



February 20, 2023

VIA EMAIL & OVERNIGHT DELIVERY SERVICE

Vice Admiral Joanna M. Nunan, USMS
Superintendent
United States Merchant Marine Academy
300 Steamboat Road
Kings Point, NY 11024

Dear Admiral Nunan:

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 States¹ as well as before other federal and state courts.

The purpose of this letter is to respond to and correct the many erroneous legal arguments made by Mr. Michael L. “Mikey” Weinstein when he contacted you regarding the painting in the Elliot M. See conference room in Wiley Hall that depicts merchant mariners in a lifeboat on a lonely sea with Jesus Christ at their side (see photo on page 3) and demanded that the painting be removed from its present location for allegedly violating the Establishment Clause of the First Amendment.²

¹See, e.g., *Pleasant Grove City v. Summum*, 55 U.S. 460 (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).

²Email from Michael L. Weinstein, Founder and President, Military Religious Freedom Foundation, to VADM Joanna Nunan, Superintendent, U.S. Merchant Marine Academy, available at <https://myemail.constantcontact.com/USMMA-Vice-Admiral-Keeps-Promise-to-MRFF--Giant-Jesus-Painting-Covered-.html?soid=1101766362531&aid=FeUdI5FIMB0> (last visited Feb. 13, 2023) [hereinafter, Weinstein].



We at the ACLJ frequently respond to claims of Constitutional infringement made by Mr. Weinstein and his organization, the Military Religious Freedom Foundation (MRFF). In general, Mr. Weinstein and the MRFF have an overly strict conception of the Establishment Clause and what it allows and disallows. As is often his wont, Mr. Weinstein also included a snarky, condescending statement in his letter to you, to wit, “I’m not going to offer you a free clinic on the germane Constitutional law attendant to this sordid matter.”³ Yet, that is exactly what he should have done so that your legal advisors could check out his claim of unconstitutional wrongdoing. He often neglects to provide such a “free clinic” because the law is not on his side. Instead, he charges in like a bull in an attempt to intimidate the addressee into acting as he desires, a fact he readily admits: “*I don’t want to be on the losing side knowing that I didn’t use every last diatribe and embellishment and wild-eyed, hair-on-fire, foaming-at-the-mouth harangue to get my point across . . .*”⁴

Further, it is also the norm for Mr. Weinstein to use hyperbolic language and string together as many pejoratives as he can. In his letter to you, he begins by describing display of the painting as a “blatantly outrageous matter of unconstitutional Christian domination, triumphalism, and exceptionalism.”⁵ He continues by describing the painting as “a massive, sectarian painting illustrating the supremacy of Jesus Christ,”⁶ and by likening the painting to the “noxious Confederate flag,” which he claims “wretchedly eviscerates good order, morale, discipline and unit cohesion.”⁷ These are his perceptions of the painting’s message.

Unfortunately, Mr. Weinstein simply fails to get the law right. Mr. Weinstein believes in strict church-state separation, which the Constitution neither supports nor requires (as we will show below when we explain what the Constitution does require). Moreover, Mr. Weinstein’s beliefs are more on the order of freedom *from* religion as opposed to freedom *of* religion (which is the Constitutional standard). What Mr. Weinstein has, in fact, done is to allege a Constitutional violation where none actually exists. And, sadly, you readily concurred in his faulty legal analysis and quickly acquiesced in his demand by having the painting covered with a curtain. That action, *instead of correcting a Constitutional violation*, created a Constitutional violation by singling out the private religious expression of the artist for special detriment based on its content and treating religious expression in general as less deserving of protection than secular expression.

