



May 31, 2007

The Honorable Michael W. Wynne
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330

The Honorable Peter Geren
Acting Secretary of the Army
101 Army Pentagon
Washington, DC 20310

Re: Equal Treatment of Religious Organizations that Request Flyovers or Parachute Demonstrations for Events that Honor American Active Duty Service Personnel, Veterans, and Fallen Heroes

Dear Secretary Wynne and Secretary Geren:

The American Center for Law and Justice (ACLJ) has recently learned that the United States Air Force cancelled several scheduled flyovers and the United States Army cancelled a demonstration by the Silver Wing Parachute Team for the recent Task Force Patriot "Salute to the Troops" Memorial Day Celebration at Stone Mountain Park, Georgia. It appears that the Air Force and Army scaled back their participation in this event because of a letter dated May 23, 2007 from Americans United for Separation of Church and State (AU) which claimed that the originally scheduled activities would violate the "separation of church and state."

This informational letter explains why the Air Force and the Army should continue to provide flyovers, parachute demonstrations, and similar activities for Memorial Day and other patriotic events without regard to the religious affiliation, if any, of the groups organizing the events. Conducting flyovers and parachute demonstrations at patriotic events that also include some religious expression does *not* violate the First Amendment to the United States Constitution. A reasonable observer aware of the history of military flyovers and parachute demonstrations, the wide array of events that these activities are provided for, and the many religious references that

have existed throughout American military history would certainly conclude that the military has *not* improperly endorsed a particular religious viewpoint by treating requests for flyovers and parachute demonstrations at patriotic events on a non-discriminatory basis.

By way of introduction, the ACLJ is a non-profit, public interest law firm. 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. We have been active in defending the Mount Soledad Veterans Memorial in San Diego, California. ACLJ attorneys have also argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. For example, in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987), the Court unanimously struck down a public airport's ban on First Amendment activities. In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court held 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. In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), the Court unanimously held that denying a church access to public school premises to show a film series on parenting violated the First Amendment. Also, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court unanimously held that minors enjoy the protection of the First Amendment.

Statement of Facts

According to published reports, the Air Force had originally planned several hourly flyovers at the Stone Mountain memorial celebration. Similarly, the Army had scheduled a parachute demonstration. The Stone Mountain event was designed to honor American military men and women and celebrate the Air Force's 60th Anniversary with "Heritage to Horizon Activities."

After receiving the May 23, 2007 letter from AU, the Air Force scaled back its participation and the Army withdrew its participation from the event. AU claimed that the military would violate the Establishment Clause of the First Amendment by conducting flyovers or parachute demonstrations during portions of the Stone Mountain memorial celebration involving religious speech. AU also claimed that Air Force Major Brian Neal could not speak in uniform about his personal religious beliefs at the event, even in his personal capacity, without violating the Establishment Clause.

Importantly, AU's letter failed to explain that flyovers and parachute demonstrations are provided at a wide array of memorial and community events on a non-discriminatory basis. Flyovers and parachute demonstrations are part of the military's broader mission to become an integral part of every community. The Air Force and Army use flyovers, parachute demonstrations, and similar activities for recruitment, ceremonial, and entertainment purposes. For example, the Air Force has established a presence at many patriotic and memorial celebrations, college campuses, job fairs, sporting events, and other locations to further its important goals. The Air Force also sends recruiters, flight simulators, and engines to events such as NASCAR races, motocross races, and high school shop classes.¹

¹ U.S. Air Force, http://www.events.airforce.com/details.htm?event_id=3171 (last visited May 30, 2007).

Any American can request a military flyover by contacting the local Air National Guard and filling out a simple form (DD Form 2535). Flyovers are often provided for events related to the five patriotic holidays that honor the nation and the men and women that have served in the military:

Armed Forces Day (third Saturday in May),
Memorial Day (last Monday in May),
Independence Day (July 4),
POW-MIA Day (third Friday in September), and
Veterans Day (Nov. 11).²

The Department of Defense also approves flyovers for aviation-related events throughout the entire year such as airport dedications, air shows, and fly-ins. The military also reviews requests for flyovers at non-aviation events that are not related to these holidays on a case-by-case basis. From a Memorial Day celebration with 300 people in Etowah, Arkansas to the 180,000 spectators at the Coca-Cola 600 NASCAR race, the military performed a flyover nearly every day during the month of May 2007. The military often provides flyovers for NASCAR races, minor league baseball games, Special Olympics events, and patriotic events.

