

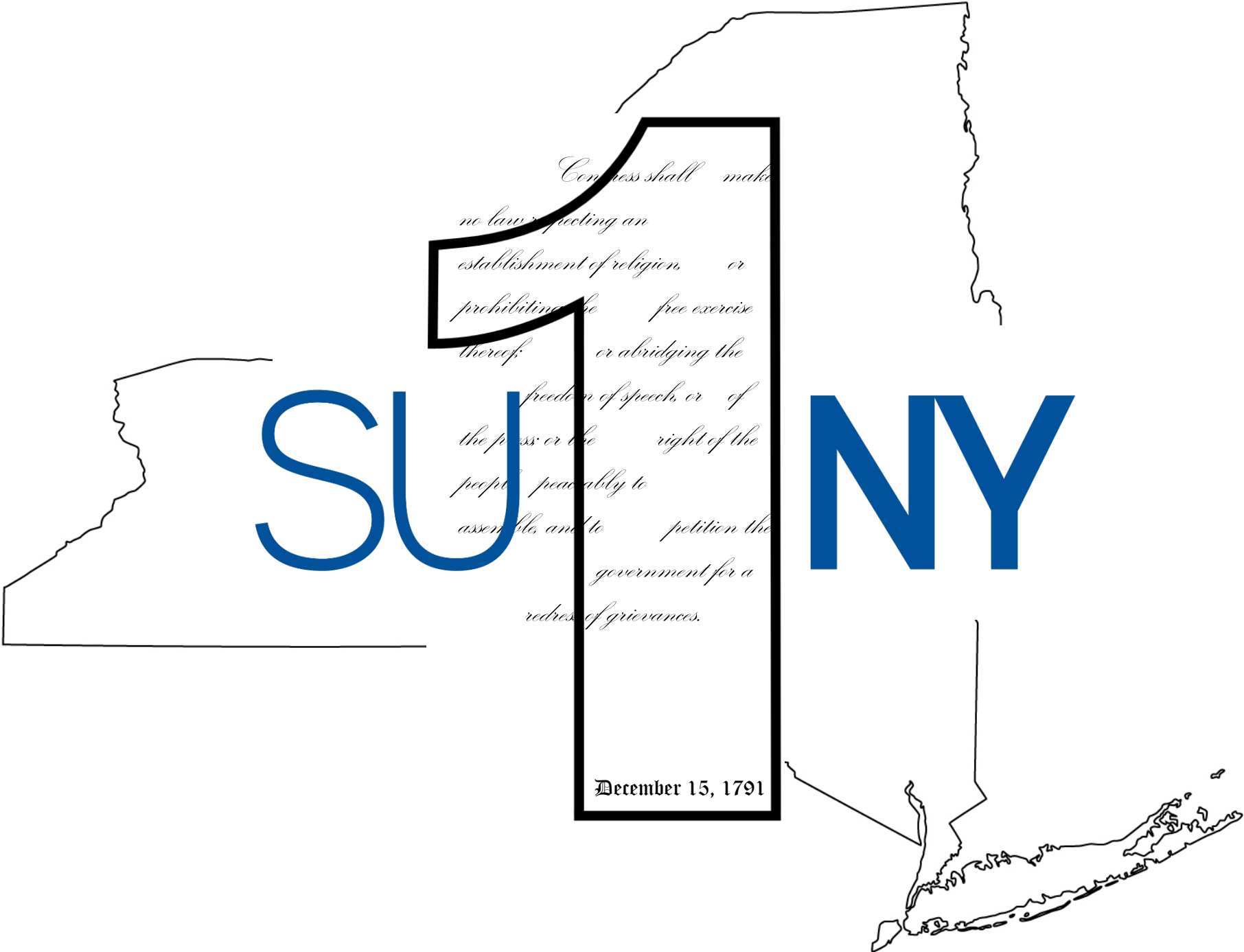


The State of Church and State at SUNY

Freedom of Religion: Students and Employees on Campus & Use of Public Facilities by Religious Groups

April 11, 2018

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*Congress shall make
no law respecting an
establishment of religion, or
prohibiting the free exercise
thereof; or abridging the
freedom of speech, or of
the press; or the right of the
people peaceably to
assemble, and to petition the
government for a
redress of grievances.*

December 15, 1791



THE STATE OF CHURCH AND STATE FREEDOM OF RELIGION

RELIGIOUS HOLIDAY DISPLAYS

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NATIONAL ASSOCIATION OF COLLEGE & UNIVERSITY ATTORNEYS (NACUA)

Article:

Holiday and Religious Displays on Campus: Threading the First Amendment Needle

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FIRST AMENDMENT APPLICATION TO RELIGION

Establishment Clause — prohibits the government from taking action which tends to favor one religion over other religions, or the idea of religion over no religion.

