



March 31, 2022

VIA OVERNIGHT DELIVERY SERVICE

Ms. Sonja Brown
Interim Director, VA New Mexico Health Center
Raymond G. Murphy VA Medical Center
1501 San Pedro Drive, S.E.
Albuquerque, NM 87108-5153

RE: Removal of Bibles & Other Religious Literature From the Patriot Store at the Raymond G. Murphy VAMC as Demanded by Mr. Michael L. "Mikey" Weinstein, Founder & President of the Military Religious Freedom Foundation (MRFF)

Dear Ms. Brown:

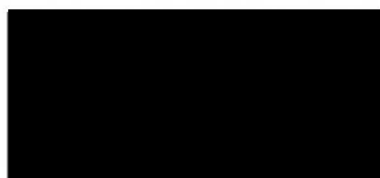
By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States.¹

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Mr. Michael L. "Mikey" Weinstein of the Military Religious Freedom Foundation (MRFF) has been boasting on his website that his recent efforts led to the removal within 24 hours of "Christian Bibles" from the "Patriot Store" after he contacted senior leaders at the Raymond G. Murphy VAMC in Albuquerque.² He did not, however, identify by

¹See, 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).

²See <https://myemail.constantcontact.com/At-MRFF-s-Request--Raymond-G--Murphy-VAMC--Albq--NM--Does-the-Right-Thing--Removes-Christian-Bibles-from-VA-Easter-Display.html?soid=1101766362531&aid=cEpS96kBES0>



name the person or persons with whom he spoke. The purpose of this letter is twofold: first, to point out that the decision by officials at the Raymond G. Murphy VAMC to remove the Bibles and other religious literature from the Patriot Store, *rather than being in compliance with the U.S. Constitution, actually violated it by singling out religious expression for special detriment while favoring non-religious expression*; and, second, to demand that the officials who made the decision remedy their mistake forthwith. On his website, Mr. Weinstein claimed he was reacting to “the unconstitutionality of [the] sectarian Christian literature display; especially as it was juxtaposed right next to an otherwise non-objectionable display of ‘secularish’ [sic] chocolate Easter bunnies related holiday candy and Easter bunny cutouts et al.”³ As explained more fully below, Mr. Weinstein’s conclusion that the display and sale of so-called “sectarian Christian literature” was unconstitutional is simply incorrect.

Mr. Weinstein included the following photo to show what he had achieved:



(Photo Credit Military Religious Freedom Foundation)

Mr. Weinstein’s photo appears to confirm that VAMC officials in Albuquerque complied with his demand, permitting the continued display and sale of the non-religious items associated with Easter while refusing further display and sale of the religious items. Mr. Weinstein had raised the specter of the VAMC’s potential violation of the Establishment Clause of the First Amendment when he spoke to VAMC officials.

Accordingly, we will begin by discussing the First Amendment.

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”⁴ One of the methods used by the Supreme Court of the United States for interpreting the meaning and legal reach of the First Amendment is to examine how those who drafted and ratified the Amendment acted in light of its express terms. “[T]he

³*Id.* Note Mr. Weinstein’s description of the secular items as “non-objectionable,” thereby tipping his hand that, in his view, the religious items were “objectionable” from a constitutional perspective.

⁴U.S. CONST. amend. I.

Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”⁵ One can begin to understand what the Establishment Clause allows (and disallows) by examining what transpired in the earliest years of our Nation during the period when the First Amendment was being drafted and subsequently ratified.⁶ For example, “the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer,”⁷ and a “statute providing for the payment of these chaplains was enacted into law on September 22, 1789.”⁸ Within days of legislating to pay Congressional chaplains from the federal treasury, “final agreement was reached on the language of the Bill of Rights.”⁹ As former Chief Justice Burger explained, it “can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause to forbid what they had just declared acceptable.”¹⁰ *If the Establishment Clause is not violated when the government pays for legislative chaplains out of the U.S. Treasury to offer spoken prayers, then it is certainly not violated by offering for sale to interested persons passive religious items, like Bibles and other literature, in a display.*

