ACLJ
AMERICAN CENTER
for LAW & JUSTICE

[redacted]

Nov 26, 2024

VIA E-MAIL & FED-EX

David Voye, Division Manager
Allegheny County Elections Division
542 Forbes Avenue, Room 326
Pittsburgh, PA 15219
(412) 350-4500
David.Voye@AlleghenyCounty.US

Re: Allegheny County's Unconstitutional Prohibition of Election Worker Bible Use

Dear David Voye,

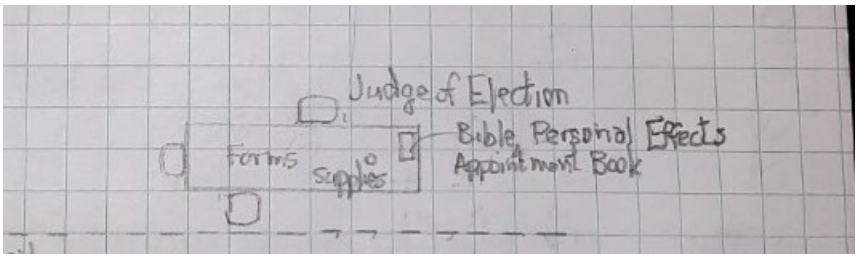
The American Center for Law & Justice (ACLJ)[1] represents John Goodhart, a Judge of Elections in Pittsburgh, Pennsylvania, with regard to his constitutional right to express his faith and read his Bible on his personal time. Goodhart was instructed by an official in your office that he was not allowed to have his Bible visible at the polling place where he worked, and therefore could not read it during his employment, even though other election workers were engaged in their own personal activities during their personal time. This discriminatory instruction specifically targeting religious activity was a violation of the First Amendment and contrary to established law. A summary of the facts and law are set forth below.

[1] By way of introduction, the ACLJ is an organization dedicated to the defense of religious and constitutional freedoms. The ACLJ engages legal, legislative, and cultural issues through advocacy, education, and litigation that includes representation before the Supreme Court of the United States and international tribunals around the globe. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding 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) (striking down an airport's ban on First Amendment activities).

Summary of Facts

John Goodhart is an elected Judge of Elections in Pittsburgh, Pennsylvania. He is currently serving in his second four-year term and has been serving for six and a half years. Election workers spend an entire day running elections, and everyone brings personal items of various kinds for quiet periods, like books, magazines, personal phones, snacks, etc. In fact, a nonprofit organization that supports election workers and encourages volunteers likewise notes, "You may get a break so it's a good idea to bring a book or magazine."[2] Your election officer handbook[3] does not prohibit the bringing of personal items by election workers.

Goodhart has never had any issues with bringing his Bible before or have anyone complain about his personal religious materials. He brings his Bible during elections as his personal item. The Bible is off to the side whenever he engages in his official duties, and he only opens his Bible to read when things are quiet and has a break from his official duties. Goodhart has never proselytized to voters in any way whatsoever. He has a fellow election official in his precinct who also brings her Bible as a personal item. She, likewise, keeps her Bible off to the side, away from voters, and only opens it during break times. In particular, Goodhart keeps his Bible off to the side with his other personal effects, such as an appointment book and a water bottle, as far away on the table from where voters might sit as possible. Other personal effects, like a computer bag and a lunch sack, are kept on the floor near him under the table. Goodhart has drawn an image of where his Bible and personal effects were placed:



Goodhart received a telephone call from an Allegheny County Elections Division staff member, who only identified herself as Hannah, at 2:21 pm on Election Day. She informed him that a voter complained about the presence of a closed Bible among his personal effects on the table beside him. She ordered him to remove the Bible from view as he is a functionary of the state within the polling place at that time. Goodhart asked why, and instead of any specific policy of Allegheny County being identified, he was told "the separation of church and state" was the basis for the order. Goodhart later informed the other election worker that she needed to put her Bible away also.

