ACLJ
American Center
for Law & Justice
Jay Alan Sekulow, J.D., Ph.D.
Chief Counsel

May 15, 2015

VIA OVERNIGHT DELIVERY SERVICE

General Mark A. Welsh III
Air Force Chief of Staff
[redacted]

RE: MRFF Demand Letter re MajGen Craig S. Olson, USAF

Dear General Welsh:

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. *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).

INTRODUCTION

As you are doubtless aware, Mr. Michael L. "Mikey" Weinstein and his organization, the Military Religious Freedom Foundation (MRFF), take frequent issue with the public expression of religious sentiments by persons serving in uniform. Their recent demand letter to you (dated May 14, 2015) is just such an example. The intemperate and condescending language he used in his letter to you is typical of the letters he sends when he is offended by the religious sentiments expressed by those with whom he disagrees. Mr. Weinstein is especially hostile to Evangelical Christians as shown on the first page of his letter to you: "General Welsh, . . . please take a good, hard look at [the link he provided in the letter] and tell me that you're just not sick to damn death seeing an active duty Air Force General Officer

boastfully proselytizing and freely witnessing his personal brand of his own fundamentalist flavor of his evangelical Christian faith . . . ."

We hope that you did, indeed, watch that youtube video. If you did, we think that you would agree with us that General Olson gave a measured address consistent with his Christian faith without any language denigrating anyone else's beliefs or trying to convert others to his (proselytizing). General Olson's remarks spoke of his respect and need for prayer during his career and in raising his family. That Mr. Weinstein finds such remarks offensive is his privilege, but it appears to us that Mr. Weinstein and many of those he purports to represent are hypersensitive, if not downright hostile, to all things religious and that their goal is the removal *in toto* of all religious discourse from the military, something that the Constitution does not require—and would not tolerate. Despite Mr. Weinstein's bombast, *there is no Constitutional violation in what General Olson did.*

Mr. Weinstein's allegation that General Olson violated the Establishment Clause is ludicrous on its face. General Olson gave a personal testimony about the importance of prayer in his life. No one was required to do or believe anything. The coercive force of the United States Government was not behind his remarks, and no one was compelled to accede to his beliefs or change theirs. Then, in another stretch, Mr. Weinstein claims that General Olson "constructively created" a "religious test" for office. What nonsense! General Olson neither said nor could it be reasonably inferred from his remarks that he intended to say that, absent agreement with his beliefs, a person should be denied a commission in the military. Moreover, even assuming *arguendo* that he had meant to say such a thing, it would not—indeed, could not—"create" (constructively or otherwise) a religious test for office, since such a matter was wholly outside General Olson's authority. Mr. Weinstein frequently creates straw-man arguments like the "religious-test-for-office" argument in the hope of convincing others that there is some sinister Constitutional crisis looming. There isn't.

Another straw-man argument concerns the alleged "limitless propaganda bonanza" ISIS reaps from General Olson's remarks. This is also nonsense. One wonders, first, how many ISIS adherents are watching GOD TV and how many would have listened at the precise time to hear General Olson's remarks. One wonders, further, how the comments of one two-star Air Force general talking about what his faith and prayer meant to him and his family would add one iota to the already widely accepted ISIS argument about the United States military's being modern-day "Crusaders" bent on destroying Islam. ISIS does not care whether the U.S. military has committed Christians in its ranks nor whether such persons are fighting to elevate Christianity over Islam—it merely alleges that that is so and that that is the reason why the United States and other western nations are sending their armed forces to fight in the Muslim Middle East. In ISIS's view, the West in general is simply "Christian." General Olson's remarks added nothing to that view and certainly was not a "limitless propaganda bonanza" for ISIS or any other jihadist group.

