IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00247-REB

R. DAVID MULLIN,
JOHN DOE #1,
JOHN DOE #2,
JOHN DOE #3,
JOHN DOE#4,
THE MILITARY RELIGIOUS FREEDOM FOUNDATION, a corporate entity,

Plaintiffs,

v.

LT. GEN. MICHAEL C. GOULD, Superintendent, U.S. Air Force Academy, in his official capacity,

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This is a civil rights action brought on behalf of the Plaintiffs, all of whom are currently faculty members at the United States Air Force Academy in Colorado Springs, save for the institutional Plaintiff, save for the institutional Plaintiff. On February 10, 2011, the Air Force Academy (AFA) will host an event called the National Prayer Luncheon on the campus of the Academy. According to the AFA, the event's purpose has consistently been: "to bring together the leadership of the United States in recognition of the spiritual values upon which our Nation is founded." According to the AFA: "There will be readings by an Islamic Airman, a Jewish Airman, an African-American Christian Airman, a Jewish chaplain (rabbi), a Buddhist sensei and a Catholic chaplain (priest). By design, this expresses some of the rich religious diversity that makes up America's Air Force and your United States Air Force

Academy."

The keynote speaker will be Lt. Clebe McClary, a highly decorated disabled Vietnam veteran (Silver Star and Bronze Star) from South Carolina. According to his website, McClary is a retired Marine, who was wounded in Vietnam and now serves the "Lord's Army," and believes that USMC (US Marine Corps) will always stand for "US Marines for Christ."

This event is being hosted, organized and sponsored on the AFA campus by the command structure of the AFA itself. While apparently no tax dollars are being used to fund this event as it is financed by the "Chapel Tithes and Offerings Fund" the AFA command structure is responsible for this event. It is contended in this law suit that for the command structure of the AFA to undertake a purely religious activity such as this is a violation of the Establishment Clause of the First Amendment to the United States Constitution. Plaintiff s who are all faculty or staff members, both civilian and military, at the AFA seek injunctive relief in order to stop this from occurring. They are proceeding as John Doe plaintiffs in this action as they fear retribution from the command structure if their identities are revealed.

II. LEGAL ANALYSIS

Plaintiffs in a First Amendment case must satisfy four conditions to obtain a preliminary injunction and show: (1) they will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood Plaintiffs will ultimately prevail on the merits; (3) the threatened injury to Plaintiffs outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999).

A. Absent Injunctive Relief, Plaintiffs will Suffer Irreparable Harm.

The first showing Plaintiffs must make to obtain injunctive relief is that they will suffer irreparable harm unless an injunction issues. *Johnson*, 194 F.3d at 1155. Harm is irreparable when it is "certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th

Cir. 2003) (internal quotation marks omitted). "The loss of First Amendment freedoms, even for minimal periods of time, unquestionable constitutes irreparable injury." *Elrod v. Burns*,427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 173 (1971)).

Because Plaintiffs allege a First Amendment violation, they have established irreparable harm. The first factor therefore weighs in favor of granting the injunction.

B. Plaintiffs Can Show a Likelihood of Success on the Merits

Next, Plaintiffs must establish that there is a substantial likelihood that they will succeed on the merits of their claim. *Johnson*, 194 F.3d at 1155. To do so, they must show that the Air Force Academy's National Prayer Luncheon violates the Establishment Clause. In evaluating Establishment Clause claims, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, government action is constituent with the Establishment Clause if: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion. *Id*. at 613.

1. **The Endorsement Test**

The Tenth Circuit, like other circuit courts, consider the first two prongs of the *Lemon* test together as the "endorsement test." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008). Under the endorsement test, "[i]n deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer.'" *Id*. at 1031. A court "must also consider the government's secular justification for its challenged conduct when applying the purpose prong." *Id*.; "*Lemon*'s inquiry as to the purpose and effect of a [government action] requires courts to examine whether government's purpose is to endorse religion and whether the [government action] actually conveys a message of endorsement." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring); *see also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("[W]e have paid particularly close attention to whether

the challenged governmental practice has either the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.").

