



December 12, 2019

Mayor Paul Kuhns  
City of Rehoboth Beach  
229 Rehoboth Avenue / P.O. Box 1163  
Rehoboth Beach, Delaware 19971  
*Sent via certified mail RRR, fax, and email*

Ms. Sharon Lynn, City Manager  
City of Rehoboth Beach  
229 Rehoboth Avenue / P.O. Box 1163  
Rehoboth Beach, Delaware 19971  
*Sent via certified mail RRR, fax, and email*

**Re: Unlawful Religious Viewpoint Discrimination and Free Exercise Violation**

Mayor Kuhns and Ms. Lynn:

Knights of Columbus Star of the Sea Council 7297 (“KOC”) retained First Liberty Institute in connection with the City of Rehoboth Beach’s (the “City”) unlawful refusal to allow KOC to include a crèche as part of the holiday displays at the Bandstand circle or immediately adjacent to it on the Boardwalk due to the crèche’s religious nature. The purpose of this letter is to inform the City of the relevant law so it can take the steps necessary to avoid litigation. Please direct any further communications regarding this matter to me.

**Facts**

A free standing crèche, or Nativity, has been a part of the Christmas holiday tradition at the Bandstand circle in Rehoboth Beach for as long as most people can remember, reportedly since the 1930s. Most recently and for many years, the crèche was owned and placed on the circle by a local public service club. Other yearly holiday displays on site include a Christmas tree, holiday lights and light displays, and a large Santa’s House adjacent to the circle on the Boardwalk that is erected, owned, and displayed by the local Chamber of Commerce.

The crèche’s traditional location is on the Bandstand circle west of the Bandstand where a new public restroom now stands. During construction, the crèche was temporarily moved to an alternate location where it has been placed for several years.

Early last December, Saint Edmond Church (the “Church”), supported by KOC, asked the City for permission to place the crèche back on the circle for the 2018 holiday season. Understanding it had permission, KOC placed the crèche there on a small grassy area.

The next day, Sharon Lynn, the city manager, called the Church and ordered the crèche removed. KOC removed the crèche shortly thereafter.

The City’s decision to prohibit the crèche proved unpopular with many Rehoboth Beach residents, and the City addressed its policy and decision at subsequent December 2018 city council meetings and to the media. The City consistently made clear that the crèche could not be placed on city property because it is a religious display.

Earlier this year, in October 2019, the Church received a letter from Ms. Lynn with the subject line “Religious displays during the 2019 holiday season.” The letter explained that the City had met with the local Chamber of Commerce and arranged for the crèche to be placed on property leased by the Chamber. That location is one half mile from the holiday displays at the Bandstand circle and completely removed from the site of the town’s Christmas traditions, which are located predominately on or adjacent to the circle. A map showing the locations of the Bandstand circle, the Santa’s House, and the Chamber’s property is attached as Exhibit A.

On November 18, during a television interview about the crèche, Mayor Paul Kuhns again reiterated the City’s anti-religion mandate. Commenting on placement of KOC’s crèche, Mayor Kuhns explained that “city policy is not to have religious displays on public property or city property.”

Then, in late November and early December, KOC emailed Ms. Lynn and asked to use the grassy area on the circle for its crèche display. Images of the crèche are attached as Exhibit B. Ms. Lynn responded that the grassy area was not available. In a follow up email on December 5, KOC asked Ms. Lynn if KOC could at least place the crèche on the Boardwalk right by the circle, like the Chamber of Commerce is allowed to do with its Santa’s House. The Boardwalk is exceptionally large and wide, and the crèche is decidedly smaller than the Santa’s House.

Ms. Lynn responded that the Boardwalk is public property, and reiterated that city policy prohibits the crèche from placement on the Boardwalk or any other public property because it is religious.

### **Legal Analysis**

#### ***Viewpoint discrimination is prohibited by the First Amendment***

It is well established that the speech protections of the First Amendment extend to displays like the crèche. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (display of flag); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969) (arm bands). It is equally well established that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Furthermore, religious speech clearly is recognized as a specific viewpoint. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Viewpoint discrimination, an “egregious form of content discrimination,” “targets . . . particular views taken by speakers.” *Ne. Pa. Freethought Soc’y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (quoting *Rosenberger*, 515 U.S. at 829). Moreover, as the Third Circuit explained, the U.S. Supreme Court has “adopted a broad construction of [viewpoint discrimination], providing greater protection to private religious speech on public property.” *Ne. Pa. Freethought Soc’y*, 938 F.3d at 433.

The City has refused to allow KOC to place a crèche either on the circle or adjacent to it on the Boardwalk because the City prohibits religious displays on public property. This “broad prohibition on religious speech can[not] validate religious viewpoint discrimination.” *Ne. Pa. Freethought Soc’y*, 938 F.3d at 433. To the contrary, such “blanket bans on religious messages . . . constitute impermissible viewpoint discrimination.” *Id.* at 938 (quoting *Byrne v. Rutledge*, 623 F.3d 46, 55 (2d Cir. 2010), and citing *Rosenberger*, 515 U.S. 819; *Lamb’s Chapel*, 508 U.S. 384; and *Good News Club*, 533 U.S. 98). Viewpoint discrimination “is impermissible in any forum.”<sup>1</sup> *Ne. Pa. Freethought Soc’y*, 938 F.3d at 436 (citing, *inter alia*, *Good News Club*, 533 U.S. at 111–12; *Rosenberger*, 515 U.S. at 829).