Early national leaders also acted in ways that some today—like Mr. Weinstein and his organization—argue expressly violate the Establishment Clause. For example, President George Washington issued proclamations of thanksgiving to Almighty God during his presidency,¹¹ and President John Adams called for a national day of fasting and prayer.¹² President Thomas Jefferson—a man often described as a strong defender of strict church-state separation—signed multiple Congressional acts to support Christian missionary activity among the Indians.¹³ Further, during his presidency, President Jefferson also approved a curriculum for schools in the District of Columbia which used the Bible and a Christian hymnal as the primary texts to teach reading,¹⁴ and he signed the Articles of

⁵*Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

⁶Most agree that, at a minimum, the Establishment Clause was intended to prohibit the creation of a national church for the U.S., such as existed in England. Nevertheless, one must keep in mind that the First Amendment did not preclude individual states from adopting a state church or a state religion. See CARL ZOLLMAN, *AMERICAN CHURCH LAW* 2–4 (2d ed. 1933). In fact, Massachusetts was the last state to disestablish its state church, and it did so of its own accord in 1833, more than forty years after the ratification of the First Amendment. Kelly Olds, *Privatizing the Church: Disestablishment in Connecticut and Massachusetts*, 102 J. POL. ECON. 277, 281–82 (1994).

⁷*Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983).

⁸*Id.* at 788.

⁹*Id.* (citation omitted). The First Amendment is part of the Bill of Rights.

¹⁰*Id.*; see also *id.* at 790.

¹¹E.g., CATHERINE MILLARD, *THE REWRITING OF AMERICA’S HISTORY* 61–62 (1991).

¹²Proclamation of President John Adams (Mar. 6, 1799), in 1 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897* 284–86 (1899).

¹³See DANIEL L. DRIESBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 127 (1987) (noting that the 1803 treaty with the Kaskaskia Indians included federal funds to pay a Catholic missionary priest; noting further treaties made with the Wyandotte and Cherokee tribes involving state-supported missionary activity).

¹⁴JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* 100 (1982) (citing 1 J. O. WILSON, *PUBLIC SCHOOL OF WASHINGTON* 5 (1897)).

War which “[e]arnestly recommended to all officers and soldiers, diligently to attend divine services.”¹⁵ Moreover, once the U.S. Navy was formed, Congress enacted legislation directing the holding of, and attendance at, divine services aboard U.S. Navy ships.¹⁶

As one honestly examines Governmental acts contemporaneous with the adoption of the First Amendment, it is difficult to deny that, in the early days of our Republic, church and state existed relatively comfortably (and closely) together, with contemporaries of the drafters of the First Amendment showing little concern that such acts violated the Establishment Clause. As the Court in *Marsh v. Chambers* aptly recognized, actions of the First Congress are “contemporaneous and weighty evidence” of the Constitution’s “true meaning.”¹⁷ Moreover, in *Marsh*, the Court held that legislative prayers do not violate the Establishment Clause of the First Amendment.¹⁸ Instead the Court found them to be “a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁹ *Offering Christian literature for sale to interested buyers in a VAMC gift shop fits nicely into that category, especially in light of the fact that the largest religious faith in the United States is some variant of the Christian faith.*

The Supreme Court has aptly noted that “this is a religious nation.”²⁰ 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 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.²¹

¹⁵CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 63–64 (1964).

¹⁶Act of March 2, 1799, ch. XXIV, 1 Stat. 709 (where Congress enacted legislation requiring commanders of ships with chaplains on board “to take care that divine service be performed twice a day, and the sermon preached on Sundays”); Act of March 23, 1800, ch. XXXIII, 2 Stat. 45 (where Congress directed commanders of ships to require the ship’s crew “to attend at every performance of the worship of God”).

¹⁷*Marsh*, 463 U.S. at 790 (citation omitted); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 328 (1936) (noting that understanding “placed upon the Constitution . . . by the men who were contemporary with its formation” is “almost conclusive”) (citation omitted).

¹⁸*Marsh*, 463 U.S. at 792.