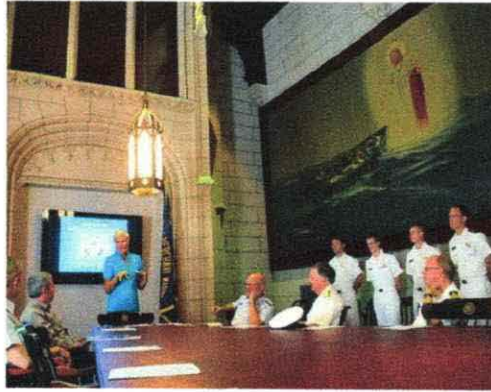
³*Id.*

⁴MICHAEL L. WEINSTEIN & DAVIN SEAY, WITH GOD ON OUR SIDE 129 (2006) (emphasis added).

⁵Weinstein, *supra* note 2.

⁶*Id.*

⁷*Id.*



Review of the Facts

As you are doubtless already aware,

[t]he 10-foot by 19-foot painting, entitled “Christ on the Water” . . . was painted in 1944 by noted marine artist Lt. Hunter Wood, USMS, to hang in the chapel built at the USMMA Basic School in San Mateo, California. The painting depicts an image of Jesus and merchant seamen adrift in a lifeboat, presumably after being torpedoed in the Indian Ocean during World War II. When the San Mateo campus closed in 1947, the painting came to the Academy, and was installed in its current location, which served as the Academy’s interfaith chapel from 1942 to 1961. The American Merchant Marine Museum has custody of the painting and holds it as a heritage asset.⁸

The painting was painted during World War II. What appears on the painting came from the mind of the artist and reflects his personal decisions and point of view. It was he who decided to portray Jesus with the merchant mariners in peril on the sea. The presence of Jesus appears to reflect the mariners’ hope of being rescued from their situation and the faith that sustained them through their ordeal. It also doubtless reflects the faith of many merchant mariners who found themselves in such peril during the Second World War, and it honors and acknowledges the courage and hope of countless merchantmen in perilous situations on the high seas.

In his letter to you, Mr. Weinstein claimed that the mere presence of Jesus in the painting rendered it constitutionally unsound by doing the following: it promoted “Christian domination, triumphalism, and exceptionalism”; it “illustrat[ed] the supremacy of Jesus Christ,” it is “antithetical [to] and destructive [of] . . . the maintenance of good order, morale, discipline, and unit cohesion at USMMA”; it displayed “sectarian Christian

⁸*Statement on Painting Entitled "Christ on the Water" at the United States Merchant Marine Academy*, U.S. MERCHANT MARINE ACADEMY (last updated Jan. 26, 2023), <https://www.usmma.edu/about/communications/statement-painting-entitled-christ-water-united-states-merchant-marine-academy>.

supremacy”; and its “outrageousness . . . is only further exacerbated by the fact that [the Elliot M. See] room is also used regularly for USMMA Honor Code violation boards where midshipmen are literally fighting for their careers, and, often even more, as they face the shameful ignominy of potential expulsion with prejudice if found guilty of USMMA Honor Code violations.”⁹

The hyperbolic, over-the-top language used by Mr. Weinstein demonstrates an underlying animus against Christianity on his part. Despite repeated declarations that he and his organization (the MRFF) are fighting for religious tolerance, Mr. Weinstein is in reality a serial purveyor of religious intolerance. In his book, *No Snowflake in an Avalanche*, he propagates the despicable lie that Evangelical and Fundamentalist Christians “would willingly, even eagerly, condemn, ostracize and *even put to death* their fellow citizens for praying to the wrong god.”¹⁰ He asserts further: “I know that they will stop at literally nothing to achieve their ends. *That includes mass murder.*”¹¹ Mr. Weinstein claims that “fundamentalist dominionist Christians are willing to kill to achieve their twisted agenda.”¹² Yet, he fails to cite to one source for his outlandish claims—he simply “knows” such things. His latest *cause célèbre* is the painting at the USMMA. Admiral, the foregoing are statements of the man on whose legal analysis you relied and acted.

