

LIBERTY INSTITUTE

May 24, 2011

The Honorable Eric K. Shinseki
Secretary of Veterans Affairs
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
Fax: (202) 495-5463
Eric.Shinseki@va.gov
Via certified mail RRR, fax, and email

Ms. Arleen Ocasio
Director, Houston National Cemetery
10410 Veterans Memorial Drive
Houston, TX 77038
Fax: (281) 447-0580
Arleen.Ocasio@va.gov
Via certified mail RRR, fax, and email

Dear Secretary Shinseki and Director Ocasio:

Pastor Scott Rainey retained Liberty Institute in connection with the U.S. Department of Veterans Affairs' (the "Department") unconstitutional attempt to direct and control the content of his prayer during the Houston National Cemetery's Memorial Day Ceremony scheduled for May 30, 2011. The purpose of this letter is to inform the Department of the relevant law so that it can take the necessary steps to avoid litigation. Please direct any further communications regarding this matter to me.

FACTS

The Department censors Pastor Rainey's prayer by directing him to remove its religious references, and states that he may not give the Memorial Day invocation unless he complies

Scott Rainey is the Lead Pastor at Living Word Church of the Nazarene in Houston, Texas, where he has served since 2003. Pastor Scott has given invocations before numerous governmental bodies, including the Texas State House of Representatives, the Spring Valley City Council, and the Harris County Commissioner's Court.

For the past two years, Pastor Rainey delivered the invocation at the Houston National Cemetery's Memorial Day Ceremony. During each invocation, Pastor Rainey closed his prayer, as he believes he is instructed to do by his faith, by praying in Jesus' name. Before this year, Pastor Rainey was never asked to submit his prayer for prior approval, to edit his prayer to remove references to Christianity, or to not mention the name of Jesus in an effort to be inclusive of all beliefs.

This year Pastor Rainey was again invited to give the invocation for the Memorial Day Ceremony, but unlike previous years, Ms. Arleen Ocasio, Director of the Houston

National Cemetery, requested that his prayer be submitted to her for prior approval. Pastor Rainey complied with this request by emailing a copy of the prayer to Zelner “Stoney” Stone, President of the National Cemetery Council for Greater Houston, on May 19¹ (email and prayer attached as Exhibit A), which Mr. Stone forwarded to Ms. Ocasio (email attached as Exhibit B).

Less than four hours after receiving the email from Mr. Stone, Ms. Ocasio emailed Pastor Rainey, and copied Jackie Reyes and Mr. Stone. In her email, Ms. Ocasio wrote, “Pastor Reiney [sic], ... I have reviewed your attached Memorial Day Prayer/Message, while it is very well written I must ask you to edit it.” Ms. Ocasio stated that Pastor Rainey’s prayer is “specific to one belief” and “on Memorial Day we will be commemorating veterans from all cultures and religious beliefs.” Therefore, “[t]he tone of all messages must be inclusive of **all** beliefs, need to be general, and its fundamental purpose should be ... non-denominational in nature” (email attached as Exhibit C) (emphasis in original).

After receiving the email from Ms. Ocasio, Pastor Rainey contacted her by phone. Ms. Ocasio instructed Pastor Rainey that if he did not remove the references to one religion that he would not be allowed to deliver the Memorial Day invocation.

LEGAL ANALYSIS

Invocations do not violate the Establishment Clause but serve the legitimate secular purpose of solemnizing public occasions

Our nation has historically included invocations in its public ceremonies. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (discussing “references to the Almighty that run through our laws, our public rituals, [and] our ceremonies”). These prayers serve to solemnize public occasion and acknowledge the role religion plays in American history and culture. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (opening legislative session with prayer “is simply a tolerable acknowledgment of beliefs widely held among the people of this country”); *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (“[G]overnment acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”). When used in his manner, these prayers are consistent with the Establishment Clause.

Furthermore, invocations may be in accord with a certain religious tradition without violating the Establishment Clause. In *Marsh v. Chambers*, 463 U.S. 783, 793 (1983), the legislative prayer at issue was characterized as “Judeo-Christian,” and was given by a clergyman of one denomination (Presbyterian) who was employed for the “long tenure” of sixteen years. Despite the unbroken practice of only having a Presbyterian ministry give a prayer specific to the Judeo-Christian tradition, the Supreme

¹ Evelyn L. Stone is Stoney’s wife. He used her email address for these communications.

Court found it to be constitutional. Additionally, specific references to Jesus or to a particular religious tradition are part of “the fabric of our society” and are constitutional. See *Marsh*, 463 U.S. at 792; Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104, 2107 (1996) (finding that “[e]xplicit supplications to Jesus Christ [have been] part of every [Presidential] inaugural ceremony” from 1936-1996 and “over two hundred and fifty opening prayers delivered by congressional chaplains included supplications to Jesus Christ” between 1990 and 1996.).

