



Jay Alan Sekulow, J.D., Ph.D.  
Chief Counsel

November 7, 2016

## VIA OVERNIGHT DELIVERY SERVICE

The Honorable Robert A. McDonald  
Secretary of Veteran Affairs



RE: The Presence of Religious Literature in VA Facilities

Dear Mr. Secretary:

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. *See, e.g., Pleasant Grove City v. Summum*, 555 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); *McCormell 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).

## INTRODUCTION

Recently, Mr. Michael L. "Mikey" Weinstein, President and Founder of the Military Religious Freedom Foundation (MRFF), has been writing to various VA facilities, demanding that officials responsible for those facilities remove what he has referred to as the "New Testament Bible" from generally available reading material for those waiting for their appointments. As such, he has insinuated that generally available reading material with a religious theme somehow runs counter to what the Constitution of the United States allows in a government-run facility. As will be explained below in considerable detail, he is wrong as a matter of law, and the position he is advocating itself runs counter to the Constitution by



singling out religion and religious expression for special detriment. Further, as VA officials have acceded to Mr. Weinstein's demands, it is they who have committed Constitutional wrongdoing by removing only religiously themed materials. We are writing to you to demand that you correct such Constitutional wrongdoing that elevates secular expression over religious expression.

A recent case in point concerned a Gideon Bible in the Athens, Ohio, VA Mental Health Clinic waiting room (see ATCH A for before and after picture of the table on which the reading materials were located). After someone complained to the MRFF, Mr. Weinstein contacted the clinic, claiming that the display of the Bible violated the Constitution and demanding that the Bible be removed. He received an email response from Adam Jackson, Pharm.D., R.Ph., informing him, *inter alia*, that

the Athens clinic has searched their [sic] waiting rooms and did find 1 bible. The Athens CBOC is unsure how this came into the clinic but it has been removed. The clinic did not find any other religious material and *we routinely have environment of care rounding teams that look for such material* (emphasis added) (see ATCH B for Adam Jackson's response to Mr. Weinstein).

This latter statement, to wit, that "we routinely have environment of care rounding teams that look for such material," is indicative that VA personnel at the Athens clinic believe that they have an obligation to be on the look-out for and to remove "such material," which, in context, is religious material. Singling out religious expression for special detriment violates a whole host of Constitutional provisions and indicates that personnel at the Athens clinic misunderstand their obligations under the Constitution and laws of the United States. Although Mr. Weinstein's claim was incorrect as a matter of law, VA's actions to seek out and remove only religious materials actually *violated* the law. *This must be corrected forthwith.*

We are writing to you to explain what the Constitution and law require and to urge you and your legal advisors to advise employees throughout the Department that they may not generally single out religious expression for detrimental treatment. In that regard, if VA facilities permit non-religious literature to be available for use by persons waiting for appointments in VA facilities, they must also permit religious literature to be available as well. Mr. Weinstein and the MRFF apply an overly strict view of the Establishment Clause which the Supreme Court of the United States has repeatedly rejected. Accordingly, when VA personnel acceded to Mr. Weinstein's demands to remove only religious literature based on his overly restrictive understanding of the Constitution, they violated the rights of those persons seeking VA services who desire to avail themselves of such literature.

In the remainder of this letter, we provide you with information you can use to provide principled, legal arguments to support legitimate religious expression in VA facilities as well as to counter the arguments of those who advocate restrictions far beyond what the Constitution requires.

## I. GENERAL PRINCIPLES CONCERNING RELIGIOUS FREEDOM.

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; or abridging the freedom of speech . . .” U.S. CONST. amend. I. In 1892, the Supreme Court stated that “this is a religious nation.” *Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). More recently, 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 guarantee the freedom to worship as one chooses. 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.*

343 U.S. 306, 313-14 (1952) (emphasis added).

Thus, “[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality.” *School District v. Schempp*, 374 U.S. 203, 226 (1963). The Court has consistently noted the importance the role of neutrality plays, emphasizing that neutrality prohibits hostile treatment of religion. 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, simply by virtue of their status as such, as subversive of American ideals and therefore *subject to unique disabilities.*” 496 U.S. 226, 248 (1990) (emphasis added). 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.” *Schempp*, 374 U.S. at 299 (emphasis added).