¹⁹*Id.*

²⁰*Holy Trinity v. United States*, 143 U.S. 457, 470 (1892); see also *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion) (“[O]ur national life reflects a religious people . . .” (quoting *Schempp* 374 U.S. at 213)); *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) (“We are a religious people whose institutions presuppose a Supreme Being.” (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952))); *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (noting “our heritage as a religious people”).

²¹343 U.S. 306, 313–14 (1952) (emphasis added).

Further, the Supreme Court recognized that strict separation between church and state could lead to absurd results. For example, the Court stated that the First Amendment

does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: “God save the United States and this Honorable Court.”²²

Rather than a bright-line rule, the so-called “wall” separating church and state “is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship,”²³ and the location of the line separating church and state must be determined on a case-by-case basis.²⁴ Justice Brennan explained it this way: “The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”²⁵ *Strict* church-state separation has never been required in the United States and is not required now. Mr. Weinstein fails to understand this and advocates for strict separation (which is reflected in the VAMC officials’ decision to remove only religious items from the Patriot Store based on his complaint).

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 . . . as subversive of American ideals and therefore subject to unique disabilities.”²⁶ 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.”²⁷ *Removing only the religious items dealing with Easter while leaving the non-religious items violates the neutrality required of government agents like those at the Raymond G. Murphy VAMC in Albuquerque.*

Further, neutrality does not require excising all religious expression from government fora. In *Marsh v. Chambers*, the Court considered the constitutionality of prayers led by paid legislative chaplains. The Court concluded that chaplain-led prayer, *even if such prayer is explicitly Judeo-Christian in form*, opening each day’s legislative session “is

²²*Id.* at 312–13; *see also id.* at 314 (“[N]o constitutional requirement . . . makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”).

²³*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

²⁴*Id.*

²⁵*Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

²⁶496 U.S. 226, 248 (1990) (emphasis added).

²⁷*Schempp*, 374 U.S. at 299 (emphasis added).

not . . . an ‘establishment’ of religion,” but rather “a tolerable acknowledgment of beliefs widely held among the people of this country.”²⁸ *Marsh* refuted the contention that clergy-led, ceremonial prayer violated the Establishment Clause merely because a particular prayer might reference monotheistic terminology or beliefs. In *Marsh*, the Court rejected the argument that selection by the Nebraska legislature of a Presbyterian clergyman who chose to pray in the “Judeo-Christian” tradition violated the Establishment Clause. The Court declared: “We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church.”²⁹ The Court noted that “[t]he content of the prayer is not of concern to judges where, *as here*, there is *no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief.*”³⁰ In *Town of Greece v. Galloway*, the Court reaffirmed its holding in *Marsh*, and upheld a practice that included explicitly Christian prayers before town council meetings.³¹ The Court noted that “Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion”³² Once again, *offering Christian religious items for sale does not violate the Establishment Clause*³³; *instead, doing so not only reflects “a tolerable acknowledgment of beliefs widely held among the people of this country,” which the Supreme Court has found to be fully constitutional, it is also far removed from government establishment of religion because it simply allows private persons to make private decisions as to what to purchase. There is a de minimis governmental role here.*

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 . . . as subversive of American ideals and therefore subject to unique disabilities.”³⁴ *Removing only religious items does in fact subject religion and its adherents to unique disabilities vis-à-vis non-religious items.*

The Supreme Court noted in *Rosenberger v. Rector & Visitors of the Univ. of Va.*: “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.”³⁵ *In this matter, by removing the Christian literature and retaining Easter bunnies, it was the Christian religious message that was being discriminated against. Accordingly, it is presumed to be unconstitutional; if officials at the VAMC disagree, it is the VAMC officials who bear the burden of persuasion to show*

²⁸*Marsh v. Chambers*, 463 U.S. 783, 792 (1983); accord *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820 (2014).

²⁹*Id.* at 793.

³⁰*Id.* at 794-95 (emphasis added).

³¹*Town of Greece*, 134 S. Ct. at 1823-24.

³²*Id.* at 1823.

