

JONES DAY

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By Email & Mail

Senate President Pro Tempore Martin M. Looney
Legislative Office Building

Speaker of the House Matthew Ritter
Legislative Office Building

Executive Director Michael A. Harrington
Legislative Office Building

Director Brian C. Pencz
Legislative Office Building

Re: Family Institute of Connecticut's Request to Display Nativity Scene

Dear President Pro Tempore Looney, Speaker Ritter, Mr. Harrington, and Mr. Pencz:

We represent the Family Institute of Connecticut ("FIC"). As you know, FIC plays an active role in Connecticut public life through lobbying efforts and general advocacy in support of religious freedom.

On December 5, 2025, FIC, following the application procedure prescribed by the Joint Committee on Legislative Management, applied for permission to display a Nativity scene on a table inside the State Capitol during the 2025/2026 holiday season. According to the Committee, however, FIC's request was "impermissible" under the Establishment Clause of the U.S. Constitution because the display would be "purely religious in nature" and "could be seen as government endorsement of Christianity." *Letter from Michael A. Harrington* (Jan. 12, 2026) ("Harrington Letter"). The Office of Legislative Management further explained that it has a "policy"

against “permit[ting] religious displays by outside organizations in these public spaces.” *Email from Brian C. Pencz* (Dec. 19, 2025) (“Pencz Email”).

The Committee’s position is legally incorrect, and the Committee itself has violated the First Amendment to the U.S. Constitution by maintaining a facially unlawful policy and denying FIC’s application: as summarized below, the Establishment Clause does not forbid the display of a Nativity scene at the State Capitol, and the Committee’s denial of FIC’s request based on its religious nature was viewpoint discrimination in violation of the Free Speech Clause.

FIC anticipates again applying for permission to display the Nativity scene in the same area of the Capitol during the upcoming holiday season. This is now the third time FIC has asked the Committee to allow the Nativity display, and its second request that the Committee change its facially unlawful policy. If the Committee is unwilling to change its policy and allow the display, FIC is prepared to file suit.

I. The Committee’s Denial of FIC’s Request to Display a Nativity Scene in the State Capitol

The Committee routinely permits organizations to use facilities within the State Capitol if they follow a formal application process. *Use of Legislative Facilities*, OFF. OF LEGIS. MGMT., <https://www.cga.ct.gov/olm/Use2.asp>. Through this process, the Committee permits organizations to set up private displays and exhibits within the Capitol building. *Guidelines Concerning Exhibits and Displays in the Capitol and Legislative Office Buildings*, Temporary Displays or Exhibits, OFF. OF LEGIS. MGMT., <https://www.cga.ct.gov/olm/docs/AdminRegulations.pdf>. It is also our understanding that the State displayed religious symbols, such as menorahs, in the Capitol and Legislative Office Building during last year’s holiday season.

In early December 2025, Leslie Wolfgang, FIC’s Director of Public Policy, filed an application for permission to display a “small nativity on a table” in a public area of the Capitol building between December 22, 2025, and January 2, 2026. *Application* at 1–2. Brian C. Pencz, the Director of Facilities and Administrator of the Office of Legislative Management, notified Wolfgang that FIC’s request was denied, explaining that “the Office of Legislative Management receives numerous requests from a variety of faith-based organizations seeking to install displays within the Legislative Office Building and the State Capitol.” *Pencz Email*. Pencz said that the Office of Legislative Management’s policy is “not to permit religious displays by outside organizations in these public spaces.” *Id.*

Wolfgang then wrote on behalf of FIC to the Committee’s members, seeking reconsideration and permission to display the Nativity scene in early 2026. She noted that FIC’s request “was denied while private secular exhibits and displays have been and are permitted at the State Capitol.” *Letter from Leslie Wolfgang* (Dec. 31, 2025). She also explained—accurately—that the U.S. Supreme Court “has repeatedly held that when a government entity opens a forum for

private expression—particularly on Capitol grounds or within Capitol buildings—it may not exclude religious expression while allowing comparable secular expression. Religious speech is a protected viewpoint, and its exclusion constitutes impermissible viewpoint discrimination.” *Id.*

In response, Michael A. Harrington, the Committee’s Executive Director, wrote that the Nativity scene was “purely religious in nature,” so “displaying the Nativity Scene, especially on its own, in the State Capitol lobby could be seen as government endorsement of Christianity, which is impermissible.” *Harrington Letter*. For that reason, FIC’s “request to display the Nativity Scene within the Capitol Building” was “denied.” *Id.*

II. The First Amendment Does not Prohibit the Display of a Nativity Scene in the Capitol, and the Denial of FIC’s Request Because of its Religious Viewpoint Violated the First Amendment

The Committee’s position is simply incorrect under any number of U.S. Supreme Court and Second Circuit precedents.