Further, the Supreme Court has noted a clear distinction in the context of religious expression between government speech and private speech: “[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.*” *Mergens*, 496 U.S. at 250 (emphasis added). **The Court also aptly noted that it is not a difficult concept to understand that the Government “does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis.”** *Id.* This would clearly include the presence of a Gideon Bible (or other religious literature) in the waiting area of a VA facility where other reading material is available. The mere presence of a Bible in the Athens clinic waiting room is no more offensive to the Constitution than the national motto, In God we trust, which is found on U.S. currency used to pay our vets and those who care for them in VA facilities. Only the most sensitive or religiously hostile would be offended by the mere presence of a religious book placed among other, non-religious reading materials in a waiting room. Further, Gideon Bibles are provided by a private organization and constitute

private religious expression. Note, too, that the Bible was located among secular reading material (see photo at ATCH A). Note, further, that no one was compelled (or even encouraged) to read the Bible. Its passive presence imposed no religious belief on anyone and compelled no one to do or believe anything. Thus, each individual in the clinic was free to choose for him or herself what literature to read or to avoid reading altogether. Such options accord fully with the Constitution, whereas excluding such a religious option because of some animus or aversion to religious perspectives violates that same Constitution. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (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. . . .*” (emphasis added)).

## **II. LIMITATIONS ON RELIGIOUS FREE EXERCISE & RELIGIOUS EXPRESSION IN VA FACILITIES MAY BE JUSTIFIED ONLY WHEN THERE IS ACTUAL DANGER THAT THE ESTABLISHMENT CLAUSE MIGHT BE VIOLATED, NOT BY A “HECKLER’S VETO” OF THOSE EITHER HOSTILE TO OR OPPOSED TO RELIGION.**

A major concern regarding free exercise of religion and free expression of religious sentiments in VA facilities deals with how VA officials determine when such exercise or expression must be curtailed. To protect religious expression to the extent required by the Constitution, VA officials must not curtail religious rights based on hypersensitive or hostile reaction, merely because one or a few persons dislike the religious message or misunderstand what the Constitution requires. As noted in *Lee v. Weisman*, the Supreme Court 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.” 505 U.S. 577, 597 (1992) (emphasis added). Where the offending expression is a private message made by one or more individuals (i.e., not “state action”) (such as the placement of a Gideon Bible with other, non-religious reading materials in a waiting room), the VA official must be even more careful in fulfilling his responsibility to protect and defend the Constitutional rights of the persons availing themselves of the VA services, since First Amendment rights were intended to protect the individual *from actions of his own Government and its agents*.

In other words, alleged Constitutional violations must be real, not illusory. Accordingly, VA officials must studiously avoid blindly reacting to complaints (such as the frequent, erroneous Establishment Clause complaints lodged by the MRFF and similar groups), especially when any reasonable, minimally informed, person knows that no endorsement of religion is intended. 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 unconstitutional religious endorsements, “even though a reasonable person, and any minimally informed person, knows that no endorsement is intended.” 980 F.2d 1538, 1553 (6th Cir. 1992). The court characterized such a hypersensitive response as a form of heckler’s veto which the court labeled an “‘ignoramus’ veto.” *Id.*

### III. THE ESTABLISHMENT CLAUSE DOES NOT FORBID ALL PRIVATE RELIGIOUS EXPRESSION ON PUBLIC PROPERTY.

The Supreme Court has consistently ruled that the Establishment Clause does not automatically require a state entity to exclude private religious expression from a public forum. The Court noted, in fact, that it is

peculiar to say that government “promotes” or “favors” a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.

*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-64 (1995). In one of the most powerful proclamations upholding the rights of private religious speakers in a public forum, the Supreme Court stated:

The contrary view [i.e., limiting religious expression where non-religious expression is permitted] . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.

*Id.* at 766-67 (internal citations omitted). The placement of a Gideon Bible in an area with other generally available non-religious literature for use by those availing themselves of the services of the VA clinic is the very type of private expression the Court is referring to.

Moreover, in *Mergens*, the Supreme Court noted a key distinction in this regard: “[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.” 496 U.S. at 250. The placement of a *Gideon* Bible is a classic example of such private expression. In fact, the Supreme Court has stated that a policy of excluding private religious speakers from public places where other speakers are permitted is unconstitutional:

Indeed, the message is one 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. “The 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.”