Even Mr. Weinstein's citing to Air Force Instruction 1-1, Section 2.12, is misplaced. The portion of AFI 1-1 that Mr. Weinstein highlighted in his letter to you stresses that a leader must ensure that his words "cannot reasonably be construed to be officially endorsing" a faith,

belief or absence thereof. The key portion is "reasonably construed" and "official" endorsement. General Olson's own words indicated without a doubt that he was giving his personal story. He was not acting as a government official when he made his remarks. Hence, it would be *un*reasonable for anyone to draw the conclusion that he was "officially" endorsing anything. Moreover, one simply cannot measure reasonableness based on the perceptions of the most religiously hostile and hypersensitive amongst us. Mr. Weinstein and the MRFF clearly fall into that category. That is confirmed by Mr. Weinstein's allegation that General Olson violated in some way "the solemn oath he took to support and defend the United States Constitution." Such a charge is difficult to fathom, since the Constitution includes both the Free Exercise and Free Speech clauses of the First Amendment. Accordingly, General Olson's religious remarks were fully protected by the First Amendment. *There was no violation.*

I. GENERAL PRINCIPLES CONCERNING RELIGIOUS FREEDOM.

The First Amendment to the U.S. Constitution reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. In 1892, the Supreme Court stated that "this is a religious nation." *Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). More recently, Supreme Court Justice Douglas, writing in *Zorach v. Clauson*, clearly and succinctly summarized the place religion holds in our history and the role the government plays in protecting religious expression and freedom:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that *lets each flourish according to the zeal of its adherents and the appeal of its dogma.*

343 U.S. 306, 313-14 (1952) (emphasis added).

Thus, "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality." *School District v. Schempp*, 374 U.S. 203, 226 (1963). The Court has consistently noted the importance the role of neutrality plays, emphasizing that neutrality prohibits hostile treatment of religion. In *Board of Education v. Mergens*, Justice O'Connor aptly noted that "[t]he 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*." 496 U.S. 226, 248 (1990) (emphasis added). Justice Brennan, in his concurrence in *Schempp*, also recognized that the Religion Clauses required the government to be neutral, not hostile, towards religion: "The State must be steadfastly neutral in all matters of faith, and neither favor *nor inhibit* religion." *Schempp*, 374 U.S. at 299 (emphasis added).

Further, the Supreme Court has noted a clear distinction in the context of religious expression between government speech and 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*." *Mergens*, 496 U.S. at 250 (emphasis added). General Olson's remarks were private speech, not government speech. Hence, his remarks were protected speech. The Supreme Court also aptly noted that it is not a difficult concept to understand that the Government "does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis." *Id.*

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 be legitimately limited to what some government official or civilian advocacy group (like the MRFF) or civilian attorney (like Mr. Weinstein) may think it should mean—or is willing to tolerate. After all, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Hence, it is clear that the enforcement of a blanket rule prohibiting individuals serving in the military from discussing their faith or expressing other religious sentiments violates the most basic First Amendment rights of free speech and free exercise of religion. Such Constitutional rights also apply to senior officers like General Olson. Granted, due to the unique nature of military life and society, there are times when senior officers must limit their religious or philosophical expression—such as situations where there is a captive audience—but the forum where General Olson spoke was not a captive audience. No one was required to be in attendance, and no one was required to stay to hear General Olson's remarks. Nor was it a military audience, so the concerns about seniors vis-à-vis subordinates was not present.

II. RELIGIOUS EXPRESSION IN THE MILITARY.

The Department of Defense has correctly recognized its responsibility under the Constitution to provide for the religious free exercise needs of men and women in uniform, consistent with the requirement to maintain good order and discipline.

A. Official DOD Policy Protects Religious Expression.

- All military commanders must provide for the free exercise of religion by servicemen under their command:

  - "[C]ommanders [must] discharge their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution." Dep't of Def. Directive 1304.19 § 4.1 (June 11, 2004) ("Appointment of Chaplains for the Military Departments") (hereinafter DoDD).

- All requests to accommodate religious expression *should* be approved when not adversely impacting (1) military readiness, (2) unit cohesion, (3) standards, or (4) discipline:

  - "A basic principle of our nation is free exercise of religion. The Department of Defense places a high value on the rights of members of the Armed Forces to observe the tenets of their respective religions. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline." DoDD 1300.17 § 3.1 (Feb. 3. 1988) ("Accommodation of Religious Practices Within the Military Services").