Given the wide array of events that the military provides flyovers and parachute demonstrations for, AU's suggestion that the military endorsed the content of the private speech that occurred at the Stone Mountain memorial event during the exact moment that the flyovers took place is simply absurd. No reasonable person would conclude that the military endorses the content of every word spoken at every privately organized event that it appears at in some capacity. The military does not endorse every word spoken at every event that it provides flyovers or parachute demonstrations for, nor does the Establishment Clause prevent the Color Guard from presenting the nation's colors at religious services conducted in honor of a particular person or Veterans Day.

Statement of Relevant Law

I. Memorial Events That Include Religious Speech Must Be Given the Same Level of Access to Air Force Flyovers and Army Parachute Demonstrations as Other Events.

The organizers of the "Salute to The Troops" event at Stone Mountain Park had the right to request Air Force flyovers and Army parachute demonstrations on the same basis as any other organization. An event that includes Christian or other religious content should not become ineligible to have a military flyover or parachute demonstration due to the content of its speech. The government does not violate the First Amendment by allowing religious groups to access benefits, such as military flyovers and parachute demonstrations, which are made available to non-religious groups.

² USAF Aerial Events Support, <http://www.airshows.pa.hq.af.mil/PublicSite/Index.cfm?fwa=faq> (last visited May 30, 2007).

It is well established that the government may not give private speech disfavored treatment because the speech is religious. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel*, 508 U.S. at 394; *Widmar v. Vincent*, 454 U.S. 263 (1981). The First Amendment's prohibition on viewpoint discrimination applies to government services, funds, facilities, laws, and ordinances.

For example, in *Lamb's Chapel*, the Supreme Court held that the First Amendment prohibits the government from denying religious groups access to its facilities for expressive purposes due to the content of the group's message. The Court noted that "the government violates the First Amendment when it denies access to a speaker *solely to suppress the point of view* he espouses . . ." 508 U.S. at 394 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)) (emphasis added). The Court also stated that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

Here, the military's practice of providing flyovers and parachute demonstrations at events such as the "Salute to The Troops" event on the same basis as other events ensures that the government has not engaged in unconstitutional viewpoint discrimination. Religious organizations have the right to use public facilities, compete for public grant funding, and request military flyovers and parachute demonstrations on the same basis as non-religious groups. If the military had refused to provide any flyovers for the "Salute to The Troops" memorial event solely because the event contained some religious expression, the military would have practiced unconstitutional viewpoint discrimination.

Contrary to AU's claims, the military did not violate the First Amendment by providing an equal opportunity for all groups to request a flyover. An equal access policy is consistent with the Supreme Court's holdings in cases such as *Mergens*, where a school board permitted thirty student groups to form clubs while refusing to allow students to form a Bible club. Just as the school in *Mergens* would not have endorsed the religious content of the Bible club's meetings by allowing the students to meet on a non-discriminatory basis, the Air Force did not endorse the religious content of the "Salute to The Troops" memorial event by providing flyovers on a non-discriminatory basis. The wide variety of student groups in *Mergens* is similar to the wide variety of events that the Air Force and Army have provided flyovers and parachute demonstrations for across the country such as Armed Forces Day events, numerous Memorial Day events, NASCAR races, the Special Olympics, Multiple Sclerosis fundraisers, the World Series of Off Road Racing, and a Vietnam War Memorial Dedication.

Moreover, in the *Lamb's Chapel* case, a public school violated the First Amendment by denying religious groups access to school facilities while permitting access to non-religious groups. Similarly, the military would engage in unconstitutional viewpoint discrimination if it adopted a blanket prohibition denying all groups with a religious message the ability to apply for flyovers

and parachute demonstrations. The Air Force's current non-discriminatory policy for flyovers is distinguishable because, as the Public Affairs website states, the policy does not "promote favoritism among the general public, and all requests are treated equally."

II. The Military's Practice of Treating Memorial Events That Include Religious Speech the Same as Non-Religious Events For Purposes of Flyovers and Parachute Demonstrations Does Not Violate the Establishment Clause.