*Id.* at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)). That is exactly what Mr. Weinstein was implying when he demanded that clinic personnel remove the Bible. VA personnel compounded the error by actually removing the Bible, thereby suggesting by their actions that religious literature was indeed somehow subversive to American ideals. *That was wrong, and it must be corrected forthwith.*

#### **IV. THE FIRST AMENDMENT PROTECTS THE RIGHT OF RELIGIOUS CITIZENS & GROUPS TO ACCESS PUBLIC PROPERTY TO PROCLAIM A RELIGIOUS MESSAGE TO THE SAME EXTENT THAT NON-RELIGIOUS CITIZENS & GROUPS MAY PROCLAIM A SECULAR MESSAGE.**

The Constitution protects the right of private citizens to engage in religious expression in a public forum. In *Pinette*, the Supreme Court held that a private group could erect an unattended cross on State Capitol grounds. *Pinette*, 515 U.S. at 770. The Court noted:

Respondents’ religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

*Id.* at 760 (internal citations omitted). Unfortunately, in this matter, by removing the Gideon Bible (placed there as private expression) and conducting a broader search to find other religious literature, VA clinic personnel were actually suppressing religious speech in violation of the Constitution.

Justice O’Connor has aptly noted that courts must apply the “reasonable observer” standard when evaluating alleged Establishment Clause violations, not the most hypersensitive or hostile observer standard. Justice O’Connor wrote the following regarding the “reasonable observer” of religious expression on public property:

There 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.*

*Pinette*, 515 U.S. at 779-80 (emphasis added). See also *Rosenberger*, 515 U.S. at 828-29 (“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. . . .”).

VA patients are deemed to be “reasonable observers.” As such, they are deemed to know that the presence of *religious* reading material placed with other, *non-religious* reading material does not mean that the VA is endorsing a religious message, just as the placement of some non-religious literature to the exclusion of other secular literature does not mean that the VA endorses the secular message of the materials it provides. In fact, the reading material in VA clinics is provided so that patients and those who accompany them have something to do while they wait to be seen. No one is required to read any of the literature provided, be it religious or non-religious, much less be compelled to believe any message set forth in any of the materials. To imply that the presence of a Gideon Bible with other, non-religious material imposes religion on anyone or indicates that the VA is advocating a religious message is absurd on its face and must be rejected.

Once again, as the Supreme Court noted in *Mergens*, it is not a difficult concept to understand that the Government “does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis.” See 496 U.S. at 250. Further, in *Zorach*, 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.”

See 343 U.S. at 312-13; see also *id.* at 314 (noting “no constitutional requirement which 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”).

## V. MR. WEINSTEIN AND HIS AGENDA.

Although Mr. Weinstein and his organization have every right to espouse the views they do, it is imperative that the VA be aware of who Mr. Weinstein is and what his agenda entails. It is important that the VA not accept Mr. Weinstein’s charges at face value.

Mr. Weinstein is a self-described opponent of so-called “Dominionist Christians” in the military. He has repeatedly claimed that he is fighting “a subset of Evangelical Christianity that goes by a long technical name . . . Pre-Millennial, Dispensational, Reconstructionist, Dominionist, Fundamentalist, Evangelical Christianity.” Moreover, how Mr. Weinstein describes his organization, the MRFF, also says much about his beliefs and how he approaches those with whom he disagrees. He describes the MRFF as follows: “We are a weapon. We’re a militant organization. Our job is to kick ass, take names, lay down a withering field of fire, and leave sucking chest wounds on this unconstitutional heart of darkness, if you will, this imperious fascistic contagion of unconstitutional triumphalism.” See Brian Kresge, *An Interview with Mikey Weinstein*, JEWS IN GREEN (Aug. 24, 2007), <http://www.jewsingreen.com/2007/08/an-interview-with-mikey-weinstein/>.

He has demonstrated open and continuing hostility to Evangelical Christians and their message and admits that he is willing to do whatever it takes to achieve his ends: “*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 . . .*” See MICHAEL L. WEINSTEIN & DAVIN SEAY, WITH GOD ON OUR SIDE 129 (2006) (emphasis added). Accordingly, Mr. Weinstein is known for making bombastic, over-the-top statements about persons of whatever religious stripe who disagree with his views and his personal ideas on what constitutes acceptable speech and conduct under the Constitution and laws of the United States.