Goodhart was told that his Bible could not be visible to voters. He was not given further detail on what exactly that means, but he certainly was not given any indication that he could read

[2] https://www.pennfuture.org/Blog-Item-What-You-Need-to-Know-About-Being-a-Poll-Worker
[3] https://www.alleghenycounty.us/files/assets/county/v/5/government/elections/documents/election-officers-handbook.pdf

the Bible on his breaks while at his desk, and likely cannot, as the Bible would still be visible. The key instruction he was given was that the Bible was not to be visible in the polling place. But reading his Bible in private is not expedient as he supervises the processing of voters, particularly during the busy General Election. The polls in the municipality of Ben Avon, Pittsburgh are in a large, open hall. He purposes, according to his sworn oath, to minimize his absence from his poll. All election officers are entitled to breaks either at their stations or off-site, as circumstances and personnel permit. There are intervals of low voter traffic wherein situations requiring individual voter assistance may be irregular. His Bible reading at his table during a "working lunch" is more serviceable to voters and attendant elections officers than doing so in seclusion, and such breaks are typical for other election officers.

The offended voter did not speak to Goodhart. At no time during his years of service has he opened a Bible in the immediate presence of an individual, nor has he ever proselytized anyone.

The staff member who called Goodhart referred only to a Bible on Goodhart's table, not the other Bible in the polling place. She did not refer to any other person or Bible, but instead discriminated specifically against Goodhart's religious materials.

Statement of Law

As the Supreme Court recently reiterated, "the Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expression." *Id*. at 2421. "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id*.

The Supreme Court has also made clear 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." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). The Constitution's Establishment Clause does not require that government employees be banned from expressing their religious faith. On the contrary, the Constitution requires equal treatment for religious expressions in the public sphere.

Government employees have a First Amendment right to equal treatment for their religious activity. *See Kennedy*, 597 U.S. at 544. The First Amendment right to speak freely on public issues does not disappear, merely because someone becomes a public employee. *Id.* at 531. "The theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable, has been uniformly rejected." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967)).

The test in *Kennedy* governs the Free Speech rights of public officials. It is a two-part test. The first step considers whether an employee speaks according to official duties or as a private citizen. "Under the *Pickering-Garcetti* framework, a second step remains where the government

may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern." *Kennedy*, 597 U.S. at 531.

In *Kennedy,* a school district disciplined and ultimately fired a football coach for praying on the field after weekly football games. In examining whether Coach Kennedy's speech was protected under the First Amendment, the Supreme Court considered whether the speech (his prayers) took place within the scope of his official duties as a coach. *Id.* at 530. The Court explained:

> During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. *Garcetti*, 547 U.S., at 421. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

Id. The Court explained that the mere fact that an employee is on duty at the time of his/her speech does not categorically eliminate the First Amendment's protections. *Id.*

The policy in *Kennedy* required Coach Kennedy not to engage in any "demonstrative" religious activity in front of students, in order to avoid any possibility that students might participate. *Id.* at 540. The school attempted to justify this policy based on the Establishment Clause. The Court rejected this policy as a violation of the First Amendment.

> The only added twist here is the District's suggestion not only that it may prohibit teachers from engaging in any demonstrative religious activity, but that it must do so in order to conform to the Constitution.
>
> Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be required to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it.

Id. at 540-541. The Supreme Court in *Kennedy* has thus rejected the notion that public school employees can be categorically prohibited from praying publicly. The Establishment Clause contains no such requirement; on the contrary, the Constitution protects the rights of public school employees to engage in religious speech, even before others, when that speech is not in their official capacity. Government employees have a right to live out their faith without religious discrimination. It is essential to understand 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)).

By reading his Bible during his personal time while on a break at his election desk, Goodhart is engaged in private activity, not within the scope of his employment. The Supreme Court's analysis in *Kennedy* of a similar matter should be dispositive here. Goodhart wishes to engage in private religious activity, during his personal time, when his fellow coworkers are likewise engaging in private, personal activity. That religious activity is "unquestionably of inherent public concern." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011); *see also Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) ("[T]he speech is religious expression and it is obviously of public concern.").

