



Jay Alan Sekulow - Chief Counsel

1000 Regent University Drive - P.O. Box 64429 - Virginia Beach, VA 23467
Atlanta, GA - Mobile, AL - New Hope, KY - New Milford, CT - Scottsdale, AZ - Virginia Beach, VA - Washington, D.C.

Dear School Official:

In 1952, President Truman signed into law a joint resolution by Congress declaring an annual National Day of Prayer. In 1988, President Reagan amended the law by permanently setting the day as the first Thursday of every May. *See* 36 U.S.C. § 119 (West Supp. 2000); 131 Cong. Rec. S5323-03 (daily ed. May 2, 1985) (statement of Sen. Armstrong). As we approach the forty-ninth consecutive observance of the National Day of Prayer on May 4, 2000, we at the American Center for Law and Justice (ACLJ) would like to inform you of your rights to participate in National Day of Prayer activities.

By way of introduction, the ACLJ is a not-for-profit, public interest law and educational group. Our organization exists to educate the public and the government about the constitutional rights of citizens, particularly in the context of the expression of religious sentiments.

Governmental endorsement of the National Day of Prayer is well-documented and constitutional. For instance, in 1985

[m]ore than 20 States and over 50 cities . . . issued proclamations declaring [the day] a Day of Prayer . . . State and local coordinators . . . indicated that rallies [were] planned on the steps of city halls in at least 15 major cities. . . . One mayor of a large southern city sent a copy of his proclamation to all pastors in the city encouraging them to observe the Day of Prayer. . . . [and] [t]he Governor of Florida made a special 30-second and 60-second public service announcement encouraging Floridians to join in prayer for their State and Nation

131 Cong. Rec. S5323-03 (daily ed. May 2, 1985) (statement of Sen. Armstrong). Indeed, since at least 1993, members of the United States Congress have reserved the Caucus Room of the Cannon Building in Washington, D.C., to pray and celebrate the Day of Prayer. *See, e.g.*, 143 Cong. Rec. E818-03 (daily ed. May 1, 1997) (statement of Rep. Hefley); 139 Cong. Rec. S5549-01 (daily ed. May 6, 1993) (statement of Reverend Richard C. Halverson).

Unfortunately, despite the long history of official government acknowledgment of the role of religion in American life and observation of the National Day of Prayer, there are still those who would challenge that observation and the right of private citizens to participate in National Day of Prayer activities on public property or in the public schools. The purpose of this letter is to address questions and concerns you may have concerning the use of public facilities for religious

speech, prayer, and worship on the National Day of Prayer and students' rights to observe the National Day of Prayer in the public schools.

I. PRIVATE SPEECH IS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." This prohibition on governmental infringement of free speech was applied to the states via the Fourteenth Amendment's protection of fundamental personal rights and liberties. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The standard by which limitations upon the freedom of speech must be evaluated depends upon the character of the property being used. The United States Supreme Court has established the following three-pronged analysis for evaluating free speech cases: (1) Determine if the speech in question is protected by the First Amendment; (2) identify the nature of the forum in which the speech would take place; and (3) assess whether the government's exclusion of the speech from the forum is justified under the requisite standard. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 797 (1985). When a government entity denies an individual or group the opportunity to engage in protected speech in an appropriate forum without justification, it violates the First Amendment.

II. RELIGIOUS SPEECH IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

It is a fundamental proposition of constitutional law that religious speech is protected by the First Amendment:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted).

The Supreme Court in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), specifically included worship as a form of protected speech: "Here [University of Missouri–Kansas City] has discriminated against . . . speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." Thus, National Day of Prayer activities such as worship, religious speech, and prayer are protected speech under the First Amendment

III. WHETHER AND TO WHAT DEGREE THE GOVERNMENT MAY RESTRICT PROTECTED SPEECH DEPENDS UPON THE TYPE OF FORUM.

The United States Supreme Court has identified three types of public property for First Amendment expressive purposes: the traditional public forum, the designated public forum, and the nonpublic forum. *Perry Education Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Certain government properties are presumed to be traditional public fora, such as **streets, sidewalks, and parks**. See *United States v. Grace*, 461 U.S. 171, 177 (1983) ("streets, sidewalks, and parks, are considered, without more, to be 'public forums' [sic]"). Traditional public fora are areas which traditionally have been opened to public discourse and debate:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. C.I.O., 307 U.S. 496, 515 (1939).