Even without a blanket ban on religious displays, the City’s prohibition of KOC’s religious Christmas display while allowing a secular Christmas display by another local organization is itself textbook viewpoint discrimination. “[I]f the government allows speech on a certain subject, it must accept all viewpoints on the subject, . . . even those that it disfavors.” *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). Where “a government claims to have excluded ‘religion as a subject or category of speech,’ ‘if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective.’” *Ne. Pa. Freethought Soc’y*, 938 F.3d at 434 (quoting *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004)). Such “[d]iscrimination against speech because of its message is presumed to be unconstitutional.” *Rosenberger*, 515 U.S. at 828.

The City has prohibited KOC from displaying a crèche as part of the holiday displays at or immediately adjacent to the Bandstand circle solely because the crèche is religious. The City simultaneously banned KOC’s religious Christmas display but permitted one or more privately sponsored secular Christmas displays by another organization. Such viewpoint discrimination is repugnant to the First Amendment, unlawful, and provides KOC “entitle[ment] to relief.” *Ne. Pa. Freethought Soc’y.*, 938 F.3d at 436.

### ***Viewpoint discrimination is not justified by fear of an Establishment Clause violation***

The City has no grounds for claiming its unlawful policy and actions are justified by Establishment Clause concerns. KOC’s crèche is, for one, private speech. “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). The U.S. Supreme Court never has found that fear of an Establishment Clause violation justifies viewpoint discrimination. Instead, it has consistently determined such viewpoint discrimination unnecessary and unlawful. *E.g.*, *Rosenberger*, 515 U.S. at 842–46; *Lamb’s Chapel*, 508 U.S. at 394–97; *Widmar*, 454 U.S. at 270–75.

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<sup>1</sup> Forum analysis is inapplicable in this case because “no matter what kind of property is at issue, viewpoint discrimination is out of bounds.” *Ne. Pa. Freethought Soc’y.*, 938 F.3d at 432. This is true “[r]egardless of whether the [property at issue] is a public or nonpublic forum.” *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011); *see also Ne. Pa. Freethought Soc’y.*, 938 F.3d at 436 (quoting same).

Even if the crèche were a government display, the Establishment Clause would be a non-issue. The City itself could display a crèche or other religious holiday item as part of its larger holiday display at the circle without Establishment Clause concerns. The Supreme Court has made it crystal clear that a government holiday display consisting of both secular and religious items is in keeping with constitutional requirements. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989).

Further, a crèche used to commemorate the holiday season is constitutional apart from *Lynch* or *County of Allegheny*. Earlier this year, the Third Circuit, applying First Liberty’s recent win at the U.S. Supreme Court,<sup>2</sup> held that a Latin cross as part of a county seal was lawful under the Establishment Clause. It found “established government symbols, monuments, and practices with religious elements” have “a strong presumption of constitutionality” that is difficult to overcome. *Freedom from Religion Found., Inc. v. Cty. of Lehigh*, 933 F.3d 275, 281–82 (3d Cir. 2019). The age-old tradition of municipal displays of crèches at Christmas time more than qualifies.

Any attempt by the City to excuse its unlawful policy and conduct based on Establishment Clause concerns will be unavailing.

### ***Targeting religion violates the Free Exercise Clause***

When government action that burdens religious exercise is “not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.” *Tenaflly Eruv Ass’n*, 309 F.3d at 165 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

More specifically, government action whose object “is to infringe upon or restrict practices because of their religious motivation . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 533. KOC believes that public display of the crèche at Christmas time is its religious duty, and that it should display the crèche as part of the holiday displays at the circle or immediately adjacent to it on the Boardwalk so as to reach the most people with the message that Christmas commemorates the birth of Jesus Christ. The City’s prohibition of the crèche has not merely burdened but utterly prevented this particular religious exercise,<sup>3</sup> and the City repeatedly has admitted its prohibition is because of the crèche’s religious nature. Similarly, the City’s allowance of a private secular Christmas display while prohibiting KOC’s religious Christmas display “violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* because it devalues [KOC’s religious] reasons for [its Christmas display] by judging them to be of lesser import than nonreligious reasons, and thus singles out [KOC’s] religiously motivated conduct for discriminatory treatment.” *Tenaflly Eruv Ass’n*, 309 F.3d at 168.

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<sup>2</sup> *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

<sup>3</sup> While KOC’s religious exercise has been substantially burdened, “[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct.” *Tenaflly Eruv Ass’n*, 309 F.3d at 170.