As an initial matter, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” U.S. CONST. amend. I. The “Religion Clauses” “have ‘complementary’ purposes.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022) (quoting *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947)). While the Establishment Clause prohibits the government from “mak[ing] law[s] respecting an establishment of religion,” the Free Exercise Clause protects “the free exercise” of religion. U.S. CONST. amend. I. The Clauses are two means to the same end—ensuring “religious liberty.” *Everson*, 330 U.S. at 13.

As to the Establishment Clause, the Supreme Court has made clear that it cannot properly be read to require the “government to be hostile to religion.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). It in fact *prohibits* governmental hostility to religious expression because that would be at odds with “the very neutrality [the Clause] requires.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995).

As for the Free Exercise Clause, it prohibits the government from “proceed[ing] in a manner intolerant of religious beliefs or restrict[ing] practices because of their religious nature.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). And “[w]here the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.” *Kennedy*, 597 U.S. at 523; *see also Skoros v. City of New York*, 437 F.3d 1, 36 (2d Cir. 2006) (holding that “private speech that endorses religion . . . is protected by the Free Speech and Free Exercise Clauses.”).

A. Displaying a Nativity Scene in the Capitol Would not Violate the Establishment Clause

Explaining why FIC’s request was denied, Mr. Harrington said that the Nativity scene “could be seen as government endorsement of Christianity.” *Harrington Letter*. That concern is misplaced. The State itself has displayed religious symbols, such as menorahs during the holiday season, within the Capitol and Legislative Office Building. Such government displays do not violate the Establishment Clause, *see, e.g., Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 63 (2019) (holding that a 32-foot tall Latin cross did not violate the Establishment Clause), and “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a . . . public forum.” *Cap. Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (plurality opinion; emphasis added). That is just the circumstance we have here.

The Establishment Clause *does*, however, “forbid” the State from “disapprov[ing] of a particular religion or of religion in general.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). It does not “compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.” *Kennedy*, 597 U.S. at 534–35 (“An Establishment Clause violation does not automatically follow whenever a . . . government entity fails to censor private religious speech.” (citation modified)); *see also Emilee Carpenter, LLC v. James*, 107 F.4th 92, 112 (2d Cir. 2024) (“The Establishment Clause does not include a modified heckler’s veto, in which . . . religious activity can be proscribed based on perceptions or discomfort.” (citation modified)).¹

Meanwhile, the Committee’s asserted “policy” against “permit[ting] religious displays by outside organizations” actually violates the Free Exercise Clause because it specifically targets the expression of religious belief. *See Fulton*, 593 U.S. at 533 (stating that the Free Exercise Clause prohibits the government from “proceed[ing] in a manner intolerant of religious beliefs or restrict[ing] practices because of their religious nature”). “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Lukumi*, 508 U.S. at 532.

¹ Moreover, the Supreme Court “long ago abandoned *Lemon* and its endorsement test offshoot” to assess governmental interactions with religious expression. *Kennedy*, 597 U.S. at 534; *see Groff v. DeJoy*, 600 U.S. 447, 460 & n.7 (2023) (explaining *Lemon v. Kurtzman* was “abrogated” by *Kennedy*). The Establishment Clause now “must be interpreted by reference to historical practices and understandings,” *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014), “focus[] on original meaning and history” and “faithfully reflect the understanding of the Founding Fathers,” *Kennedy*, 597 U.S. at 536 (citation modified). Even if the Establishment Clause were applicable here, there is no question a Nativity display fits well within this rubric.

