ACLJ
American Center for Law & Justice

February 13, 2007

County Executive Steve Ehlmann
Historic Courthouse
100 North Third Street, Rm. 318
St. Charles, MO 63301
Fax: 636-949-7521

VIA FAX AND FEDERAL EXPRESS

Re: First Amendment Protection for the Voluntary Bible Study for Lawyers Occurring at the St. Charles County Courthouse

Dear County Executive Ehlmann:

The American Center for Law and Justice (ACLJ) has recently learned that St. Charles County officials have been asked to prevent a voluntary Bible study for lawyers from meeting at the county courthouse because of church-state separation concerns. This letter explains that the First Amendment to the United States Constitution does not require the censorship of private religious speech such as the voluntary Bible study that happens to occur on government property. To the contrary, the First Amendment protects such religious expression from government censorship on the basis of its religious content.

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. ACLJ attorneys have 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.

It is our understanding that a Bible study group led by Associate Circuit Judge Matthew E.P. Thornhill has met at the county courthouse since 2002. The Bible study is designed primarily for lawyers although other courthouse employees have attended on occasion and some lawyers have invited friends to attend. The group meets at noon on Wednesdays and typically has about ten people in attendance. The group meets on a voluntary basis. No government employee, lawyer or member of the general public is coerced to attend, and no person is penalized in any way for failing to attend. While the Bible study is attended by adults, it is important to note the Supreme Court's observation that even secondary school students "are mature enough and are likely to understand that a [public] school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250.

We have also learned that a St. Charles attorney has written a letter of complaint to presiding Judge Ted House about the voluntary Bible study. The letter claimed that, "by allowing this group to meet regularly and free of charge, the court is in fact forcing the taxpayers of the county of St. Charles to support these Christian gentlemen in their avocation and beliefs." Copies of this letter have been sent to all the other judges as well, and you and County Counselor Joann Leykam will discuss the issue with the judges at their next meeting on Monday, March 5. This letter explains why the First Amendment prohibits censorship against the religious speech of the voluntary Bible study due to its content.[1]

I. Under the Establishment Clause, There is a Major Difference Between *Official Government* Religious Speech and the *Private* Religious Speech of Public Employees or Members of the General Public.

The Establishment Clause certainly does *not* prohibit government employees, lawyers and members of the public from attending a voluntary Bible study at the county courthouse. The Establishment Clause only limits the power of government; it does not restrict the rights of individuals acting on their own behalf. As the Supreme Court has acknowledged, "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." *Mergens*, 496 U.S. at 250 (emphasis added). In other words, there is a critical difference between official government sponsorship of a sectarian religious message and a voluntary discussion of religious issues by public employees or other citizens in their private capacities.

[1] Title VII of the Civil Rights Act of 1964 is another source of protection for religious practices and applies to most private employers and state and local governments. 42 U.S.C. § 2000e(a), (b). The statute provides, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The statute requires employers to reasonably accommodate the religious observances and practices of employees unless doing so would impose undue hardship on the conduct of the employer's business. *Id.*; 42 U.S.C. § 2000e(j). While some state elected officials are not considered "employees" for the purposes of Title VII, 42 U.S.C. § 2000e(f), the prohibition on discriminating against any "individual" may still protect such officials. 42 U.S.C. § 2000e-2(a)(1).

Moreover, the Establishment Clause imposes no affirmative duty upon the government to suppress private religious expression. The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel*, 508 U.S. at 395; *Widmar v. Vincent*, 454 U.S. 263 (1981). 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 Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary*." *Everson v. Board of Educ*., 330 U.S. 1, 18 (1947) (emphasis added).

The Supreme Court has consistently held that the Constitution cannot be interpreted to purge all religious reference from the public square. "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). Since "[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," it is important to remember that "[a] State has not made religion relevant to standing in the political community simply because a particular viewer of [religious activity] might feel uncomfortable." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J, concurring). The Establishment Clause "is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* at 779.