The Air Force and Army do not unconstitutionally endorse religion by simply allowing flyovers and parachute demonstrations to take place during religious aspects of large memorial events. The Constitution "requires the state to be neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*" *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added). The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 263. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The Supreme Court has held 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 (citation omitted). The Court has discussed the historical role of religion in our society and concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. Moreover, in *Lee v. Weisman*, 505 U.S. 577, 598 (1992), the Court noted that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."

The Court has noted in the public school context that "secondary school students are mature enough and are likely to understand that a school *does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.*" *Mergens*, 496 U.S. at 250 (citations omitted) (emphasis added). Similarly, the Air Force and Army do not endorse or support the speech of every event that they provide flyovers and parachute demonstrations for on a non-discriminatory basis. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248. A government practice designed "to prevent discrimination against religious and other types of speech" has an "undeniably secular" purpose. *Id.* at 249. In other words, "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." *Id.*

In addition, it is doubtful that anyone would have legal standing to bring an Establishment Clause challenge to the Air Force and Army's non-discriminatory flyover and parachute demonstration policies. For example, in *Winkler v. Gates*, 481 F.3d 977 (7th Cir. 2007), the

United States Court of Appeals for the Seventh Circuit recently held that taxpayers lacked standing to bring an Establishment Clause challenge to a federal law requiring the United States military to assist the Boy Scouts of America (BSA) in conducting its Jamboree. The court in *Winkler* defined “military recruiting and positive public relations for the armed forces” as secular purposes. *Id.* at 985. The court added that, “[e]ven assuming that it is correct to characterize the BSA as a ‘religious’ organization, this statute is for the purpose of assisting the military in persuading a new generation to join its ranks and in building good will. *This is a secular and valid purpose.*” *Id.* at 986 (emphasis added). Similarly, the military’s policy of providing flyovers and parachute demonstrations at memorial and patriotic events on a non-discriminatory basis serves the secular purposes of recruiting, positive public relations, and building good will within the community.

III. A Reasonable Observer Would Conclude that the Air Force and Army Have Not Impermissibly Endorsed a Particular Religious Viewpoint by Providing Flyovers and Parachute Demonstrations on a Non-Discriminatory Basis.

A reasonable observer with knowledge of the history and ubiquity of military flyovers and parachute demonstrations as well as American military history would conclude that the Air Force and Army have *not* endorsed a particular religious viewpoint by treating requests for flyovers and parachute demonstrations at memorial events on a non-discriminatory basis. No reasonable person would conclude that the Air Force impermissibly endorsed the religious aspects of the Memorial Day celebration at Stone Mountain Park by providing flyovers on a neutral basis.

In determining whether a government action has the primary effect of endorsing religion in violation of the Establishment Clause, a court considers whether a “‘reasonable observer’ would perceive an advancement of religion” from the government action. *Freedom from Religion Foundation, Inc. v. Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). The reasonable observer is not a “mere casual passerby nor a particular individual” but rather is a “personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring).

The hypothetical reasonable person is “presumed to possess a certain level of information that all citizens might not share,” including an “awareness of the history and context of the community and forum in which the religious display appears.” *Id.* (O’Connor, J., concurring). In other words, the reasonable observer does *not* focus solely on the religious aspects of the conduct at issue but rather takes into account the history, ubiquity, and context of the overall situation.

[W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion. Rather, the inquiry here is whether *the* reasonable person *would* conclude that [the government’s conduct] has the effect of endorsing religion. Context is crucial to this analysis.

ACLU of Kentucky v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005) (citations omitted). Courts will not apply an “Ignoramus’s Veto” that “lies in the hands of 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” *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992).

Here, a reasonable person would be able to separate a flyover from actual government endorsement through his reasonable understanding of what flyovers are. A reasonable observer understands that, historically, flyovers have been a part of countless American memorials, festivals, and events. The flyover is an adaptation of the British “flypast” which originated in 1913 when the Royal Flying Corps Military Wing performed a flypast for King George V. For almost a century, flyovers have been used to honor famous citizens, memorialize the dead, commemorate important events, and celebrate military victories. The flyovers that occur every Memorial Day, Fourth of July, and other patriotic days promote patriotism and appreciation for military service and have become engrained into the fabric of American society. The reasonable person understands that, when these jets fly overhead, the government is *not* endorsing everything and anything that is said or done at that particular event.