B. Denying FIC’s Request Is Viewpoint Discrimination in Violation of the First Amendment

Because the Committee denied FIC’s request for being “purely religious in nature,” *Harrington Letter*, the Committee has also engaged in viewpoint discrimination, “an egregious form of content discrimination” that is “presumed to be unconstitutional.” *Rosenberger*, 515 U.S. at 828–29. The Supreme Court and the Second Circuit have consistently held that excluding organizations from public or even non-public forums based on their religious viewpoint violates the Free Speech Clause. *See, e.g., Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022) (holding the government “may not exclude speech based on religious viewpoint; doing so constitutes impermissible viewpoint discrimination” (citation modified)).²

The Second Circuit has made abundantly clear that “the government violates the First Amendment when it denies access to a speaker”—even in “a nonpublic forum”—“solely to suppress the [religious] point of view he espouses on an otherwise includible subject.” *Byrne*, 623 F.3d at 55 (citation modified). It is no safe harbor for the Committee to assume that by prohibiting all religious displays its policy is viewpoint neutral. “In the context of restrictions on all religious speech, this argument has been expressly considered—and rejected—by the Supreme Court” and the Second Circuit. *Id.* at 58. “As the [Supreme] Court explained in *Rosenberger*, religion is not just a vast area but a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Id.* Like in *Byrne*, the Committee’s “ban on all religious [displays] in a forum it has otherwise broadly opened to comment on a wide variety of subjects . . . discriminate[s] against a specific premise, perspective, and standpoint, and, as such, is impermissible.” *Id.* at 59 (citation modified).

The Supreme Court’s decision four years ago in *Shurtleff v. City of Boston* is instructive. There, the City of Boston permitted private groups to use a flagpole next to Boston City Hall to raise flags of their choosing. 596 U.S. at 247. But when an organization sought permission to hold a flag-raising event with a Christian flag to commemorate the contributions of the Christian community, the City denied the request. Like here, “[t]he commissioner worried that flying a religious flag at City Hall could violate the Constitution’s Establishment Clause.” *Id.* at 250.

The Supreme Court unanimously held that the City’s denial was impermissible viewpoint discrimination in violation of the Free Speech Clause. The Court reasoned that “the city’s lack of

² *See also Byrne v. Rutledge*, 623 F.3d 46, 48 (2d Cir. 2010) (holding that excluding a religious message from a vanity license plate was unlawful viewpoint discrimination); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that excluding a religious club from meeting after hours at a school violated the Free Speech Clause); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396 (1993) (holding that denying a church access to school premises violated the Free Speech Clause); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (holding that excluding student groups from using university facilities violated the Free Speech Clause).

meaningful involvement in the selection of flags or the crafting of their messages” meant that “flag raisings [were] private, not government, speech.” *Id.* at 258. And because Boston denied the “request solely because the Christian flag . . . promoted a specific religion,” its “refusal discriminated based on religious viewpoint and violated the Free Speech Clause.” *Id.* at 258–59 (citation modified); *see also id.* at 261 (Kavanaugh, J., concurring) (“government *violates* the Constitution when (as here) it excludes religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like.”).

The Supreme Court’s reasoning applies here with equal force. The Committee, with no involvement beyond the approval of an application, has allowed any number of organizations to set up displays in the State Capitol. And, like the City of Boston, the Committee has adopted a mistaken understanding of the Establishment Clause by denying a display request because it is “religious in nature.” *Harrington Letter*. It is clear, however, that the Committee “may not exclude speech based on religious viewpoint; doing so constitutes impermissible viewpoint discrimination.” *Shurtleff*, 596 U.S. at 258 (citation modified). Thus the Committee’s policy is facially unlawful and its refusal to approve FIC’s application “discriminated based on religious viewpoint and violated the Free Speech Clause.” *Id.*

* * *

FIC would like to display the Nativity scene during the upcoming holiday season. Please let us know by July 27, 2026, whether the Committee will change its policy and approve FIC’s request. If the Committee refuses to change its policy and continues to deny FIC’s request, FIC is prepared to seek relief through the courts.

In the interim, given the potential for litigation, the Committee and its staff should preserve all relevant information relating to this matter, including but not limited to notes, emails, texts and other direct electronic messages. If you have counsel in relation to this matter, please let us know so we can communicate through your counsel moving forward.

Sincerely,

/s/ Andrew E. Lelling

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