A reasonable person who learns of the voluntary Bible study that takes place at the county courthouse would be aware of the fact that our nation has a long history of accommodating the religious beliefs of public employees through the use of prayer rooms or chapels in government buildings. "Congress has long provided chapels in the Capitol for religious worship and meditation." *Lynch*, 465 U.S. at 677. An official prayer room used primarily by members of Congress was established near the Rotunda of the United States Capitol in the 1950s. *Van Zandt v. Thompson*, 839 F.2d 1215, 1225 (7th Cir. 1988). "The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: 'Preserve me, O God, for in Thee do I put my trust.' Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag." *County of Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part and dissenting in part).

In *Van Zandt v. Thompson*, the Seventh Circuit upheld a Illinois resolution that authorized the establishment of a prayer room in the Illinois State Capitol Building. The Court noted that allowing part of a public building to be used for voluntary prayer is similar to the practice of opening legislative sessions with a prayer that the Supreme Court upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). The Court observed that the Establishment Clause argument against the prayer room was even weaker than the argument rejected in *Marsh*:

> The proposed prayer room, while open to the public, need not impose any inconvenience on anyone who wishes to avoid it. Legislators and visitors to the Illinois Capitol will presumably be able to exercise their prerogatives as mature adults and avoid the room without even the bother of absenting themselves from a public and ceremonial exercise.

839 F.2d at 1219 (citation omitted). Since a government office may establish a prayer room for the use of employees without violating the Establishment Clause, it is clear that employees themselves may choose to meet on a voluntary basis to discuss religious matters consistent with the First Amendment.

II. The Free Speech and Free Exercise Clauses of the First Amendment Protect Private Religious Speech from Government Censorship Even When that Speech Occurs at the Workplace.

It is a fundamental proposition of constitutional law that the government may not suppress or exclude the speech of private parties for the sole reason that the speech is religious. *See, e.g., Good News Club v. Milford Central School,* 533 U.S. 98 (2001); *Rosenberger,* 515 U.S. at 819; *Pinette,* 515 U.S. at 753; *Lamb's Chapel,* 508 U.S. at 384; *Widmar,* 454 U.S. at 263. To deny this bedrock principle would be to eviscerate the essential guarantees of the First Amendment. As the Supreme Court has explained,

> private religious speech, far from being a First Amendment orphan, is as 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.

Pinette, 515 U.S. at 760 (plurality opinion).

The Supreme Court has repeatedly rejected the idea, raised by the letter of complaint, that the government endorses the content of all speech occurring on its property that it fails to censor. *See, e.g., Mergens*, 496 U.S. at 250 ("[t]he proposition that [public] schools do not endorse everything they fail to censor is not complicated"). The Court has noted that "attribut[ing] to a neutrally behaving government private religious expression has no antecedent in our jurisprudence." *Pinette,* 515 U.S. at 764 (plurality opinion).

In countless cases, the Court has held that the Establishment Clause does not require the censorship of private religious speech solely because it occurs on government property. *See, e.g., Good News Club*, 533 U.S. at 98; *Rosenberger*, 515 U.S. at 819; *Pinette,* 515 U.S. at 753; *Lamb's Chapel*, 508 U.S. at 384; *Mergens*, 496 U.S. at 226; *Widmar*, 454 U.S. at 263. The voluntary Bible study is like the private religious speech at issue in those cases because a

reasonable person would attribute the religious content of the speech to the individuals attending, *not* to St. Charles County.

The fact that some members of the voluntary Bible study are government employees does not mean that the employees' speech is attributable to the government or that it may be restricted on the basis of its content. It is well established that government employees retain their First Amendment rights at their workplace. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that public school "teachers [do not] shed their constitutional rights . . . at the school house gate"). The Supreme Court has rejected the idea that public employees may "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

When the government seeks to restrict the speech of its employees due to its content, the Court must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* In other words, a government employer may restrict employee speech that is likely to disrupt the office, interfere with proper discipline, undermine the authority of superiors, or destroy close working relationships. *Connick v. Myers*, 461 U.S. 138, 150-54 (1983). Employee speech at a voluntary Bible study touches upon matters of public concern and does not interfere with the operation of the workplace in any way.