Mr. Weinstein and the MRFF routinely accuse others of making offensive and bigoted comments. He compares Christian believers with whom he disagrees to al-Qaeda and the Taliban: “We’re fighting al-Qaeda, we’re fighting the Taliban, and we’re turning our own military into that exact same thing.” See *Video Archives (2007-2009): Los Angeles Times Festival of Books*, MIL. RELIGIOUS FREEDOM FOUND., [http://www.militaryreligiousfreedom.org/Media\\_video/festival-of-books/index.html](http://www.militaryreligiousfreedom.org/Media_video/festival-of-books/index.html) (last visited Apr. 28, 2016). Mr. Weinstein continues: “[W]e’ve lost the Marine Corps, we’ve lost the Army, we’ve lost the Navy and the Air Force.” See Mikey Weinstein, “Champion of the First Amendment” Award Acceptance Speech at the 29th Annual Convention of the Freedom from Religion Foundation (Oct. 7, 2006) (transcript available at <http://www.ffrf.org/publications/freethought-today/articles/The-Christianization-of-the-Military/>). He seems to be incapable of seeing any differences between the widespread violence perpetrated on unbelievers by radical Islamists and the actions of committed Bible-believing Christians.

Moreover, despite repeated pious declarations that he is fighting for religious freedom and tolerance, Mr. Weinstein is in reality a serial purveyor of religious bigotry who repeatedly 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.” See MICHAEL L. WEINSTEIN & DAVIN SEAY, NO SNOWFLAKE IN AN AVALANCHE 119 (2012) (emphasis added). He even asserts: “I know that they will stop at literally nothing to achieve their ends. *That includes mass murder.*” *Id.* at 178 (emphasis added). Mr. Weinstein claims that “fundamentalist dominionist Christians are willing to kill to



achieve their twisted agenda.” *Id.* at 179. Such assertions are not only outrageous—they are absolutely delusional.

Further, despite admitting that he has “doubts over the actual existence of God and an even more abiding skepticism about the claims of organized religion,” *id.* at 31, Mr. Weinstein nonetheless expects his readers to simply accept that *he* can speak *with authority* about what certain *Christians* believe. For example, *without citing any authoritative source whatsoever*, Mr. Weinstein claims that “Christian fundamentalist dominionists . . . believe that the Bible instructs them *to eradicate all nonbelievers* as a prerequisite for the Second Coming of Christ.” *Id.* at 197 (emphasis added). Elsewhere, once again without citing any authority to back up his statement, he claims that “hardcore fundamentalist Christian elements within every branch of the military [are] intent on creating nothing less than an army of zombie zealots prepared to fight and die to usher in the dispensational reign of Jesus Christ on earth.” *Id.* at 12. Such outlandish assertions are commonplace in Mr. Weinstein’s writings and speeches. He sees religious intrigue wherever he looks. He has found it once again in the presence of a single Gideon Bible at an Ohio VA clinic.

## CONCLUSION

Mr. Weinstein and the MRFF have seriously misconstrued the Constitutional limits on religious exercise and expression in public facilities like a VA clinic. Mr. Weinstein and the MRFF espouse an extreme form of church-state separation. To them, even the passive presence of a single Gideon Bible on a table containing secular reading materials in a VA clinic waiting room constitutes a serious violation of the Establishment Clause. That extreme view has been repeatedly rejected by the Supreme Court of the United States. *See, e.g., Zorach*, 343 U.S. at 314 (noting “no constitutional requirement which 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”).

The MRFF and its allies want to remove all semblance of religious expression from the public square. Such a policy singles out religion and its adherents for special detriment, thereby violating the very Establishment Clause the MRFF and its allies claim to be protecting. The VA has an obligation to protect the free exercise rights of all VA users—believers and non-believers alike. Limiting religious expression to avoid offending the non-religious requires VA officials to determine which religious expression to allow and which to disallow, in effect, preferring certain types of religious expression over others, in itself something Government officials are precluded from doing by our Constitution. Allowing both religious and non-religious reading materials in VA waiting rooms fully meets the requirements of neutrality and neither favors nor disfavors religion.

In light of the foregoing, VA officials must utterly reject such specious complaints when they surface, irrespective of which group or organization raises the complaint. Moreover, should VA officials desire ACLJ assistance in dealing with such a matter or in drafting or reviewing guidelines for VA officials faced with similar or future MRFF demands, we stand ready to assist you.