³³Nor would offering Jewish items, Muslim items, Buddhist items, etc., violate the Constitution.

³⁴496 U.S. 226, 248 (1990) (emphasis added).

³⁵515 U.S. 819, 828 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)) (emphasis added).

that they acted correctly in this matter, and we would be interested in hearing their arguments, should they desire to make a case for their actions.

* * * * *

Although we will assume *arguendo* that personnel at the Raymond G. Murphy VAMC were attempting to act in good faith when they accepted Mr. Weinstein's arguments and made the decision to remove the Easter-themed Christian religious items for sale in the Patriot Store, as indicated above, they were relying on erroneous advice and a misunderstanding of what the Constitution requires. Instead of complying with the Constitution, they violated it, albeit inadvertently.

Two points follow from this. First, once it is discovered that a mistake has been made, officials should acknowledge the mistake and correct it as quickly as possible. Given how close we are to Easter, that should be done quickly in order to afford visitors, families, and patients the opportunity to purchase Christian literature, should they so desire. Second, in the future, before responding to a complaint and/or demand made by someone about a display or policy at the VAMC, the complaint should be forwarded to a VA attorney with knowledge of Constitutional law for thorough review to ensure that any decision made by VAMC personnel is based on a proper understanding of what the Constitution requires and not on—as in this instance—commonly held *misinterpretations* of what separation of church and state (i.e., the Establishment Clause of the First Amendment) requires.

One final point: the Patriot Store is a gift shop that is engaged in commerce. It doubtless carries a broad array of items for possible sale. Offering religious items for sale does not *ipso facto* mean that the Government is expressing a religious preference or endorsing the religious message contained in the materials offered for sale. Moreover, removing religious items may significantly limit the scope of what a person in treatment at the VAMC may be able to purchase, depending on his/her ability to leave the facility based on his/her health status. So long as there is a demand for religious literature (or other religious items), it makes business sense to offer items customers want. If a line of products has been requested and carried, *but does not sell*, then it is permissible to cease offering such items in the future. One cannot simply assume, however, that the absence of holiday items of other faith groups implies government favoritism towards Christianity. Customs vary between faith groups. If, for example, gifts are not usually exchanged at certain religious holidays of a specific faith group, there is no reason to offer faith group specific items of that faith at such holidays. Further, if gift items are usually exchanged but there has been insufficient demand for such items to make offering them financially profitable (because of the small number of adherents to that faith in the United States; or the presence of only a small number of patients of that faith at the VAMC; or a similar reason), that is a reasonable reason not to offer such items.

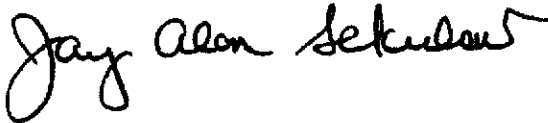
CONCLUSION

Leaders at the Raymond G. Murphy VAMC in Albuquerque have acted to remove Christian religious literature from the Patriot Store based on a faulty understanding of what the Establishment Clause of the First Amendment requires. Now that such leaders are aware of both their error and the constitutional law permitting religious displays like the one recently forbidden in the Patriot Store, it is incumbent upon them to remedy the mistake and replace forthwith the display of Christian literature they removed.

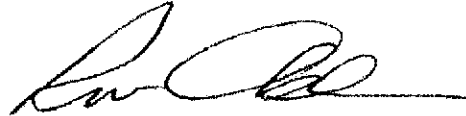
Because the misunderstanding at the VAMC in Albuquerque is doubtless not confined to Albuquerque, we are forwarding this letter to both the Secretary of Veterans Affairs as well as to the General Counsel of the Department. In the meantime, we call on leaders at the Raymond G. Murphy VAMC to correct the violation as soon as possible.

If we at the ACLJ can be of any service in answering any questions you have in this regard, please do not hesitate to contact us.

Respectfully yours,



Jay Alan Sekulow
Chief Counsel



Robert W. Ash
Senior Counsel

Cc: Honorable Denis R. McDonough, Secretary of Veterans Affairs
Honorable Richard A. Sauber, General Counsel