Free Exercise Clause — limits the ability of government to prevent individuals from exercising their religious beliefs, or from speaking out about religious issues.

APPLICATION OF THE FIRST AMENDMENT TO HOLIDAY DISPLAYS ON PUBLIC SCHOOL CAMPUSES

The Lemon Test: Lemon v. Kurtzman (1971)

A three prong analysis by the Courts:

1. The State must have a secular (non-religious) purpose.
2. The State's primary effect must be one that neither advances religion nor inhibits religion.
3. The State must not foster an excessive entanglement with religion.

County of Allegheny v. A.C. L. U. (1989)

Supreme Court modified the Lemon Test relative to holiday displays to consider:

1. Whether the government has a secular purpose for the action.
2. Whether the primary effect of the action endorses religion



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ALLEGHANY TEST

The Court in Alleghany introduced the “reasonable observer” or “reasonable passer-by” criteria, leading to the notion that context matters in such situations.

The case concerned two recurring holiday displays in and around the County of Alleghany Courthouse, which the local ACLU sought to enjoin from being erected:

1. A crèche (or manger) donated by the Holy Name Society, placed on the ornate grand staircase of Courthouse, the “main”, “most beautiful” and “most public” part of county building.
2. An 18-foot Chanukah menorah owned by Chabad, placed outside the county building next to a 45-foot Christmas tree, with a “Salute to Liberty” sign.

ALLEGHANY TEST (continued)

The Alleghany case was something of an uber-scenario in the finding that “context” matters.

With respect to the crèche, it violated the First Amendment because it was:

- a strictly sectarian manger scene
- accompanied by an overtly religious message
- capable of communicating that religious message
- placed at a dominant space within the public building
- where others were not free to place their displays
- not accompanied by secular holiday displays

With respect to the menorah, it was deemed constitutional because it was:

- outside of the county building
- next to a Christmas tree
- accompanied by a sign with Mayor’s name and the message “Salute to Liberty”

Note: The holding on the “menorah” portion of Alleghany mirrored the 1984 *Lynch v. Donnelly* case where a mixed media holiday context was upheld as constitutional.



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ALLEGHANY TEST (continued)

The Supreme Court “voted” as follows:

- Free-standing crèche violated the First Amendment - 5 to 4
- The mixed media menorah was constitutional - 6 to 3

Note: Four Justices found both to be constitutional, three justices found both violated the First Amendment, and two Justices split.



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ANECDOTAL NEWS

Could it have been constitutional?

- In 2004, CNN reported that a Pennsylvania school, through its Multicultural Committee, set up a mixed media holiday display with a crèche, menorah and a Kwanzaa scene. The Principal ordered the crèche removed because it was too religious.
- In another setting, a city firehouse was ordered to take down largely secular holiday decoration because some of the neighbors were offended by it.
- The so-called “War on Christmas” media debate of recent years seems to purposefully overlook the fact that there are hundreds of different faiths in America, and that the Establishment clause prohibits the government from favoring “a single religion over others and the idea of religion over no religion”.



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RELATED CASE

Capitol Square Review and Advisory Board v. Pinette (1995)

- The Ohio KKK sought an injunction requiring an advisory board to allow them to erect a cross during the Holiday season in a State-owned park plaza.
- The Supreme Court found that the private group could erect the cross, because:
 - (1) it had sought permission
 - (2) the park had often been used for religious activities and
 - (3) the KKK disclaimed any government endorsement of the cross in writing on the cross.