In the interim, we strongly urge senior VA officials to instruct all VA employees regarding their responsibilities under the Constitution of the United States vis-à-vis private religious expression in VA facilities, and we demand that the Gideon Bible be returned to its rightful place with the non-religious literature in the VA clinic in Ohio.

Respectfully yours,



Jay Alan Sekulow  
Chief Counsel

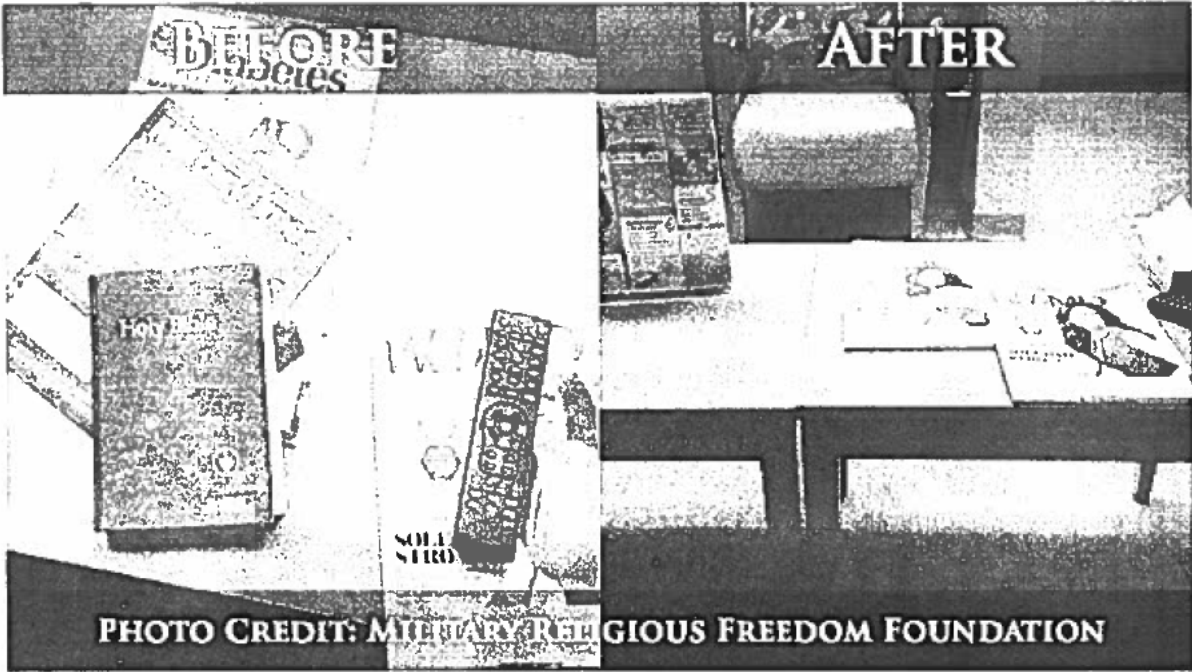


Robert W. Ash  
Senior Counsel

Attachments

cc: The Honorable Leigh A. Bradley, General Counsel, Department of Veteran Affairs  
Adam Jackson, Pharm.D., R.Ph., Associate Chief, Primary & Preventive Care Line,  
Chillicothe VAMC

**ATCH A**



**ATCH B**

**Response to Mikey from Chillicothe VAMC's Associate Chief, Pharm.D, R.Ph Adam Jackson confirming New Testament Bible removal, after MRFF's removal demand**

From: "Jackson, Adam (Chillicothe)"  
Subject: VA Athens Clinic Concern  
Date: October 17, 2016 at 8:13:45 AM PDT  
To: Mikey  
Cc: "McManaway, Tina"

Hello,

I wanted to respond back as soon as possible to confirm with you that the Athens clinic has searched their waiting rooms and did find 1 bible. The Athens CBOC is unsure how this came into the clinic **but it has been removed**. The clinic did not find any other religious material and we routinely have environment of care rounding teams that look for such material. I did place 2 phone calls to your cell phone and they were answered by someone else. If you want to contact me directly at the phone and extension below feel free to do so.

Thank you

Adam Jackson, Pharm.D, R.Ph  
Associate Chief, Primary and Preventive Care Line  
Chillicothe VAMC  
(phone number withheld)

**(Emphasis added by [MRFF] editor)**