Review of the Law

In his email letter to you, Mr. Weinstein alleged that the painting’s display in Wiley Hall (as opposed to the Mariner’s Chapel) constitutes an affront to the Constitution. Although he does not mention what specific provision he believes was violated, he strongly implies that he believes that the Establishment Clause of the First Amendment was violated by the display of the painting with a depiction of Jesus in a non-chapel setting. He claims that the USMMA is violating time, place, and manner restrictions by having the painting in the Elliot M. See conference room.¹³

The First Amendment to the Constitution reads in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁴ 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 Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”¹⁵

⁹Weinstein, *supra* note 2.

¹⁰Michael L. Weinstein & Davin Seay, *No Snowflake in an Avalanche* 119 (2012) (emphasis added).

¹¹*Id.* at 178 (emphasis added).

¹²*Id.* at 179.

¹³Weinstein, *supra* note 2.

¹⁴U.S. CONST. amend. I.

¹⁵*Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (citation omitted).

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.¹⁶ 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,”¹⁷ and a “statute providing for the payment of these chaplains was enacted into law on September 22, 1789.”¹⁸ Within days of legislating to pay Congressional chaplains from the federal treasury, “final agreement was reached on the language of the Bill of Rights.”¹⁹ 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.”²⁰ If the Establishment Clause is not violated when the government pays religious clergy out of the U.S. Treasury to offer spoken prayers invoking God’s blessing and wisdom, then it is not violated by a passive painting on a wall in Wiley Hall at the USMMA which simply includes a depiction of Jesus.

Early national leaders also acted in ways that some today—like Mr. Weinstein and the MRFF—argue expressly violate the Establishment Clause. For example, President George Washington issued proclamations of thanksgiving to Almighty God during his presidency,²¹ and President John Adams called for a national day of fasting and prayer.²² 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.²³ 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,²⁴ and he signed the Articles of War

¹⁶Most 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).

¹⁷*Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983).

¹⁸*Id.* at 788.

¹⁹*Id.* (citation omitted). The First Amendment is part of the Bill of Rights.

²⁰*Id.*; see also *id.* at 790.

²¹E.g., CATHERINE MILLARD & D. JAMES KENNEDY, *THE REWRITING OF AMERICA’S HISTORY* 61–62 (1991).

²²Proclamation of President John Adams (Mar. 6, 1799), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, 284–86 (James D. Richardson) (1899).

²³See 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).

²⁴JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* 100 (1982) (citing 1 J. O. WILSON, *PUBLIC SCHOOL OF WASHINGTON* 5 (1897)).

which “[e]arnestly recommended to all officers and soldiers, diligently to attend divine services.”²⁵ Also, once the U.S. Navy was formed, Congress enacted legislation directing the holding of, and attendance at, divine services aboard U.S. Navy ships.²⁶

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 Supreme Court aptly recognized in *Marsh v. Chambers*, actions of the First Congress are “contemporaneous and weighty evidence” of the Constitution’s “true meaning.”²⁷ Moreover, in *Marsh*, the Court held that legislative prayers do not violate the Establishment Clause of the First Amendment.²⁸ Instead the Court found them to be “a tolerable acknowledgment of beliefs widely held among the people of this country.”²⁹ Because the majority religious faith in the United States is some branch of Christianity, a painting painted almost 90 years ago of merchant mariners in a lifeboat adrift on the high seas which contains a depiction of Jesus would also depict a scene acknowledging “beliefs widely held among the people of this country.” Accordingly, there is no Constitutional violation.

Despite such evidence, however, Mr. Weinstein and the MRFF seem utterly unwilling to acknowledge and unable to grasp our nation’s rich religious history and how it is reflected in government settings and seeks instead to consign religious expression to chapels and other areas it approves of, thereby purging the public square of all religious expression.

In *Zorach*, the Supreme Court noted that “[w]e are a religious people whose institutions presuppose a Supreme Being.”³⁰ Elsewhere, the Supreme Court has held that “[t]he First Amendment’s Religion Clauses mean that religious beliefs *and religious expression* are too precious to be either proscribed or prescribed by the [Government].”³¹ With respect to government neutrality, *a concept which Mr. Weinstein and the MRFF have taken to an illogical level*, Justice Goldberg pointed out the following:

²⁵CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 63–64 (1964) (citing Act of April 10, 1806, ch. XX, II Stat. 359, 360).