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THE BOTTOM LINE

- Context matters.
- History, background, focus, spirit, and individual intent or the lack thereof all matters.
- The less governmental involvement with the wishes of an individual religion, the better.
- When the religious nature of a crèche or a menorah can be combined with the secular holiday symbols or cultural symbols, such as Kwanzaa display, the better the argument for the display passing constitutional muster.



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The State of Church and State at SUNY

Freedom of Religion: Religious Expression and Practices by Students and Employees on Campus

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April 11, 2018**



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The First Amendment

Congress shall make no law respecting **an establishment of religion**, or **prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Establishment Clause

Prohibits government from
“establishing” a religion

- *Everson v. Board of Education*, 1947





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The Free Exercise Clause

American Citizens have the right to:

- Accept any religious belief
- Engage in religious rituals
- Exception: “those acts deemed criminal by the law of the land.”
- Reynolds v. United States, 1878

A successful challenge to the Free Exercise Clause must:

- Demonstrate that the religious belief is central to one’s belief
- Is sincerely held



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So What Does This Mean?

Most religious discrimination issues arising on campus will be “accommodation” issues.

Students and/or employees may have their claims brought by:

- Equal Employment Opportunity Commission (EEOC)
- Office of Federal Contract Compliance Programs (OFCCP)
- Department of Justice (DOJ)
- Office of Civil Rights (OCR)



U.S. Department of
Education



Office for Civil Rights
(OCR)



Accommodation of Religious Beliefs on Campus

Student's belief must be:

- Sincerely held
- A central tenant of one's belief system

In response, the campus may request the student to submit information about their professed belief.

However:

- The law (and courts) looks **unfavorably** on attempts to question or dispute the reasonableness of the religious belief
- The purpose of the request is to determine to what extent the campus policy or practice imposes a real burden on religion
- Consistency



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Religious Expression on Campus

Student Housing

- Rader v Johnson, 924 F. Supp. 1540 (D. Neb. 1966)

Curriculum Requirements

- Axson-Flynn v. Johnson, 356 F 3d. 1277
(10th Cir. 2004)

Religious Attire

- DOJ Complaint





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Freedom of Religion and Employees

David Nida

First Amendment vs. Title VII/NY HRL Claims

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Establishment Clause Concerns

- Conditioning Employment on Religion
- Employee Conditioning Provision of Service on Religion
- Endorsement of Religion



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Establishment Clause Concerns

Example:

Venters v. City of Delphi, 323 F.3d 959 (7th Cir. 1997)

Radio Dispatcher fired by Police Chief who allegedly . . .

- Cited Bible verses to subordinates at work and put video “Hell’s Fire and Heaven’s Gate” with police training material
- Spoke to her about salvation, going to cult deprogramming program in Kokomo, job at risk if does not follow God, accused her of sex with family members and animals, and that suicide better than life of sin

Court found against Police Chief

“Public employment may not be conditioned on one’s willingness to subscribe to particular religious principles or to any religious belief at all.”



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Free Exercise Concerns

Wait, isn't the government here not really the "Government" but the employer?

Yes, but . . .

- Resulting exclusion of religious practitioners--Establishment Clause violation
- From employee perspective, having (coincidentally government) job taken away b/c of religion by the government
- Religious practitioner ability to participate in their government



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Free Exercise Concerns

Comes up . . .

- Work intruding on religious life (e.g. prayer schedule, work days)
- Employees asserting beliefs at work (proselytizing)
- Conflicts with work requirements (terminating pregnancies)



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Free Exercise Concerns

But, wait, what about . . .

- Conflicts with government agency's mission
- Disruption among employees
- Rights of other employees (e.g. collectively-bargained seniority rights)

And . . .

- Establishing a religion



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Free Exercise Concerns

Courts have adopted a balancing test (Pickering*):

Public employee is entitled to exercise his or her religious beliefs at the workplace so long as the effective functioning of the public employer's enterprise is not interfered with.

