



MEMORANDUM

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National Day of Prayer

Governmental endorsement of the National Day of Prayer is well-documented and constitutional. 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.

The Seventh Circuit Court of Appeals, in a case where the ACLJ submitted a vital amicus brief, recently upheld the President's National Day of Prayer proclamation, holding that those challenging the National Day of Prayer did not have legal standing to sue because "hurt feelings differ from legal injury." *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011).

I. Private religious speech, including prayer, is protected by the First Amendment.

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." Supreme Court "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." *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995). Thus, participation in National Day of Prayer activities such as worship, religious speech, and prayer are protected speech under the First Amendment. *See Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

The Supreme Court developed the following three-prong analysis to determine whether government limitations on the freedom of speech are valid: (1) Determine if the speech in question is protected by the First Amendment; (2) identify the nature of the forum (type of public property) 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 appropriate standard. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 797 (1985). When a government entity denies

an individual or group the opportunity to engage in protected speech, such as prayer, in an appropriate forum without justification, it violates the First Amendment.

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 Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). A traditional public forum is government property that is traditionally opened to public speech, *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), including such places as streets, sidewalks, and parks, see *United States v. Grace*, 461 U.S. 171, 177 (1983). A designated public forum is government property that “the state has opened for use by the public as a place for expressive activity,” such as a courthouse lawn, a government-owned community center, or a high school auditorium made available for indiscriminate use by the public. *Perry Education Ass'n*, 460 U.S. at 45.

As “the government’s ability to permissibly restrict expressive conduct is very limited,” regulation of speech, including prayer, in both traditional and designated public fora is examined under strict scrutiny and “will be upheld only if narrowly drawn to accomplish a compelling governmental interest.” *Grace*, 461 U.S. at 177.

Even in a nonpublic forum, where the government has not opened its facilities for general use by the public, a government agency may not discriminate 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). “The principle that has emerged from [the Supreme Court’s] 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)). 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.

II. The Government does not violate the Establishment Clause by allowing individuals to participate in National Day of Prayer activities on Government property.

Private individuals can never violate the Establishment Clause because they are not government actors - they are private citizens. The Supreme Court has repeatedly held that “the state[’s] interest ... in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause and ... the Free Speech Clause” *Widmar*, 454 U.S. at 276. “[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.” *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality).

For the same reasons, government accommodation of religious activity does not violate the Establishment Clause. *Cf. Zobrest v. Catalina Foothills District*, 509 U.S. 1 (1993). 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, including the right to pray. *See Pinette*, 515 U.S. at 764; *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 839 (1995); *Lamb's Chapel*, 508 U.S. at 395. 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).

In sum, 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.

III. Students have a right to observe the National Day of Prayer in student Bible clubs and prayer groups in public schools.

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.

As a result of the Supreme Court’s decision in *Mergens*, students clearly have the right to organize and participate in Bible Clubs and prayer groups and to advertise events as any other school group would be free to do. 496 U.S. at 244–45. These religious clubs provide one way through which students may observe the National Day of Prayer. The Equal Access Act provides, “[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. § 4071(a) (1984).

Students enjoy the right to freedom of speech, including prayer, 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.” *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 512–13 (1969). 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.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

IV. 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)). No matter whether one wishes to use a courthouse plaza or a public library meeting room, if that space has been opened up for use by the public (for community meetings, craft fairs, political events and the like), the government is barred from discriminating against the use of that facility during the hours and in the manner in which it is

normally used solely because one wishes to use it for religious purposes, such as National Day of Prayer activities.