It is well established that in a public forum, "the government's ability to permissibly restrict expressive conduct is very limited." *Grace*, 461 U.S. at 177 (citations omitted). In fact, "[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *U.S. v. Kokinda*, 497 U.S. 720, 726 (1990). Under strict scrutiny, the restrictions placed on an individual's speech "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Grace*, 461 U.S. at 177.

Traditional public fora are not the only type of fora open for public expression. Government-owned facilities which are opened for use by the public may also be public fora, available for expressive activities. For example, a courthouse lawn, a government-owned community center, or a high school auditorium made available for indiscriminate use by the public are considered to be areas which "the state has opened for use by the public as a place for expressive activity," and are therefore "open or designated public" fora. *Perry Education Ass'n*, 460 U.S. at 45 (emphasis added). See also *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (holding that public school facilities open to speech on particular subjects could not be closed to a religious viewpoint on those subjects); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (holding that a high school created a designated public forum by allowing noncurriculum-related clubs to meet on school grounds); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that public university facilities constituted a designated public forum). In both traditional public fora and designated public fora, the government may **not** censor speech solely based on the content of that speech absent a compelling government interest. *Perry Education Ass'n*, 460 U.S. at 45.

The third classification of public property is the nonpublic forum. A nonpublic forum exists where a governmental entity has not opened its facilities for general use by the public or any portion of the public. Even in a nonpublic forum, however, a government agency may not engage

in viewpoint-based discrimination (discrimination against one's point of view on an otherwise permissible topic) without a compelling governmental interest and a policy narrowly tailored to achieve that interest. *Carey v. Brown*, 447 U.S. 455, 461 (1980).

IV. THE ESTABLISHMENT CLAUSE REQUIRES GOVERNMENT NEUTRALITY TOWARD RELIGION AND DOES NOT JUSTIFY EXCLUSION OF RELIGIOUS SPEECH.

One of the most frequently advocated positions for restrictions on religious speech in the name of a "compelling state interest" is that of achieving the separation of church and state. The Supreme Court in *Widmar*, expressly rejected this defense to content-based discrimination by government officials:

[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

Widmar, 454 U.S. at 276.

Achieving separation of church and state cannot justify suppressing private speech because the Establishment Clause forbids **the government** from "establishing religion." A private individual can never violate the Establishment Clause because he is a private citizen. The Establishment Clause limits the power of government; it does not restrict the rights of individuals acting on their own behalf according to the dictates of their conscience. The Supreme Court has recognized that "there 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 (plurality) (emphasis in original). For the same reasons, accommodation of religious activity does not violate the Establishment Clause. *Cf. Zobrest v. Catalina Foothills District*, 509 U.S. 1 (1993) (holding that state did not violate the Establishment Clause by providing a sign-language interpreter, through a neutral program, for a deaf student attending a religious school).

Efforts to deny access to a public forum for celebration of the National Day of Prayer based on concerns about violating the Establishment Clause are unjustifiable. The Establishment Clause is not a sufficiently compelling government interest to legitimize a governmental entity's discriminatory treatment of an individual attempting to observe the National Day of Prayer.

In *Lamb's Chapel*, the Supreme Court rejected the argument that the School District would be in violation of the Establishment Clause by permitting community groups to use their facilities for a religious purpose:

We have no more trouble than the *Widmar* court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. . . . The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 395 (1993). In *Pinette*, the Court summed up its holdings in *Widmar* and *Lamb's Chapel* stating:

The State did not sponsor respondent's expression, [because] the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups. . . . We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays 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.

