



March 17, 2014

**VIA FACSIMILE (719-333-4146) &  
OVERNIGHT DELIVERY SERVICE**

Lieutenant General Michelle D. Johnson  
Superintendent, U.S. Air Force Academy  
2304 Cadet Drive, Suite 3300  
U.S. Air Force Academy, CO 80840

Dear General Johnson:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States.<sup>1</sup>

It has come to our attention that officials at the U.S. Air Force Academy recently had a cadet remove a Bible verse from the cadet's personal whiteboard.<sup>2</sup> A spokesman for the Air Force Academy confirmed that such "whiteboards are for both official *and personal use*."<sup>3</sup> The Military Religious Freedom Foundation (MRFF), an organization hostile to religious expression in the military, claims that it played an instrumental role in the removal of the verse. The MRFF is also boasting that, after its President and Founder, Mr. Michael L. "Mikey" Weinstein, received complaints about the posted verse, he "immediately contacted the Air Force Academy and filed a complaint. Exactly two hours and nine minutes later, the Bible verse had been scrubbed from the cadet's whiteboard."<sup>4</sup>

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<sup>1</sup>*See, e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

<sup>2</sup>Todd Starnes, *Air Force Academy Removes Bible Verse from Cadet's Whiteboard*, FOX NEWS (Mar. 11, 2014), <http://www.foxnews.com/opinion/2014/03/11/air-force-academy-removes-bible-verse-from-cadet-whiteboard/>.

<sup>3</sup>*Id.* (emphasis added).

<sup>4</sup>*Id.*



The MRFF claimed that the Bible verse “clearly elevated one religious faith (fundamentalist Christianity) over all others,” creating a “hostile environment at the academy.”<sup>5</sup> Mr. Weinstein went so far as to state that, not only must the cadet who posted the verse be punished, but also all officers in the “chain of command who ignored this blatant and egregious violation of Air Force regulation 1-1 and the United States Constitution.”<sup>6</sup> Such a statement is ludicrous on its face and is based on an erroneous understanding of the law—an understanding which is not based on the Constitution or Supreme Court case law. As such, the purpose of this letter is to explain the law surrounding religious expression. It is our intent to lay out the law so that officials at the U.S. Air Force Academy will know what is and is not permitted vis-à-vis religious expression. Furthermore, this letter will explain that, by forcing the Bible verse to be removed from the whiteboard, it was Air Force Academy officials who violated the cadet’s First Amendment rights to freedom of speech and free exercise of religion.

At the outset, let us consider two scenarios. First, if the Bible verse had been posted on a whiteboard that was to be used solely for official purposes, then Academy officials would have been fully justified in having the verse removed. The offending cadet would have violated an Air Force Academy regulation—not the Constitution as claimed by Mr. Weinstein.

Second, if such whiteboards are available for both official *and personal* use, then Air Force Academy officials were wrong to require that the verse be removed and they violated the constitutional rights of the cadet who posted the verse. The Establishment Clause does not forbid *private* religious speech. Moreover, the First Amendment protects private religious expression to the same extent that it protects private secular expression.

To assist you in determining what is and is not permissible, the following provides a general legal framework for such situations.

### **Legal Basis for Allowing Bible Verses on Private Whiteboards:**

#### **I. FIRST AMENDMENT PROTECTIONS**

When discussing the right to free exercise of religion, it must be clearly understood that free exercise of religion means what it says—*free exercise*. Free exercise may not legitimately be limited to what some Government official or civilian advocacy group or attorney may think it should mean—or is willing to tolerate.<sup>7</sup> That includes a cadet’s freedom to post a Bible verse on his private whiteboard attached to his dorm room door.

Upon entering the U.S. Air Force Academy, cadets are not completely stripped of their rights to free exercise of religion and free speech. All Americans, even those in uniform, retain

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<sup>5</sup>*Id.* One wonders how posting a verse from Galatians, *without more*, can be identified as elevating “fundamentalist Christianity,” since the Book of Galatians is recognized as canonical by *all* variants of Christianity.

<sup>6</sup>*Id.*

<sup>7</sup>*See, e.g.,* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).

Constitutional rights.<sup>8</sup> As such, Air Force Academy cadets retain their rights to free exercise of religion and free speech. Accordingly, they are free to post religious sentiments on their private whiteboards, just as they are free to post secular sentiments on their whiteboards.

In the instant matter, a U.S. Air Force Academy cadet posted a Bible verse as a personal, passive message on his whiteboard. Of special note in this regard, “[d]iscrimination against speech *because of its message* is presumed to be unconstitutional.”<sup>9</sup> Though Mr. Weinstein and the MRFF certainly have the right to take issue with the cadet’s posted Bible verse and his views, military commanders have no obligation to censor the cadet’s views and remove the Bible verse from the whiteboard merely because the MRFF and some cadets, faculty, and staff members may have been offended by the sentiments expressed. The First Amendment protects free speech from *Government* interference and censorship; it was never intended to protect potential hearers or onlookers from expression that offends them or hurts their feelings. Moreover, every commander, staff officer, cadet, and Service Member at the Air Force Academy has taken an oath to protect and defend the Constitution of the United States, and that includes the First Amendment’s free speech and free exercise provisions.