III. Cases of the United States Court of Appeals for the Eighth Circuit—Which Governs Missouri—Affirm that Government Employees May Discuss Religious Matters With Co-Workers During Non-Work Time.

The Eighth Circuit's holdings in *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), and *Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004), reaffirm that the Establishment Clause does not prohibit government employers from accommodating employee religious beliefs by allowing them to hold voluntary Bible studies during on the employer's premises.

In *Brown*, the Eighth Circuit observed that the First Amendment prohibits a government employer from making the workplace a religion-free zone. *Brown* involved an instruction by a county administrator to an employee "immediately [to] cease any activities that could be considered to be religious proselytizing, witnessing, or counseling." 61 F.3d at 652-53. Among other things, the employee was instructed "to remove from his office all items with a religious connotation, including a Bible that was in his desk." *Id.* at 659. The employee had also allowed voluntary prayers in his office before the start of some workdays or during department meetings and had also referred to Bible passages during one meeting. *Id.* at 652. The employee was ultimately fired and a reprimand for "religious activities" was "a factor" in the decision to fire him. *Id.* at 654.

The Court noted that the religious speech that the government prohibited "lies right at the core of the free exercise clause." *Id.* at 658. The Court observed that, because "there was not the least attempt to confine the prohibition to harassing or intimidating speech," the instruction "exhibited a hostility to religion that our Constitution simply prohibits." *Id.* at 658-59. The Court reiterated that religious speech among government employees is protected by the First Amendment:

> If Mr. Brown asked someone to attend his church, for instance, we suppose that that "could be considered" proselytizing, but its prohibition runs afoul of the free exercise clause. Similarly, a statement to the effect that one's religion was important in one's life "could be considered" witnessing, yet for the government to forbid it would be unconstitutional.

Id. In addition, the employee was told that he may no longer display any religious items at his workplace because they may be considered "offensive" by other employees. *Id.* at 659. The Court called the government's response "extraordinary" especially because "[t]here was no showing of disruption of work or any interference with the efficient performance of governmental functions." *Id.* The Court then noted:

> We emphasize, moreover, that even if employees found Mr. Brown's displays "offensive," Polk County could not legally remove them if their "offensiveness" was based on the content of their message. In that case, the county would be taking sides in a religious dispute, which, of course, it cannot do under either the establishment clause or the equal protection clause.

Id. Additionally, the government defendants argued that "their 'interest' in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplaces." *Id.* at 659. The Court replied: "[s]uch a position is too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to trump the free exercise clause." *Id.*

The Court added:

> [F]ear alone, even fear of discrimination or other illegal activity, is not enough to justify [the defendants' actions] against Mr. Brown. The fear must be substantial and, above all, objectively reasonable. A phobia of religion, for instance, no matter how real subjectively, will not do.

Id. The defendants also argued that "allowing spontaneous prayers, occasional affirmations of Christianity, and isolated references to Bible passages would amount to an undue hardship on the conduct of county business by virtue of eventual polarization between born-again Christian employees and other employees." *Id.* at 656. The Court rejected this argument, noting that this activity caused no actual imposition on co-workers or disruption of the work

routine and adding that no one had claimed that the employee had favored Christian employees in any way. *Id.* at 657.[2]

Moreover, in *Warnock*, the Eighth Circuit held that a public school district's policy of opening *mandatory* teacher meetings with a prayer and *requiring* employees to go to a Christian college for in-service training meetings that included a prayer violated the Establishment Clause because, under the circumstances, the prayers conveyed an official government message of endorsement of religion. 380 F.3d at 1079. Importantly, however, the Court reaffirmed the critical distinction between the *private* speech of government employees that occurs in the workplace and speech that may fairly be attributed to *the government itself*. *Id.* at 1080-81.