*Pickering v Bd. of Ed. Of Township High School District, 88 Sct. 1731 (1968)



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Free Exercise Concerns

Examples:

Venters v. City of Delphi, 323 F3d 959 (7th Cir. 1997)

Boss proselytizing at work, Boss loses

Brown v. Polk County, Iowa, 61 F3d 650 (8th Cir. 1995)

Boss proselytizing at work, Boss wins

Tucker v State of Calif. Dept. of Ed., 97 F3d 1204 (9th Cir. 1996)

Empl. puts SOTLJC after name, Empl. wins

Altman v. Minnesota Dept. of Corrections, 251 F3d 1199 (8th Cir. 2001)

Empl.s read Bible during training, Empl.s lose

Knight v Connecticut Dept. of Public Health, 275 F3d 156 (2nd Cir. 2001)

Empl.s proselytize with clients, Empl.s lose



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Free Exercise Concerns

Venters v. City of Delphi, 323 F.3d 959 (7th Cir. 1997)

Court also found Free Exercise violation



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Free Exercise Concerns

Brown v. Polk County, Iowa, 61 F3d 650 (8th Cir. 1995)

County IT Director fired with consideration of prior reprimand for having secretary type his Bible study notes, having subordinates say prayers in his office before work and during meetings, referencing Bible passages to employees regarding slothfulness, reprimand directed cessation of any activities that could be considered religious proselytizing, witnessing, or counseling and removal of items with religious connotation from office

Court found for the IT Director as far as occasional spontaneous prayers, isolated references to Christian beliefs, and general activities that could be considered religious proselytizing or counseling while on the job, Court found against the IT Director as far as having his secretary type his Bible study notes and holding prayers in his office before work

Court rejects County's argument that their interest in avoiding an establishment clause claim allows them to prohibit religious expression altogether. "Such a position is too extravagant to maintain, for it gives a dominance to the Establishment Clause that it does not have . . ."

Court holds any interference with religious activity must be reasonably related and narrowly tailored to ensure its workplace is free from religious activity that harasses or intimidates



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Free Exercise Concerns

Tucker v State of Calif. Dept. of Ed., 97 F3d 1204 (9th Cir. 1996)

Computer analyst ordered to stop religious advocacy at work and to stop putting SOTLJC after his name on various distributed projects

Court found for the computer analyst and that the State failed to show sufficient infringement on its interests (rejecting consumption of supervisor's time on the issue, non-specified "liberty interests" of employees and speculative disruption, and establishment clause concerns)

Court acknowledges State interest in communications under its name but notes that the communications here were not public, finds not reasonable to target religious designations only (and less restrictive alternatives, i.e. restricting to an employee bulletin board)



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Free Exercise Concerns

Altman v. Minnesota Dept. of Corrections, 251 F3d 1199 (8th Cir. 2001)

Three prison employees reprimanded for silently reading Bibles during training program on gays in the workplace

Court finds against employees and that attendance exposing them to widely-accepted views that they oppose is not a substantial burden on their free exercise rights (remanded on free speech claims, since no disciplining for other instances of inattention, including sleeping during trainings)

Free Exercise Concerns

Knight v Connecticut Dept. of Public Health, 275 F3d 156 (2nd Cir. 2001)

2 cases: nurse consultant conducting survey at gay service recipient's home penalized for discussing salvation and saying God doesn't like the homosexual lifestyle; and sign language interpreter penalized for violating Interpreters' Code of Ethics for discussing God during language assessment period

Court found for State and noted, "When government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of the government." Marchi v BOCES of Albany, 173 F3d 469 (2nd Cir. 1999)



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Free Exercise Concerns

Concerns for employers' interests and Establishment Clause violations manifest in Title VII interpretations

Interpreting Title VII, courts have applied a lower threshold (> de minimus cost) for "undue hardship"* than with the ADA (significant difficulty or expense); WRFA proposed repeatedly in Congress to change this but not passed; EEOC walks the line in its guidance

NY Human Rights Law (Executive Law §296(10)) seems to provide a higher threshold (significant difficulty or expense) but acknowledges, for example, seniority rights may be still an undue hardship

*TWA v Hardison, 432 US 63 (1977); Ansonia Bd of Ed v Philbrook, 479 US 60 (1986)



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Take-Aways

- Impose restrictions carefully, narrowly, and non-prejudicially to religion (but do not allow establishment of government religion)
- Accommodate if can and does not establish government religion
- EEOC Best Practices is a useful resource [https://www.eeoc.gov/policy/docs/best_practices_religion.html], but, by its nature, vague—confer with counsel