Pinette, 515 U.S. at 763-64.

A policy of equal access for religious speech conveys a message "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." *Mergens*, 496 U.S. at 248 (plurality). Favoring non-religious speech over religious speech would also create an impermissible favoritism toward a secular viewpoint. The Supreme Court pronounced this view by stating that "[w]e agree of course that the state may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe." *Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

Just last year, the United States Court of Appeals for the Eleventh Circuit reaffirmed this fundamental principle in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), stating that "discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion. . . ." 180 F.3d at 1261. The court explained the untenable consequences of inflicting a "prohibition of all religious speech in our public schools:"

'Cleansing' our public schools of all religious expression . . . inevitably results in the 'establishment' of disbelief—atheism—as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion. Permitting students to speak religiously signifies neither

state approval or disapproval of that speech. The speech is not the State's—either by attribution or adoption. The permission signifies no more than that the state acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d at 1261 (footnote omitted). The Eleventh Circuit made it clear that "[t]he Constitution does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions." *Chandler*, 180 F.3d at 1262.

Consequently, there is neither advancement of, nor entanglement with, religion when a public forum is utilized by religious speakers. As the Eleventh Circuit Court of Appeals noted in *Chabad-Lubavitch v. Miller*, 5 F.3d 1383, 1389 (11th Cir. 1993):

Part of the majesty of the public forum is that it insulates the government from the necessity of scrutinizing the content of the citizenry's speech. Through a broad policy of content-neutral inclusion, the public forum is uniquely situated to avoid the need for the State to make religion-based exclusionary judgments and therefore risk unconstitutional entanglement with religion.

Recent Supreme Court pronouncements render untenable any suggestion that speech by private parties, in public fora available for use by a variety of private organizations, could somehow trigger a violation of the Establishment Clause. See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 839 (1995). As Justice Scalia observed in *Pinette*, to "attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence." *Pinette*, 515 U.S. at 764. Thus, when a municipal government allows non-religious speakers to engage in protected speech activities on courthouse lawns, steps, or the like, it is simply acting in a neutral manner when it affords religious speakers the same rights.

Thus, a true violation of the Establishment Clause occurs when the government *prohibits* religious speakers *equal access* to government facilities, not when it simply treats religious speakers in a neutral manner. Therefore, local governments cannot assert the Establishment Clause as a compelling interest to justify discriminatory treatment of religious persons seeking to use government facilities for a National Day of Prayer event.

V. EVEN IN NONPUBLIC FORUM, SPEECH RESTRICTIONS ARE PERMISSIBLE ONLY IF THE DISTINCTIONS DRAWN ARE REASONABLE AND VIEWPOINT NEUTRAL.

The mere fact that a forum is a *nonpublic* forum—not opened up for expressive activity—does not permit the government to discriminate against religious speech.

Control over access to a nonpublic forum can be based on subject matter and speaker identity **so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are**

viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . , or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 806 (1985) (emphasis added). Thus, where a municipality or other governmental entity permits ceremonies honoring war veterans or celebrations of historic city events, it should likewise permit National Day of Prayer activities; failure to do so would constitute discrimination on the basis of religious viewpoint. Such viewpoint discrimination violates the First Amendment: "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

The exclusion of protected speech is not allowed unless it preserves the purposes of the forum and is viewpoint neutral. The Supreme Court, in *Lamb's Chapel*, determined that, even in a nonpublic forum, exclusions of religious speech are viewpoint discriminatory rather than viewpoint neutral. Therefore, such an exclusion would not even pass "the reasonableness standard" set forth in *Cornelius*. The Court in *Cornelius* recognized that exclusions of religious speech are unconstitutional if they are viewpoint discriminatory rather than viewpoint neutral 473 U.S. at 806.