²⁶Act of March 2, 1799, ch. XXIV, I 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 a sermon preached on Sundays”); Act of April 23, 1800, ch. XXXIII, 2 Stat. 45 (codified as amended at 10 USCS § 8221) (where Congress directed commanders of ships to require the ship’s crew “to attend at every performance of the worship of Almighty God”).

²⁷*Marsh v. Chambers*, 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).

²⁸*Marsh*, 463 U.S. at 792.

²⁹*Id.*

³⁰*Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

³¹*Lee v. Weisman*, 505 U.S. 577, 589 (1992) (emphasis added).

But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. *Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.*³²

As such, when considering whether the government has “endorsed” religion (i.e., violated the Establishment Clause), one must keep in mind that

[t]here 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 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.*³³

The men and women associated with USMMA are deemed to be “reasonable observers” who understand that the painting was the expression of a private individual who sought to capture and reflect on the hardships of merchant mariners during World War II, to capture the hope that sustained them in their struggle to survive alone on the high seas following the loss of their ship, and to honor those who were sacrificing so much to attain ultimate victory. They further understand that the USMMA is not forcing—or even suggesting—that anyone associated with the USMMA should seek after Jesus, should study his teachings, yield to his authority or anything else. The painting is simply not an evangelistic tool for Christianity in any way, shape, or form. Nor does the painting disparage any other religious faith or no faith at all. That some may find hope and solace in troubled times by calling on Jesus Christ does not demean those of other faiths or no faith. It merely reflects reality.

As the United States Court of Appeals for the Sixth Circuit aptly noted, “the reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do.”³⁴ Further,

³²*Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (emphasis added).

³³*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (Thomas, J., concurring) (emphasis added); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (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.”).

³⁴*Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992). It is difficult to claim that Mr. Weinstein does not look at religion with a jaundiced eye.

“the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.” The notion that the First Amendment commands “a brooding and pervasive devotion to the secular” . . . is a notion that simply perverts our history.³⁵

Notably, Mr. Weinstein is self-declared as an individual who “look[s] upon religion with a jaundiced eye.”³⁶

In *Town of Greece*, the Supreme Court noted that “our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”³⁷ Similarly, men and women associated with the USMMA—all adult citizens—can likewise tolerate a historical painting which includes the likeness of Jesus. Moreover, as in *Marsh*, the inclusion of Jesus has not been “exploited to proselytize or advance any one, or to disparage any other, faith or belief,”³⁸ and, as discussed in *Town of Greece*, mere personal offense, “does not equate to coercion.”³⁹ With respect to the painting, no one was asked to believe or do anything, no one was questioned about his or her faith (or lack thereof), and no one was required to support the symbolism of Jesus’ presence in the painting in any way. In other words, no one was forced to do, say, or believe anything. ***There is simply no constitutional crisis merely because some men and women at the USMMA encounter a religious symbol of which they may personally disapprove on a historic painting meant to honor merchant mariners for their sacrifices for the Nation during the Second World War.***

Further, “[t]he passage of time gives rise to a strong presumption of constitutionality.”⁴⁰ For example, in 2019, in *American Legion v. American Humanist Ass’n*, the Supreme Court ruled that a World War I memorial in the shape of a cross on public land did not violate the Establishment Clause of the First Amendment, as the cross had acquired historical and cultural significance over time and did not have a primarily religious purpose.⁴¹ The same could be said of the painting in question. It was painted in 1944. It has resided in the Elliot M. See conference room in Wiley Hall at the USMMA since 1947. It is a well-known painting at the USMMA, which, although it includes the figure of Jesus, was not displayed for a primarily religious purpose, but rather to acknowledge and honor American seamen

³⁵ *ACLU v. Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (en banc) (internal citations omitted).

³⁶ See MICHAEL WEINSTEIN & DAVIN SEAY, NO SNOWFLAKE IN AN AVALANCHE 31 (2012) (admitting his “abiding skepticism about the claims of organized religion”).