The Establishment Clause forbids the government from controlling and directing prayer

When the Department directed Pastor Rainey to edit his prayer in order to remove certain religious elements, it acted unconstitutionally. “It is a cornerstone principle of our Establishment Clause jurisprudence that ‘it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,’” *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

In *Lee v. Weisman*, 505 U.S. 577, 588 (1992), the government provided a Rabbi who was invited to pray at a school graduation ceremony a copy of its “Guidelines for Civic Occasions” and advised him that his prayer should be nonsectarian. The Court held that the government official thereby “directed and controlled the content of the prayers” in violation of the Establishment Clause. *Id.* The Court declared that the Religious Clauses mean that the government may not “proscribe or prescribe” religious expression. *Id.* at 589. Justice Kennedy went on to say that “our precedents do not permit [government] officials to assist in composing prayers.” *Id.* at 590. In the same way, by mandating that Pastor Rainey edit his prayer to be “non-denominational in nature,” “inclusive of all beliefs,” and “general,” the Department engaged in unconstitutional editorial control over religious expression.²

Indeed, “[t]he content of the prayer is not of concern to judges [I]t is not for [the government] to embark on a sensitive evaluation or to parse the content of a particular prayer.” *Marsh*, 463 U.S. at 794-95.

² It should be noted that although the Supreme Court found the graduation prayer improper because “the State has in every practical sense compelled attendance” to this important school function, it went on to distinguish the “inherent differences” of a non-school settings like the one found in *Marsh v. Chambers*, where “adults are free to enter and leave with little comment.” *Lee*, 505 U.S. at 596-98. The Memorial Day Ceremony is analogous to the facts in *Marsh* in that the Ceremony is not in a school setting, attendance is purely voluntarily, and adults may come and go as they see fit. See *id.* Prayers in these types of setting are constitutional.

Viewpoint discrimination is prohibited by the First Amendment

“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). The U.S. Department of Veterans Affairs instructed Pastor Rainey that he will only be allowed to deliver the invocation if he expresses it from a certain viewpoint, namely one that does not include specific references to a particular religion. If Pastor Rainey “edits” his prayer to rid it of its Christian elements, only then will he be allowed to participate in the Memorial Day ceremony by providing the invocation.

The government is forbidden from parsing the content of Pastor Rainey’s message and prohibiting him from speaking any message it deems “too religious.” It is a bedrock principle of constitutional law that such viewpoint discrimination is unlawful. *E.g.*, *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.”); *Police Dep’t. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove 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.”). Furthermore, it is clear that religious speech is a specific viewpoint. *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). The Supreme Court clearly held that: “Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

The Department is not objecting to Pastor Rainey’s prayer for any reason other than that it contains specific religious references. His message recognizing the honor and sacrifice of those who have given their lives for our nation, expressing thankfulness for freedom, praying for peace for our country and wisdom for our leaders fits the intended purpose of the ceremony—commemorating soldiers who died in military service. The government only objects to the extent that his message of commemoration references banned religious viewpoints. Such viewpoint discrimination is repugnant to the First Amendment and is unlawful.³

³ Forum analysis is inapplicable in this case because “viewpoint discrimination is a clearly established violation of the First Amendment in any forum.” *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350–51 (5th Cir. 2001); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) (viewpoint discrimination “violates the First Amendment regardless of the forum’s classification”).

Viewpoint discrimination is not justified by a fear of an Establishment Clause violation

In no case addressed by the Supreme Court has it found that fear of an Establishment Clause violation justifies religious viewpoint discrimination. In each case presented before the Court, it held such viewpoint discrimination unnecessary and unlawful. *E.g.*, *Rosenberger*, 515 U.S. at 842-46; *Lamb's Chapel*, 508 U.S. at 394-97; *Widmar*, 454 U.S. at 270-75. Unwarranted fear of an Establishment Clause violation cannot excuse suppressing protected religious speech.

Forcing Pastor Rainey to censor the name of Christ in his prayer in order to participate in the Memorial Day Ceremony violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

The Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1(a)-(b), prohibits the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government can show that its action “is the least restrictive means of furthering [a] compelling governmental interest.” This law is intended to provide broad protection to religious practices and only allows the government to infringe on a person’s religious exercise if it can meet the highest form of judicial scrutiny.

In this case, by requiring that Pastor Rainey censor the name of Christ in order to deliver the Memorial Day Invocation, the government is substantially burdening his religious beliefs. Pastor Rainey believes that praying in the name of Jesus is the basic foundation of prayer. He further believes that both scripture and his faith instruct him to pray in this manner.⁴ The Department is giving Pastor Rainey the ultimatum that he may either censor the name of Christ in his prayer, which violates his religious beliefs, or not provide the invocation for the Memorial Day Ceremony. By forcing him “to choose between following the tenets of [his] religion” and participating in the ceremony, the government creates a substantial burden on his religious exercise. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), which was “relied upon and incorporated by Congress into RFRA.”).