The MRFF frequently makes arguments alleging Establishment Clause violations. Yet, with respect to the Establishment Clause, the Supreme Court has consistently ruled that it does not require a Government entity to exclude private religious speech from a public forum. It is, in fact,

peculiar to say that government “promotes” or “favors” a religious display [or religious expression] by giving it the same access to a public forum that all other displays [or expression] enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.<sup>10</sup>

Hence, allowing a cadet to express his/her unique, personal religious views on a private whiteboard does not violate the Constitution.

In one of its most powerful proclamations upholding the rights of private religious speakers in a public forum, the Supreme Court aptly noted:

The contrary view [i.e., limiting private religious expression] . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but *it is outright perverse when one considers that*

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<sup>8</sup>The only exception would be if the proposed activity *actually* (not theoretically) interfered with the maintenance of good order and discipline at the Academy, which is clearly not the case here.

<sup>9</sup>*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994)) (emphasis added).

<sup>10</sup>*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763–64 (1995).

*private religious expression receives preferential treatment under the Free Exercise Clause.* It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.<sup>11</sup>

Moreover, in *Board of Education v. Mergens*,<sup>12</sup> the Supreme Court noted a key distinction in this regard: “[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.”<sup>13</sup> In fact, the Supreme Court has stated that a policy of excluding private religious speakers from public places where other speakers are permitted is unconstitutional:

Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”<sup>14</sup>

In short, neither the Free Speech nor the Establishment Clause protects us from being offended by another’s private comments. Hurt feelings and disagreements with the content of the posted Bible verse do not rise to the level of a Constitutional violation, whereas compelling a cadet to remove a posted Bible verse from an otherwise permissible expressive forum does.

The MRFF called on Air Force Academy officials to censor the cadet’s whiteboard merely because the organization (and certain individuals at the Academy) disagreed with his religious viewpoint. Demanding that the Air Force Academy censor the cadet’s whiteboard and punish him for his views indicates that the MRFF misunderstands and misstates First Amendment jurisprudence and military law. Academy officials’ compelling the cadet to remove the verse indicates that Academy officials also misunderstand the First Amendment. This is further explained in the following section.

## **II. RELIGIOUS EXPRESSION IN THE MILITARY.**

The MRFF stated that, by posting the Bible verse on his whiteboard, the cadet violated AFI 1-1, Section 2.11,<sup>15</sup> as follows: “Leaders at all levels must . . . avoid the actual or apparent use of their position to promote their personal religious beliefs to their subordinates.” The use of this citation as justification for the MRFF attack on the Bible verse posted by the cadet

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<sup>11</sup>*Id.* at 766–67 (internal citations omitted) (emphasis added).

<sup>12</sup>496 U.S. 226 (1990).

<sup>13</sup>*Id.* at 250.

<sup>14</sup>*Id.* at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)).

<sup>15</sup>Air Force Instruction 1-1, § 2.11 (Aug. 7, 2012), available at <http://www.180fw.af.mil/shared/media/document/AFD-120820-005.pdf>. Assuming, without deciding, that AFI 1-1, Section 2.11, is constitutional, the cadet who posted the Bible verse was not in a leadership position.

demonstrates a fundamental misunderstanding by Mr. Weinstein and the MRFF of the First Amendment freedoms guaranteed to cadets.

Moreover, that certain persons were offended by the cadet's posting does not mean that it was unconstitutional or that it violated any Air Force rule or regulation. The Bible verse was posted on a whiteboard where both official and personal postings are permitted; all cadets have such whiteboards and are allowed to use them to express personal views. Hence, all readers of the whiteboard were aware that it contained the personal sentiments of the cadet who posted it. No one was required to read the cadet's whiteboard or agree with the sentiments expressed on it. That some were offended or had their feelings hurt was simply the price we all pay for living in a pluralistic society that values free speech. *If mere offense is sufficient to require removal of a cadet's personal expression, then free expression is eviscerated for all.*

Further, merely because the Air Force Academy permits private speech does not convert it into Government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated."<sup>16</sup> Accordingly, Air Force Academy officials erred as a matter of law when they compelled the removal of a cadet's private religious expression from a place where personal messages were permitted.

When considering whether the *Government* has "endorsed" religion or a religious sentiment, one must recognize that

[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing . . . simply because a particular viewer of a display [such as a Bible verse posted on a whiteboard] might feel uncomfortable.