In addition, the reasonable observer would understand that the flyover at Stone Mountain Park’s Memorial Day event is *not* an isolated incident. A reasonable person understands the ubiquity of flyovers and would view this one particular event in that larger perspective. A flyover occurred almost every day during the month of May 2007. A reasonable person would realize how pervasive these flyovers are; he would not draw the inaccurate conclusion that the particular flyover that he was witnessing happened in isolation, and for the express purpose of promoting every word said at that particular event.

The reasonable observer would put this event into the proper context. It remains a fact that, religious in nature or not, this was a celebration of Memorial Day, a historical patriotic American holiday. The military would certainly want to support *any* gathering of Americans designed to show support for active military personnel, veterans, and fallen American heroes. When a reasonable person sees military planes fly overhead at a memorial celebration, he thinks patriotism and history, not religion.

Importantly, the reasonable observer is aware of America’s rich religious heritage. “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). As Justice O’Connor has explained, “[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O’Connor, J., concurring). The “history, character, and context” of things such as the national motto (“In God We Trust”) and religious references in patriotic songs “prevent them from being constitutional violations. . . .” *Id.* at 37 (O’Connor, J., concurring).

Moreover, the reasonable observer would view the Air Force and Army's flyover and parachute demonstration policies in light of the religious traditions deeply interwoven with American military history. The Declaration of Independence was drafted after fighting had broken out between British soldiers and American colonists. Given the very real threat of harm posed by their commitment to the American war effort, the signers of the Declaration concluded with an appeal "to the Supreme Judge of the world for the rectitude of our intentions" and a statement of "firm reliance on the protection of Divine Providence." Use of the slogan "In God We Trust" dates back to the War of 1812. In September 1814, fearing for the fate of his country while watching the British bombardment of Fort McHenry in Baltimore, American Francis Scott Key composed the poem the "Star Spangled Banner." The last verse of the poem—which is now our national anthem—states: "Then conquer we must, when our cause it is just, and this be our motto: 'In God is our trust.'"

During the Civil War, President Abraham Lincoln's Gettysburg Address of 1863 proclaimed that "this nation, under God, shall have a new birth of freedom." *Id.* at 28 (Rehnquist, C.J., concurring). The national motto, "In God We Trust," first appeared on coins the following year. *The Battle Hymn of the Republic*—popularized during the Civil War—is replete with religious references. Many patriotic songs popular today contain religious references such as *God Bless America* and *America the Beautiful*. World War II General (and future President) Dwight D. Eisenhower famously ended his 1944 D-Day order to the Allied forces by stating, "Good Luck! And let us all beseech the blessings of Almighty God upon this great and noble undertaking." *Id.* at 29 (Rehnquist, C.J., concurring). The reasonable observer would view the flyovers at Stone Mountain Park's Memorial Day event in light of all these facts and would recognize that military participation in such an event is a sign of respect and honor for fallen American military personnel.

It is also important to note that AU's suggestion that the Establishment Clause imposes a blanket ban on military personnel speaking about their religious beliefs in their personal capacities while in uniform is simply incorrect. The Air Force would not have violated the First Amendment by permitting Major Brian Neal, acting in his personal capacity, to speak in uniform about his personal religious beliefs. Subject to any applicable regulations or orders given by his superiors, Major Neal could have given a simple disclaimer reiterating that he was speaking as an individual to dispell any possible misconceptions that the religious aspects of his speech were somehow endorsed by the Air Force. The reasonable observer is fully aware that military personnel retain their First Amendment rights while they serve and also that the military does not endorse the content of every word that it fails to censor. The reasonable observer can tell the obvious difference between an official press conference held by the Air Force or Army and the personal, private speech of an individual member of the armed forces at a Memorial Day event.

Conclusion

In sum, the Air Force and Army's practice of providing flyovers, parachute demonstrations, and similar activities at Memorial Day and other patriotic events on a non-discriminatory basis does *not* violate the First Amendment. To the contrary, a reasonable observer with knowledge of the

history, ubiquity, and context of the use of flyovers and parachute demonstrations at patriotic events would conclude that the military is promoting its important interests in recruiting, positive public relations, and building good will within the community. Additionally, a reasonable observer would not equate the private religious speech of an individual member of the military with official government endorsement of a religious viewpoint. We sincerely appreciate your service to our country and your commitment to defending our lives and freedoms at home and abroad.

Sincerely,

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