden, 545 U.S. at 702-04 (Breyer, J., concurring).

<sup>19</sup> McCreary, 545 U.S. at 871-73.

<sup>20</sup> See the discussion at Amancio, 28 F. Supp. 2d at 68, distinguishing between “the impermissibly religious display in *Allegheny*[and] the essentially secular ‘winter wonderland’ in *Lynch*. For another example, compare ACLU of New Jersey v. Schundler, 104 F.3d 1435 (3d Cir. 1997) with a later appeal in the same litigation, ACLU of New Jersey v. Schundler, 168 F.3d 92 (3d Cir. 1999). In the first case, the Court found that a display consisting of a nativity scene and a menorah was impermissibly religious. In the second, after Kwanzaa symbols, a sled, and snowmen had been added, the same Court allowed the display to stand.

<sup>21</sup> See Skoros v. City of New York, 437 F.3d 1, 22 (2d Cir. 2006), where the Court found that a school display containing a menorah and a star and crescent would be understood to promote cultural tolerance, not Jewish or Islamic religion.