Once it is established that the governmental practice substantially burdens the individual’s religious exercise, the government bears the burden of showing that its action is necessary to further a compelling governmental interest by the least restrictive means. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-30 (2006) (stating that “the burden is placed squarely on the Government by RFRA”).

⁴ RFRA defines “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Pastor Rainey’s belief in praying in Jesus’ name is easily an “exercise of religion” under RFRA.

As stated above, allowing Pastor Rainey to recite his prayer according to his sincerely-held religious beliefs does not violate the Establishment Clause. In fact, the government's exercising editorial discretion over the content of his prayer is repugnant to and a violation of the Establishment Clause. The government can point to no compelling interest in requiring Pastor Rainey to edit his prayer and is therefore in violation of RFRA.

DEMAND

Pastor Rainey respectfully requests that the Department allow him to pray according to his religious beliefs without exercising editorial control over the content of his prayer. Please advise me in writing by **5:00 p.m. on Wednesday, May 25, 2011**, that Pastor Rainey may provide the invocation during the Memorial Day Ceremony without removing the references to his religion.

Although we are confident that this can be worked out without resorting to litigation, unless I hear from you by the above-mentioned time, Liberty Institute will be forced to seek redress in federal court, including the recovery of attorney's fees, court costs, and other reasonable expenses incurred in bringing the action. Liberty Institute will pursue all legal remedies, including seeking a temporary restraining order and suing any governmental officials in their individual capacities.

Very truly yours,

A handwritten signature in black ink, appearing to read 'J. Mateer', with a long horizontal flourish extending to the right.

Jeffrey C. Mateer
General Counsel

From: Scott Rainey [mailto:sjraine@juno.com]
Sent: Thursday, May 19, 2011 10:27 AM
To: Stone, Evelyn
Subject: Memorial Day Prayer

Stoney,

Attached is my written prayer for Memorial Day. Thank you for the honor of letting me pray.

God Bless,

Pastor Scott

EXHIBIT A

Memorial Day Prayer (by Dr. Scott Rainey)
May 30, 2011

Almighty God, we gather here today in this great assembly to honor men and women who have given the ultimate sacrifice for the freedom of a nation. We are here today in the shadow of a generation of heroes.

Thank you for the blessings of freedom we enjoy today because of their sacrifice.

Today, we join together to pray for peace. We pray for peace among nations around the world. We pray for peace in the homes of families who have lost loved ones in these great battles. We pray for peace in the heart of every person present today as we seek you with our whole heart.

Today, we pray for wisdom. We pray for wisdom for every leader in our nation, from our President to our congress, from our governor to our state representatives, from our pastors to every person who professes faith in you. We pray for wisdom for every father and mother as they raise children who love you and love others. Teach us, O God, to love as you have loved.

We pray for wisdom in these tumultuous times. We join with countless others who have prayed the prayer of serenity... "God grant me the serenity to accept the things I cannot change; courage to change the things I can; and wisdom to know the difference."

And we join the generations of faith today in praying the Lord's Prayer, "Our Father which art in heaven, Hallowed be thy name. Thy kingdom come, Thy will be done in earth, as it is in heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive those who trespass against us. And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever."

While respecting people of every faith today, it is in the name of Jesus Christ, the risen Lord, that I pray. Amen.

From: Stone, Evelyn [mailto:estone@wilson.slb.com]
Sent: Thursday, May 19, 2011 10:32 AM
To: Ocasio, Arleen
Subject: FW: Memorial Day Prayer

ARLEEN,
HERE IS PASTOR SCOTT RAINEY'S PRAYER.

STONEY

EVELYN L STONE
MTR DEPT.

WILSON A SCHLUMBERGER COMPANY 1302 CONTI ST. HOUSTON,
TEXAS 77002, USA TEL: 281-375-7675 FAX: 281-375-2654 MAIN:
713-237-3700

WWW.IWILSON.COM estone@wilson.slb.com

EXHIBIT B

From: "Ocasio, Arleen" <Arleen.Ocasio@va.gov>
To: <sjraine@juno.com>
Cc: "Reyes, Jackie" <Jackie.Powledge@va.gov>, "Stone, Evelyn" <estone@wilson.slb.com>
Subject: FW: Memorial Day Prayer
Date: Thu, 19 May 2011 14:26:23 -0400

Pastor Reiney,

Thank you for accepting to participate in our Memorial Day Program. I have reviewed your attached Memorial Day Prayer/Message, while it is very well written I must ask you to edit it.

The above prayer/message is specific to one belief. As you know, on Memorial Day we will be commemorating veterans from all cultures and religious beliefs. The tone of all messages must be inclusive of **all** beliefs, need to be general, and its fundamental purpose should be specific to those we are honoring, and non-denominational in nature.

Pastor Gantz from the Living Word Church of Nazarene is scheduled to provide the Benediction for the Memorial Day Program. If you have his contact number and email, I would appreciate it as I will need him to provide me with a copy of his Benediction for review.

Thank you again for your participation.

EXHIBIT C