The government may not, within the bounds of the First Amendment, take a position regarding the propriety of one particular brand of religion over another, or of religion over non-religion. *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) ("When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship."); *see also Bd. of Ed. v. Grumet*, 512 U.S. 687, 703 (1994) ("[G]overnment should not prefer one religion to another, or religion to irreligion."); *Allegheny*, 492 U.S. at 590-91 ("[G]overnment may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

Governmental endorsement of one particular religion over another leads to the impermissible result of those who disagree with the government's view feeling excluded or threatened. *See Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) ("[G]overnment cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonahderents that they are outsiders or less than full members of the political community."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) ("[S]ponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political

community, and an accompanying message to adherents that they are insiders, favored members of the political community.") (internal quotation marks omitted). Stated more precisely:

> When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

McCreary County, 543 U.S. at 883 (O'Connor, J., concurring). The AFA is hosting, sponsoring, and promoting an event that, by having a keynote speaker who identifies as a fundamentalist Christian and using the event as an opportunity to promote the sale of his book, clearly promotes Christianity over all other religions. This the Establishment Clause does not allow.

Just as government may not endorse one religion over another, or religion generally over non-religion, it also may not survive Establishment Clause scrutiny by merely endorsing multiple religions instead of just one. *Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *see also id*. at 617 (Souter, J., concurring) ("Nor does it solve the problem to say that the State should promote a 'diversity' of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each."); *Allegheny*, 492 U.S. at 615 ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("[T]he fact that the prayer may be demoninationally neutral . . . [cannot] serve to free it from the limitations of the Establishment Clause."). Indeed, the endorsement of multiple religions may exacerbate the isolation

and exclusion felt by those who, despite the inclusion of more religions, remain outside the preferred circle. *See Lee*, 505 U.S. at 594 ("That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront."); *Santa Fe*, 530 U.S. at 305 ("[W]hile Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."). To that end, any contention that the National Prayer Luncheon is consistent with the Establishment Clause as a result of any other religious services provided or sponsored by the AFA is without merit.

In limited circumstances, government involvement in prayer may be constitutional. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that Nebraska state legislature's practice of opening legislative sessions with prayer did not violate the Establishment Clause because of the long history of legislative bodies opening sessions with prayer). That is only true, however, where the government actor is motivated by a secular purpose, and its involvement in prayer is not a "call for religious action on the part of citizens." *McCreary County*, 545 U.S. at 877 n.24. Some government actions that initially appear motivated by a desire to promote one religious viewpoint or another may survive Establishment Clause scrutiny if the government has a valid secular purpose for the conduct and the benefit to religion is incidental. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 450-51 (1961) (upholding Maryland's Sunday closing law because its purpose was to provide one day per week when individuals did not have to work, regardless of their religious views); *cf McCreary County*, 545 U.S. at 861 ("[I]f the government justified [Sunday closing laws] with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable.").

There is simply no secular purpose behind the AFA's National Prayer Luncheon. The event is designed to promote both prayer generally and the ideology of the fundamentalist Christian keynote speaker, and the AFA has even gone so far as to promote the speaker's book sales by stocking copies of the book to be sold at the event, signed by the speaker. The book contains statements that are purely religious in nature, and it is expected that his speech will echo the same sentiment. For example, the book contains the following passage:

> Looking back, I would say a chaplain serving in the combat area should pray with every man before he gets on the helicopter to find out how he stands with the Lord. Plenty of chaplains wanted to ride the chopper and watch my men jump out, but none of them ever witnessed to me about the Lord. Perhaps they thought I was Christian because of my high moral standards. I almost went to hell with high moral standards.

The AFA may argue that the National Prayer Luncheon is merely an acknowledgement of the role religion plays in our culture. While "acknowledgement" of religion may be permissible under the Establishment Clause, the Clause is violated as soon as that "acknowledgement" turns into "endorsement." *See Lynch v. Donnely*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("[C]ourts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."). Acknowledgement of religion is permissible only where it is part of a larger secular message. *See, e.g., id*. at 679-80 (upholding display of crèche that was part of a larger holiday display); *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (upholding display of Ten Commandments that was part of a larger display of monuments, "all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time."). The Supreme Court has held that government conduct transitions from acknowledgement to endorsement when it "manifest[s] [the] objective of subjecting individual lives to religious influence," "insistently call[s] for religious action on the part of citizens," or "expresse[s] a purpose to urge citizens to act in prescribed

ways as a personal response to divine authority." *McCreary County*, 545 U.S. at 877 n.24.

There can be no doubt that the National Prayer Luncheon goes far beyond mere acknowledgment of religion and occupies the forbidden space of government endorsement of religion. The event is officially called the "Air Force Academy National Prayer Luncheon." The event is being held at the AFA's Falcon Club, a facility operated by the United States Air Force Academy Support Squadron. The official email invitation sent to AFA personnel came from the 10th Air Base Wing ("ABW"), and came with a note indicating that it was "sent on behalf of the 10th ABW Vice Commander." The invitation itself and the online R.S.V.P. form contain the United States Air Force Academy emblem. The event is being promoted by the Air Force Academy Association of Graduates, a private organization that maintains an official partnership with an endorsement by the AFA, and that has offices on AFA grounds. All of this invocation of AFA authority in hosting, sponsoring, and promoting the event establishes government endorsement of religion, in violation of the Establishment Clause.

