



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2015

The Honorable Stephen Brint Carlton, County Judge
Orange County
123 South 6th Street
Orange, Texas 77630

Dear Judge Carlton,

It has come to my attention that a local atheist group in your area called the Orange County Atheists (OCA) has recently requested to display a sign alongside the City's and Commissioner Court's nativity scenes that have been erected on governmental property. My office has learned that the City denied the OCA's request and has since removed the nativity scene at City Hall "to avoid the legal costs associated with defending the placement of the Nativity scene." Media reports have also suggested that the Commissioners Court plans to discuss the nativity scene outside the county courthouse today at 2:00pm. I write to offer my support to the Commissioners Court if the OCA decides to pursue legal action.

Although my office cannot represent local governmental entities in court, we can and will file legal briefs supporting governmental entities' authority to allow a nativity scene to be displayed on governmental property. Just this year, the Attorney General's Office addressed a similar legal issue. The Freedom From Religion Foundation (FFRF) threatened similar litigation over the display of "In God We Trust" on police department patrol vehicles in Childress. The FFRF has a history of demanding what the law does not require. For example, courts considering the issue of "In God We Trust" have uniformly held that the phrase—our national motto—is constitutional, and the Attorney General Opinion issued by my office noted that a law enforcement department's decision to display "In God We Trust" on patrol vehicles is permissible under the Establishment Clause of the United States Constitution.¹

Similarly, in considering other religious displays under the Establishment Clause, the United States Supreme Court has relied on the non-coercive nature of the display and its historical underpinnings found in our Nation's history to determine

¹ See Tex. Att'y Gen. Op. No. KP-0042 (2015) (citing *Newdow v. Peterson*, 753 F.3d 105, 107 (2d Cir. 2014), cert. denied, 135 S. Ct. 1008 (2015); *Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010); *Kidd v. Obama*, 387 Fed. App'x. 2 (D.C. Cir. 2010) (per curiam); *Gaylor v. United States*, 74 F.3d 214, 217–18 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam); *Aronow v. United States*, 432 F.2d 242, 244 (9th Cir. 1970)).

constitutionality.² The Supreme Court has consistently held that passive public displays—including nativity scenes—acknowledging our Nation’s religious heritage are constitutional.³ Put simply, because the Supreme Court has concluded that nativity scenes, as passive public displays, do not violate the Establishment Clause, the Commissioners Court is not required to grant the OCA’s request to display its own sign on the basis of equality—contrary to what the group suggests. Nativity scenes have historical significance around the Christmas season.⁴ That they are also religious has no significance in determining whether a governmental body must succumb to a demand to display a private sign on governmental property or remove an existing nativity scene.

While the City of Orange was reluctant to defend itself from legal action for its constitutionally permissible actions, I hope the Commissioners Court stands resolute in its decision to display the nativity scene outside the county courthouse.

The Orange County Commissioners Court is under no legal obligation to remove the nativity scene outside the county courthouse during the Christmas season. Rest assured that my office stands ready to provide appropriate legal support in the event the OCA takes legal action against the Commissioners Court.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Ken Paxton
Attorney General of Texas

² See *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (declining to apply the *Lemon* test and concluding that the Ten Commandments monument on the Texas State Capitol grounds does not violate the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (noting that “In God We Trust” is a constitutional “reference to our religious heritage”); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (noting that “historical practices and understandings” guide the analysis in Establishment Clause cases).

³ See *Lynch*, 465 U.S. at 685–86 (holding that a crèche “does not create excessive entanglement between religion and government”).

⁴ *Id.* at 680 (“The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”)