³⁷ *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014).

³⁸ *Marsh v. Chambers*, 463 U.S. at 794–95 (1983).

³⁹ *Town of Greece*, 572 U.S. at 589.

⁴⁰ *Id.*

⁴¹ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019).

who went to sea during wartime and who suffered the hardships that accompanied that service. Moreover, it is a heritage asset of the American Merchant Marine Museum.⁴²

The Court in *American Legion* also noted that “[a] government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”⁴³ Admiral, given that the painting has hung undisturbed in Wiley Hall since 1947, covering it now appears to indicate aggressive hostility to religion and religious expression, especially given how quickly you acted to cover it up, following receipt of Mr. Weinstein’s demand letter.

Concerning Mr. Weinstein’s reference to time, place, and manner restrictions, he has forgotten that such restrictions must be *content neutral*. In *Regan v. Time, Inc.*, the Supreme Court noted that “[r]egulations which permit the Government to discriminate on the basis of the *content of the message* cannot be tolerated under the First Amendment.”⁴⁴ In the same case, the Court noted the three requirements of Constitutional time, place, and manner restrictions, the first of which is, the restriction “*may not be based upon either the content or subject matter of speech.*”⁴⁵ The Court in *Police Dep’t. of Chicago v. Mosley* stated: “But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴⁶ Yet, that is exactly what Mr. Weinstein called for you to do. He singled out the painting because it included content of which he did not approve, to wit, the figure of Jesus with the mariners in the lifeboat. He disapproved of both the message and the content of the painting. *By his own rules, he gets it wrong.*

The Supreme Court aptly 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.”⁴⁷ Moreover, the painting in question is a form of speech, and “[t]he [Government’s] power to restrict speech . . . is not without limits. The restriction must not discriminate against speech *on the basis of viewpoint*”⁴⁸

The Court concluded in *Texas v. Johnson*: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea

⁴² *Statement on Painting Entitled "Christ on the Water" at the United States Merchant Marine Academy*, *supra* note 8.

⁴³ *Am. Legion*, 139 S. Ct. at 2084-85.

⁴⁴ *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (emphasis added).

⁴⁵ *Id.* at 648 (emphasis added).

⁴⁶ *Police Dep’t. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁴⁷ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)) (emphasis added).

⁴⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (internal citations omitted) (emphasis added).

simply because society [or an individual, for that matter,] finds the idea itself offensive or disagreeable.”⁴⁹

Finally, one must always keep in mind that there are organizations and individuals in our Nation—like Mr. Weinstein and the MRFF (including, undoubtedly, some associated with the USMMA)—who are hypersensitive to religion and religious expression. Accordingly, those associated with the USMMA must studiously avoid blindly reacting to complaints, especially when any reasonable, minimally informed, person knows that no endorsement of religion is intended (as with the painting at USMMA). 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”⁵⁰ The court characterized such a hypersensitive response as a form of heckler’s veto which the court labeled an “Ignoramus’s Veto.”⁵¹ The court ascribed the “Ignoramus’s Veto” moniker to those “determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed”⁵² The court aptly noted that such a person “*simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. . . .*”⁵³ One need not yield to such hypersensitive persons. The issue of the painting is just such an instance. The Supreme Court in *Lee v. Weisman* explicitly declared that it 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.”⁵⁴ In this matter, a small number of individuals take offense at the painting in the Elliot M. See conference room because of the depiction of Jesus. From this they conclude that the USMMA is endorsing a Christian message. Nothing is further from the truth, and, Admiral, you need not yield to those who ignorantly believe so.

CONCLUSION

Admiral, the law is clear. There is no Constitutional violation in hanging the painting in the Elliot M. See conference room in Wiley Hall. Moreover, no matter how forcefully stated, Mr. Weinstein’s misreading of the Constitution is not binding on you and your staff and should not intimidate you.