2. **Excessive Government Entanglement with Religion**

Because the AFA's National Prayer Luncheon violates the endorsement test, the government's entanglement with religion need not be examined. If, however, the Court finds that the Luncheon does not amount to an unconstitutional endorsement of religion, it should still enjoin the luncheon on the basis of excessive government entanglement with religion. Evaluating excessive government entanglement with religion "requires a weighing of the governmental interests and motives and the extent to which the action might promote religion." *Otero v. State Election Bd.*, 975 F.2d 738, 740 (10th Cir. 1992). As discussed above, there is no secular government interest behind the National Prayer Luncheon. There is no doubt, however, that the AFA's wholehearted endorsement and promotion of the Luncheon fully promotes religion generally and Christianity specifically. *See Citizens Concerned for Separation of Church & State v. Denver*, 481 F.Supp. 522, 532 (D. Colo. 1979) (enjoining display of Nativity scene in front of City and County Building because its inclusion caused "excessive government entanglement in

religious affairs"), *overruled on other grounds by Citizens Concerned for Separation of Church & State v. Denver*, 628 F.2d 1289 (10th Cir. 1980).

C. Plaintiffs' Threatened Injury Outweighs Any Potential Harm to Defendant

Plaintiffs must also establish that the threatened injury to them outweighs any potential harm an injunction would cause to Defendant. *Johnson*, 194 F.3d at 1155. Injury to First Amendment freedoms often outweighs potential harm to defendants whose conduct violates the First Amendment. *See, e.g.*, *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) (finding that First Amendment injury to plaintiff outweighed injury to city from enjoining ordinance establishing licensing procedure); *Utah Licensed Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (finding that First Amendment injury to plaintiff outweighed injury to State from enjoining advertising restrictions); *Elam Constr. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) (finding that First Amendment injury to plaintiff outweighed harm to defendant's interest in preventing corruption through enforcement of tax referendum resolution).

The First Amendment injury here heavily outweighs any purported harm to Defendant. The result of an injunction would be to prevent the AFA from hosting its National Prayer Luncheon. Allowing the Luncheon to proceed would result in significant First Amendment harms; preventing the Luncheon would result in some minor inconvenience to the AFA. The third factor therefore weighs in favor of granting the injunction.

D. An Injunction Would Serve the Public Interest.

Finally, Plaintiffs must establish that an injunction would not be contrary to the public interest. *Johnson*, 194 F.3d at 1155. An injunction enforcing First Amendment protections furthers the public interest. *Pac. Frontier*, 414 F.3d at 1237 ("Vindicating First Amendment freedoms is clearly in the public interest."); *see also Leavitt*, 256 F.3d at 1076 ("Because we have held that Utah's challenged statutes also unconstitutionally limit [First Amendment rights], we conclude that enjoining their

enforcement is an appropriate remedy not adverse to the public interest."); *Elam Constr.*, 129 F.3d at 1347 ("The public interest also favors plaintiffs' assertion of their First Amendment rights.").

Because Plaintiffs allege that the AFA's National Prayer Luncheon violates the First Amendment, and injunction preventing the luncheon would serve the public interest by "vindicating First Amendment freedoms." *Pac. Frontier*, 414 F.3d at 1237. The final factor therefore weighs in favor of granting the injunction.

IV. CONCLUSION

"A determination that the government may not endorse a religious message is not a determination that the message itself is harmful, unimportant, or undeserving of dissemination. Rather, it is part of the effort to 'carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society.'" *Freedom from Religion Foundation v. Obama*, 705 F. Supp. 2d 1039, 1069 (W.D. Wis. 2010)[1] (quoting *McCreary County*, 545 U.S. at 882 (O'Connor, J., concurring)). Plaintiffs have established that they will suffer irreparable harm in the absence of an injunction, a likelihood of success on the merits, that the impending harm to them outweighs any potential harm the injunction could cause to Defendant, and that issuing an injunction would serve the public interest. Because Plaintiffs satisfy all four prongs of the *Johnson* test, the Court should enjoin the AFA's National Prayer Luncheon.

Respectfully submitted,

s/ David A. Lane

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[1] Undersigned counsel believes that this case most cogently sets forth the analysis this Court should employ in determining this complex issue.

CERTIFICATE OF SERVICE

I hereby certify that on, February 1, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses of has emailed this pleading to

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