Most importantly, the balancing of the interests does not favor this restriction on Goodhart's private religious Bible reading. The simple presence of a religious symbol at a polling place is not a First Amendment violation. In fact, courts have rejected that very argument. In *Otero v. State Election Bd.*, 975 F.2d 738, 739 (10th Cir. 1992), the court explained that even using a church as a polling place, far more of a religious presence than simply seeing a Bible, is no violation of the First Amendment. "[B]y voting in a church building plaintiff is not required to attest to the nature of his religious beliefs, and that the burden on free exercise of religious beliefs 'is so slight that it does not begin to outweigh the interest of the state in having available to it the additional polling places which the use of the churches affords.'" *Id.* at 741 (quoting *Berman v. Board of Elections*, 420 F.2d 684, 686 (2nd Cir. 1969)). Likewise, here, "Merely employing an individual, such as plaintiff, who unobtrusively displays [] religious adherence is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion." *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 554 (W.D. Pa. 2003).

Simply put, viewpoint discrimination is contrary to what *Pickering* requires. *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny County*, 39 F.4th 95, 109 (3d Cir. 2022) ("[C]ontrary to the District Court's statement, public employers do not have a free hand to engage in viewpoint discrimination toward their employees. At present, it suffices to note that the more a public employer's policy looks like viewpoint discrimination—or is likely to foster such discrimination—the less likely it will be to survive scrutiny under *Pickering-NTEU*."). The Third Circuit struck down a policy prohibiting the wearing of "Black Lives Matter" masks, emphasizing that even when regulating the speech of its employees, the government should not discriminate among views. "Concern over viewpoint discrimination is the very reason *Pickering* rejected the older rule that the First Amendment does not protect government-employee speech." *Id.* at 108.

The key point that courts have regularly reiterated is that the Establishment Clause does

not require viewpoint discrimination, especially not religious viewpoint discrimination. *See Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996) ("We conclude that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials."); *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001) (focusing on the fact that employees were disciplined for Bible reading but employees who engaged in nonreligious personal activity at the same time were not); *Nichol v. Arin Intermediate Unit 8*, 268 F. Supp. 2d at 541 (applying *Pickering* and holding that teacher's wearing of a cross was symbolic speech protected by the First Amendment). *Nichol* is illustrative of the basic problem with such a discriminatory policy: "there are neither compelling nor important government interests promoted by prohibiting free exercise of religion and non-proselytizing, non-coercive religious symbolic speech by employees in public schools, but not secular symbolic speech by those employees." *Id.* at 551.

In short, the reason given for the suppression of Goodhart's Bible—a concern for the "separation of church and state"—is not a valid one as a matter of law. As the Court stated in *Kennedy*, rejecting the notion that the Establishment Clause is violated when a "reasonable observer" perceives government action endorsing religion, "the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Kennedy*, 597 U.S. at 534 (quoting *Good News Club v. Milford Central School*, 533 U. S. 98, 119 (2001)). "An Establishment Clause violation does not automatically follow whenever a public school or other government entity 'fail[s] to censor' private religious speech." *Id.* (quoting *Mergens*, 496 U.S. at 250).

Conclusion

This issue is still ongoing, as our client is now unsure whether he can read his Bible, in the manner described above, the next time he administers elections. In light of the violation of our client's constitutional rights, **we demand your assurances on or before December 10, 2024**, that you will not prohibit Mr. Goodhart from exercising his constitutional rights to have a Bible for his personal use on personal time during the administration of elections. Should you wish to discuss this matter further or have any questions in this regard, please feel free to contact me directly at [redacted] or by email at [redacted]

Sincerely,

Nathan Jeremiah Moelker

Nathan Moelker*
Associate Counsel
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Admitted in Virginia