*It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [activity] appears.*<sup>17</sup>

As the United States Circuit Court for the Sixth Circuit aptly noted in this regard, "the reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those [like Mr. Weinstein and the MRFF] who do."<sup>18</sup> Further,

"the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." The notion that the First Amendment commands "a brooding and pervasive devotion to the secular" . . . is a notion that simply perverts our history.<sup>19</sup>

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<sup>16</sup>Mergens, 496 U.S. at 250.

<sup>17</sup>Pinette, 515 U.S. at 780 (emphasis added); see also Rosenberger, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional.").

<sup>18</sup>Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992).

<sup>19</sup>ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 300 (6th Cir. 2001) (en banc) (internal citations omitted).

Air Force Academy cadets are deemed to be “reasonable observers.” Consequently, they are deemed to know that cadets may post personal messages on the whiteboards outside their individual rooms. Thus, the Establishment Clause is not violated by an individual cadet’s *private posting of a Bible verse* on the whiteboard outside his/her room.

Being exposed to religious symbols and sentiments is an inescapable consequence of living in a pluralistic society which honors free exercise of religion and free expression of religious sentiments. Yet, no person who reads words by a cadet on his/her whiteboard is required to assent to any sentiments expressed or take any action pursuant to them. Nor is anyone keeping track of individuals who decline to assent to or act upon such sentiments. In truth, the expression of such sentiments serves as vivid testimony to the religious tolerance that we have been able to achieve in the United States and is something that should be recognized and applauded, not rejected and forbidden. Constitutional free speech and free exercise principles permit the respective cadet to express him/herself as he/she sees fit, not as the Government may direct<sup>20</sup> or civilian advocacy groups like MRFF are willing to tolerate.

Military commanders and officials must be vigilant concerning individuals and groups, like Mr. Weinstein and the MRFF, who “are determined to see an *endorsement of religion*, even though a reasonable person, and *any minimally informed person*, knows that no endorsement is intended.”<sup>21</sup> Accordingly, MRFF “posit[s] a ‘reasonable observer’ who knows nothing about the nature of the exhibit [or other expression]—he simply sees the religious object in a prominent public place [or reads a Bible verse] and ignorantly assumes that the government is endorsing it.”<sup>22</sup> The United States Court of Appeals for the Sixth Circuit considered such an approach to be a “new threat to religious speech,” to which the court applied the telling moniker, the “Ignoramus’s Veto.”<sup>23</sup> Yet, as stated above, members of the Cadet Wing at the United States Air Force Academy are deemed to be *reasonable observers* who know the history, nature, and purpose of whiteboards and similar sites. As such, cadets know that no Government endorsement is intended and that no endorsement occurs simply because an individual cadet, in accordance with the tenets of his/her faith tradition, posts a Bible verse or some other religious sentiment on his/her whiteboard.

Again, as is evident from the cited case law, the MRFF’s position and demands are legally baseless. The Bible verse posted by the cadet was private speech that reflected his religious views—something that is totally permissible. *The MRFF’s allegation that such speech must be censored is an intolerable misstatement of the law. That Air Force Academy officials acted as they did to remove the verse compounded the injustice.*

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<sup>20</sup>See *Lee v. Weisman*, 505 U.S. 577, 588–89 (1992) (stating with respect to requiring non-sectarian prayers: “The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, *but the legitimacy of its undertaking that enterprise at all.*” (emphasis added)). The same principle applies in the military. Government officials must avoid the temptation to determine what constitutes acceptable religious expression.

<sup>21</sup>*Americans United*, 980 F.2d at 1553 (internal citations omitted) (emphasis added).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

## CONCLUSION

When persons like Mr. Weinstein demand that Bible verses be removed from private whiteboards “because they violate the Establishment Clause of the First Amendment,” Air Force Academy officials must determine whether the sentiments, such as Bible verses, posted on cadets’ private whiteboards are government speech or private speech. If they are private speech (as was the case here), as long as they are in a location otherwise open to private speech, they cannot be removed merely because they are religious in nature.

In this case, cadets are permitted to use their whiteboards to express private, personal views. As such, the Bible verse posted by the cadet did not violate the First Amendment, but was private speech—protected by the First Amendment. The Bible verse should have been allowed to remain posted on the whiteboard. Further, in no way should the cadet or those in the chain of command be punished for allowing the Bible verse to be posted (especially since the posting was fully in accord with the Constitution of the United States). By catering to Mr. Weinstein and the MRFF’s demand that the Bible verse be removed, it was Air Force Academy personnel who violated the U.S. Constitution and the rights of the cadet. It is imperative that Academy officials develop policies and procedures to ensure that they do not violate a cadet’s rights in the future.

We offer our assistance to aid you and your staff in developing such policies and procedures. Should you have any questions or wish to discuss further the matters referenced herein, please do not hesitate to contact us at [REDACTED] or via email at [REDACTED]

Sincerely yours,



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