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The City's policy and actions are therefore subject to strict scrutiny, a standard routinely fatal to any government activity that falls under its purview: "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. The City can point to no compelling interest for prohibiting KOC's display of the crèche. It has prohibited the crèche solely because it is religious. Such targeting of religion is an unlawful violation of the free exercise protections of the First Amendment.

### **Demand**

KOC respectfully requests the City allow it to continue the beloved Rehoboth Beach tradition of including a crèche as part of the holiday displays at the Bandstand circle or immediately adjacent to it on the Boardwalk, and do so on equal terms and with equal visibility provided the Chamber of Commerce for its holiday display. Please advise me in writing by **5:00 p.m. ET on Friday, December 13, 2019**, that KOC may do as requested.

Although we are confident this can be worked out without resorting to litigation, unless I hear from you by the above-mentioned time, First Liberty will proceed as KOC directs. This likely will include seeking redress in federal court, including recovery of attorneys' fees, court costs, and other reasonable expenses incurred in bringing the action. In any legal action City officials may be individually liable for violations of clearly established constitutional rights.

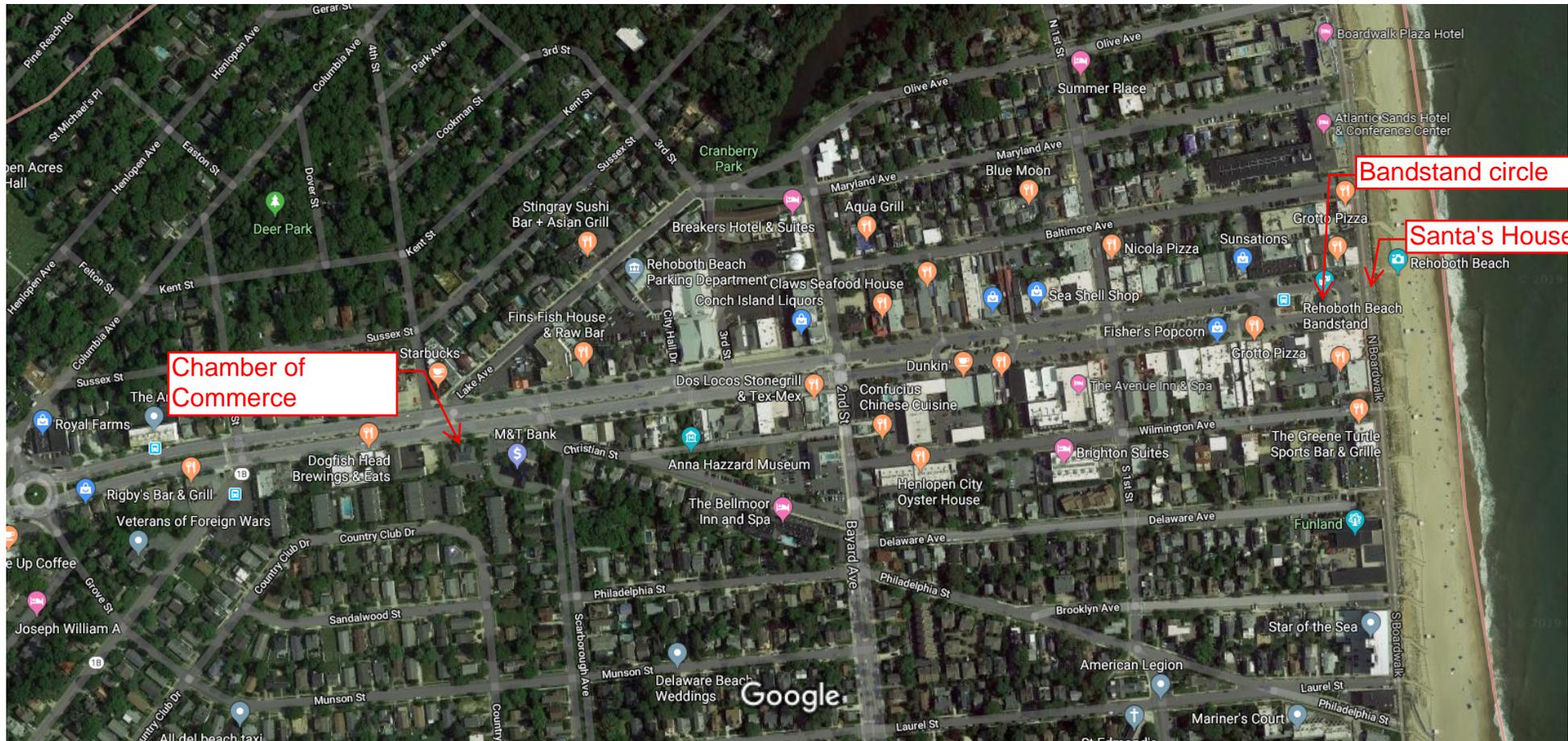
Sincerely,



Roger Byron  
Senior Counsel

# EXHIBIT A

# Rehoboth Beach



Imagery ©2019 Maxar Technologies, U.S. Geological Survey, USDA Farm Service Agency, Map data ©2019 200 ft

# EXHIBIT B