This principle was reaffirmed in *Rosenberger* where the Court ruled unconstitutional a university's policy of denying a religious newspaper access to university funds because of its religious perspective:

When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberge, 515 U.S. at 829 (citation omitted). *See also Good News/Goods Sports Club v. Board of Education for the City of Ladue*, 28 F.3d 1501, 1506-07 (8th Cir. 1994) (observing that the *Lamb's Chapel* Court "refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter"). Thus, the government may not constitutionally deny a religious speaker access to public facilities for the purpose of censoring the speaker's religious point of view on an otherwise includible subject.

VI. STUDENTS HAVE A RIGHT TO OBSERVE THE NATIONAL DAY OF PRAYER IN STUDENT BIBLE CLUBS IN PUBLIC SCHOOLS.

The Supreme Court has clearly established the right of students to organize and participate in Bible Clubs. In an 8-to-1 decision, the Supreme Court, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), upheld the constitutionality of the Equal Access Act which allows Bible Clubs or Prayer Groups to meet on public school campuses. Congress enacted the Equal Access Act to cure pervasive anti-religious sentiment exhibited by public secondary schools in the aftermath of the Supreme Court's school prayer cases. "[T]he Act was intended to address perceived widespread discrimination against religious speech in public schools." *Mergens*, 496 U.S. at 239.

Within these Bible Clubs, students may observe the National Day of Prayer. The Equal Access Act specifically protects the religious content of such meetings from regulation by school officials. Paragraph (a) of the Act states: "[Schools may not discriminate against] any students who wish to conduct a meeting . . . on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C.A. § 4071(a) (1984). Consequently, if school officials allow secular student clubs to hold meetings and assemblies on campus, they must also permit Bible Clubs to hold religious meetings and assemblies—including National Day of Prayer rallies around the flagpole. To deny Bible Clubs this right would violate the Equal Access Act.

Such discrimination would also violate the First Amendment rights of public school students. Students in the public schools have a First Amendment right to engage in religious speech on campus. The United States Supreme Court announced a landmark decision concerning students' free speech rights in 1969. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), the Supreme Court held that "**[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.**" *Id.* at 506 (emphasis added).

The *Tinker* Court made it clear that a student's free speech rights apply at all times during the school day, "when [a student] is in the cafeteria, or on the playing field, or on campus during the authorized hours. . . ." 393 U.S. at 512-13. Under the *Tinker* standard, school administrators can only prohibit protected speech by students if it "materially and substantially interfere[s] with the requirements of appropriate discipline." 393 U.S. at 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Therefore, if students wish to celebrate the National Day of Prayer with a time of prayer, school administrators may not restrict that speech unless it "materially and substantially interfere[s] with the requirements of appropriate discipline." *Id.* Failure to permit this religious speech, absent substantial disruption, would violate the First Amendment's prohibition on content- and viewpoint-based discrimination.

Administrators may not attempt to stifle or restrict students' observation of the National Day of Prayer by referring to the "separation of church and state." The private nature of student speech in the context of Bible Clubs takes such speech out of the purview of the Establishment Clause. As stated above, the Supreme Court in *Mergens* explained that "there 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." 496 U.S. at 250 (plurality) (emphasis in original).

Under both the Equal Access Act and the First Amendment, students are free to observe the National Day of Prayer without fear of interference by school officials, provided that the observation does not substantially interfere with school discipline. In fact, school administrators are in danger of violating the Equal Access Act and the Constitution if they forbid, censor, or inhibit the prayer activities of Bible Clubs or Prayer Groups, absent a substantial interference with school discipline.

CONCLUSION

The United States Supreme Court has stated 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." *Mergens*, 496 U.S. at 248 (plurality) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Accordingly, the First Amendment precludes any governmental effort to single out and censor—or otherwise burden—the speech of private parties solely because that speech is religious.

We hope this letter has helped clarify the rights of private citizens to observe the National Day of Prayer by engaging in religious speech in public fora and the public schools. The American Center for Law and Justice is committed to defending the rights of individuals in the public arena. Because of our commitment, we are available to answer any questions you might have concerning this letter.

Please feel free to share this informational letter with your local government officials, school officials, and others in your community.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE

Jay Alan Sekulow
Chief Counsel