Displaying a historic painting honoring merchant mariners which includes a depiction of Jesus fits nicely into the category of “tolerable acknowledgment of beliefs widely held

⁴⁹*Tex. v. Johnson*, 491 U.S. 397, 414 (1989).

⁵⁰*Am. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992).

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Lee v. Weisman*, 505 U.S. 577, 597 (1992).

among the people of this country,⁵⁵ especially in light of the fact that the largest religious faith in the United States is some variant of the Christian faith. Moreover, the painting is a historic work that enjoys Constitutional protection because its purpose is not to evangelize but to honor the sacrifice of those who served in the Second World War.

The painting conveys a message that neither seeks to convert anyone to any specific faith nor criticizes another faith or no faith. Accordingly, it neither harms nor requires anything of anyone. Only those hypersensitive or outright hostile to religious speech, in general, or Christianity, in particular, could raise such a fuss about the painting in Wiley Hall. There is no Constitutional violation in displaying a painting of merchant mariners in peril on the high seas which includes a depiction of Jesus in the Elliot M. See conference room of Wiley Hall at the USMMA.

In a religiously diverse country like the United States, one will inevitably encounter religious symbols and sentiments with which one disagrees and which one may find offensive, but that is the price one must pay for living in a country that protects (and does not squelch) free exercise of religion and free speech. It does not call for widespread censorship of ideas with which one disagrees—for, if it does, where will it end? And who is to decide? If you look closely at what Mr. Weinstein advocates, you will note that he actually advocates freedom *from* religion and freedom *from* speech one doesn't want to hear. If the standard becomes a subjective one (i.e., if *I* am offended by what *you* say, *you* must stop speaking and vice versa⁵⁶), then freedom of expression will cease, since virtually everyone can be offended by something.

Admiral, we believe that there are two possible actions to resolve the issue in compliance with what the Constitution requires, the first of which is optional and the second of which is mandatory. First, you can call for the making of a plaque that explains the history of the painting (something we understand that you have already done). To avoid misunderstandings in the future, the plaque could also include a *disclaimer* that, while the USMMA recognizes and respects the historical significance of the painting, the USMMA does not necessarily endorse any religious or other message the painting is perceived to convey to onlookers (or words to that effect, keeping in mind that there should be no value judgment for or against the painting's message which could convey either approval or disapproval of such message, which would violate the neutrality required of government officials like yourself). Second, the hiding of the painting behind curtains is an action that strongly suggests that religious expression is somehow suspect and subject to special detrimental treatment. That conveys disapproval of religious expression that, in turn, violates the neutrality required of government entities between religious and non-religious (secular) expression and constitutes a continuing Constitutional violation by disfavoring religious expression in favor of secular expression. To date at the USMMA, only religious

⁵⁵ *Marsh v. Chambers*, 463 U.S. at 792.

⁵⁶ *See, e.g., Tex. v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society [or an individual, for that matter,] finds the idea itself offensive or disagreeable.”).

expression has been segregated and hidden from public view. That does not comport with the neutrality required of your office and constitutes a Constitutional violation. Accordingly, the curtains should henceforth be removed. The plaque, once posted, should help resolve future misunderstandings about whether the USMMA is endorsing religion.

We reiterate that the display of the painting (prior to the use of curtains to hide it from public view) was Constitutional all along. A disclaimer would simply serve as a device to explain that the USMMA is not endorsing religion by displaying it. Yet, no disclaimer will satisfy the Mr. Weinsteins of the world, who are offended by any and every relic of religious expression on government property. Nonetheless, Admiral, your duty is clear. You are bound by your oath of office to defend the Constitution, which requires your maintaining neutrality between secular expression and religious expression at the USMMA.

We at the ACLJ are willing to assist you in any way we can. We also caution in the future against bowing to pressure from outside groups like the MRFF without first consulting your attorneys and letting them conduct in depth research on the issue before you.

Sincerely yours,



Jay Alan Sekulow
Chief Counsel



Robert W. Ash
Of Counsel