The Court distinguished the school's policy with the employee prayers in *Brown*, noting that "virtually all of the activity at issue in *Brown* was *clearly private speech*: It involved personal statements by Mr. Brown about his own beliefs and personal religious effects in his office." *Id.* (emphasis added). The Court added that "[a]n objective observer of [the prayers in *Brown*] could not conclude that the government was endorsing Mr. Brown's faith." *Id.* In contrast, however, "some of the prayers at issue [in *Warnock*] were offered in mandatory teachers' meetings by the official conducting the meetings, circumstances that would lead an objective observer to conclude that the government was explicitly endorsing the religious content of the prayers offered." *Id.*

The *Warnock* Court made two additional points worth noting. First, the Court observed that "the Supreme Court has repeatedly held that government attempts to accommodate private religious belief, even when not required by the free exercise clause, do not in themselves violate the establishment clause." *Id.* at 1083 (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987)). In addition, the Court observed that "[t]he government can permissibly engage in any number of activities that its citizens find deeply offensive without violating the Constitution." *Id.* at 1080. This is especially true when adults, rather than children, are the ones claiming to be offended by religious activity. *Id.* There is a key distinction between "the possibility of coercing the participation of students in state-sponsored religion" and the complaints of "a strong-willed adult who is unlikely to be indoctrinated by the religious activity of his employer." *Id.*

The *Brown* and *Warnock* cases reaffirm that the Establishment Clause does not require St. Charles County to force the voluntary Bible study to disband. An objective observer of the Bible study could not conclude that the government was endorsing the content of the group's

[2] On an entirely different issue, the Court held that Title VII of the federal Civil Rights Act did not *require* the employer to allow prayers in the employee's office *before the start of the workday* because the government's policy was that "once an employee arrived at the office, the workday began, regardless of the actual time, and the defendants' policy manual directed that no personal use of county resources was permitted." *Id.* at 656. Also, the defendants did not allow *any* employees to use their offices for personal purposes before the start of the workday. *Id.*

private speech. This is *not* a case where any government employee or private citizen is *required* to participate in religious activity or where the speech is a part of an official work-related meeting. There is no suggestion that employees have been harassed or intimated or that the Bible study has disrupted the efficient performance of governmental functions. It is clear that the First Amendment prohibits the censorship of religious speech solely because someone may find that speech "offensive." This is especially true where, as here, the person objecting is "a strong-willed adult who is unlikely to be indoctrinated" rather than a young child in the school setting.

IV. The Federal Government's Guidelines on Religious Expression in the Federal Workplace Confirm that a Voluntary Employee Bible Study Poses No Constitutional Crisis.

While not binding on the State of Missouri, the Federal Government's *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* are instructive on this issue.[3] The *Guidelines* provide that

> [e]mployees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency.

Id. With regard to Bible studies, the *Guidelines* provide the following example:

> During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis.

The *Guidelines* state that "such a gathering *may not be subject to discriminatory restrictions because of its religious content*." *Id.* (emphasis added). The *Guidelines* also note that "[s]uch a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded." *Id.* In other words, "a hostile environment is not created by the bare expression of speech with which some employees might disagree." *Id.*[4]

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[3] "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace" (issued Aug. 14, 1997) *at* http://clinton2.nara.gov/WH/New/html/19970819-3275.html.

[4] Importantly, the *Guidelines* recognize that "[a] person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment." *Id.* However, "[w]here a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech." *Id.*

Conclusion

The ACLJ strongly encourages you and other St. Charles County officials to continue to allow the voluntary Bible study for lawyers to meet at the county courthouse. The First Amendment does not require the censorship of private religious speech but actually protects such religious expression from government censorship on the basis of its content.

Sincerely,

Jay Alan Sekulow
Chief Counsel

cc: County Counselor Joann Leykam
Circuit Judge Ted House
Associate Circuit Judge Matthew E.P. Thornhill