- When resolving *difficult* questions about religious accommodation, commanders should consider the following factors:

  - "The importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale and cohesion."
  - "The religious importance of the accommodation to the requester."
  - "The cumulative impact of repeated accommodations of a similar nature."
  - "Alternative means available to meet the requested accommodation."
  - "Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons." *See* DoDD 1300.17 § 4.1.

B. Limitations on Religious Free Exercise in the Armed Forces May Be Justified Solely by Actual Military Necessity, Not by a "Heckler's Veto" of Those Opposed to Religion.

A major concern regarding free exercise of religion in uniform deals with how commanders determine when unit cohesion is adversely affected since "adverse impact" on "unit cohesion" is a very vague standard. To protect religious expression to the extent required by the Constitution, commanders must not curtail accommodation based on hypersensitive or hostile reaction, merely because one or a few Service Members dislike the religious message. As noted in *Lee v. Weisman*, the Supreme Court did "not hold that *every state action* implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." 505 U.S. 577, 597 (1992) (emphasis added). Where the offending expression is a private message made by one or more individuals (i.e., not "state action"), the commander must be even more careful in fulfilling his responsibility to protect and defend the Constitutional rights of the Service Members under his command, since First Amendment rights were intended to protect the individual from his own Government.

In other words, threats to unit cohesion must be real, not illusory. Accordingly, commanders must studiously avoid blindly reacting to complaints (such as the frequent, erroneous Establishment Clause complaints lodged by the MRFF and similar groups), especially when

any reasonable, minimally informed, person knows that no endorsement of religion is intended. That principle was clearly enunciated in *Americans United for Separation of Church & State v. City of Grand Rapids*, where the court noted that there are persons in our society who see religious endorsements, "even though a reasonable person, and any minimally informed person, knows that no endorsement is intended." 980 F.2d 1538, 1553 (6th Cir. 1992). The court characterized such a hypersensitive response as a form of heckler's veto, to which the court aptly applied the label, "'ignoramus' veto." *Id.*

CONCLUSION

Mr. Weinstein and the MRFF have seriously misconstrued—and continue to misconstrue—the Constitutional requirements regarding religious exercise and expression in the U.S. Armed Forces. The MRFF seeks to convince the Armed Forces that virtually all religious expression must be excised from the daily life of Service Members in order to avoid violating the Establishment Clause. Yet, Justice O'Connor aptly noted the following regarding a "reasonable observer":

> There 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 [or hearer of remarks] 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.*

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (emphasis added). *See also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) ("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. . . .").

Service Members are deemed to be "reasonable observers." As such, they are deemed to know that many different faith groups are represented in the military, that adherents of different faith groups express themselves in different ways, that it is common to hear religious sentiments expressed, and that the military does not endorse one religious sentiment over another merely because it permits such sentiments to be expressed.

The MRFF and its allies want to remove all semblance of religious expression from the public sphere in the military. Such a policy singles out religion and its adherents for special detriment, thereby violating the very Establishment Clause the MRFF and its allies claim to be protecting. The Armed Forces have an obligation to protect the free exercise and free speech rights of all Service Members—believers and non-believers alike. Limiting religious expression to avoid offending the non-religious would require military officials to determine which religious expression to allow and which to disallow, in effect, preferring certain types

of religious expression over others, in itself something Government officials are precluded from doing by our Constitution.

In light of the foregoing, we urge you to disregard Mr. Weinstein's call to discipline General Olson in any way for giving a personal testimony about prayer. It is unreasonable to conclude that anyone hearing his remarks could conclude that he was *officially* endorsing anything. His remarks were clearly personal, and he presented them in a civilian forum where persons were free to come and go as they pleased (i.e., there was no captive military audience). Accordingly, *Mr. Weinstein's allegations are baseless, and they must be treated as such by you.*

Should DOD or any military Service desire ACLJ assistance in dealing with such a matter or in drafting or reviewing guidelines for subordinate commanders faced with similar or future MRFF demands, we stand ready to assist you.

Respectfully yours,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

Cc: The Honorable Ashton Carter, Secretary of Defense
The Honorable Deborah Lee James, Secretary of the Air Force