524 JOHNSTOWN ROAD
CHESAPEAKE, VA 23322

PHONE 757.463.6133
NATIONALLEGALFOUNDATION.ORG

National Legal
FOUNDATION

To: Governors, Mayors, and Citizens of Cities and Towns throughout America

Date: November 3, 2026

Re: The Right to Display Nativity Scenes on Public Property

The National Legal Foundation has been asked to address the constitutionality of displaying nativity scenes on public property. This request came from someone who has successfully displayed nativity scenes, but sometimes only with great difficulty. I write to you in light of our experience assisting this individual and others.

It is clear from caselaw that nativity scenes **can** be displayed. However, the issues related to these displays vary depending on whether the sponsor of the display is a private group or individual or a governmental entity.

If the nativity scene on public property is owned by a private group or individual, the law is very straightforward. If the government allows any displays on its property, either by tradition or by policy, it must allow nativity scenes to be displayed on equal terms. It is recommended that all private displays on public property include a sign identifying the display as one sponsored by a private group, that the private individual or organization pay for all costs associated with the display, and that the individual or group, not the government, store the nativity scene when not on display.

A nativity scene on public property is only publicly *sponsored*, that is, governmentally sponsored, if it is erected, overseen, or funded by government action. Until recently, the caselaw concerning such displays could be complex. But on June 27, 2022, the Supreme Court of the United States, in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), clarified that the "test from history" should apply in most Establishment Clause cases. Nativity displays will almost certainly be covered by, and found constitutional under, that test, since such displays extend far back into our history.

Those who oppose nativity displays may try to argue that the displays are still covered by other Establishment Clause tests, and in some cases fail those tests. But such arguments will almost certainly be rejected by courts if they are pushed in lawsuits.

Because some uncertainty still exists, the National Legal Foundation will be glad to consult with governors, mayors, council members, individuals, and groups free of charge about these matters.

Sincerely,

Steven W. Fitschen, President