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THE WHITE HOUSE  
WASHINGTON

October 18, 1996

MEMORANDUM FOR MELANNE VERVEER  
BRUCE REED  
RAHM EMANUEL  
FLO McAFEE  
JOHN HART

CC: JACK QUINN  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: EXECUTIVE ORDER ON RELIGIOUS EXPRESSION

I am attaching to this memo materials relating to a proposed executive order on religious expression in the workplace.

Work on this order began early this year when a coalition of religious groups -- the same coalition that sponsored the guidelines on religion in the public schools -- submitted a draft to this office. The members of the drafting committee were: Steve McFarland of the Christian Legal Society (who essentially has the proxy of all the evangelical groups); Eliot Minberg of People For the American Way; Rabbi David Saperstein of the Union of American Hebrew Congregations; Marc Stern of the American Jewish Congress; Buzz Thomas of the National Council of Churches; and Brent Walker of the Baptist Joint Committee.

The principal purpose of the order is to make clear the extent to which the law permits religious expression in the federal workplace. (While the Order, of course, applies only to the federal workplace, the religious groups hope that it will serve as a kind of model for private employers.) The order recognizes constraints on such expression, imposed by the government's interests in workplace efficiency and the Establishment Clause's prohibition on endorsement of religion. But the order tries to show (much as the guidelines on religion in the public schools tried to show) that within these constraints, there is substantial room for discussion of religious matters.

Although it is our understanding that the Office of Legal Counsel has approved the version of the executive order attached here for "form and legality," the Department of Justice as a whole is quite negative about the order. DOJ believes that the document does not give enough weight to establishment clause concerns. DOJ also believes that the document does not give enough weight to what it has called "sound employment policy," including interests in workplace efficiency. In sum, DOJ

believes the document conveys a tone that is too permissive of employee religious expression.

We are trying to arrange a meeting for Monday at which members of the Counsel's Office, other interested offices in the White House, and the Department of Justice can discuss these issues. The attached materials provide some background for that meeting. They are:

- A draft of the proposed executive order, approved by the religious groups and (as we understand it, though there may be some dispute on this point) approved for form and legality by OLC. (I apologize for the redlining on this draft, which you should ignore.)
- An alternative document offered by the Justice Department, which it views as better than the proposed EO, but still undesirable. It is our understanding that this document would be unacceptable to the religious groups. Indeed, another Justice Department-prepared document that was much more similar to the proposed EO, raised howls of protest.
- A recent case indicating the kind of workplace policies the religious groups are trying to combat. The case involves a workplace rule, issued by the California Department of Education, flatly banning religious advocacy and severely curtailing the display of religious materials. The Court struck the rule down as violating employees' First Amendment rights.

If you need anything else, please let me know.

## THE EXERCISE OF RELIGION AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE

The Constitution and federal statutory law permit a greater degree of religious expression in the federal workplace than many Americans may now understand. The government may not discriminate in the workplace against private religious expression during the workday. Federal employers and supervisors also may not use the workplace to coerce the consciences of our employees, or to convey official endorsement or disparagement of religion to the public. Although application of the law might be complicated in specific factual contexts and will require careful consideration in particular cases, certain principles are clear, and permit the establishment of guidelines to apply to religious expression in the federal workplace.

Accordingly, I am ordering that executive branch agencies, officials and employees apply the following guidelines in the federal workplace. These guidelines principally address employees' exercise of religion and its expression when acting in their personal capacity within the federal workplace, in situations where the public has no regular exposure to that workplace. The Guidelines do not address whether and when governmental employers may, in their official capacity, engage in religious speech or other activities directed at, or in the presence of, the public. Nor do these Guidelines purport to address in any definitive manner the rights and responsibilities of non-governmental employers -- including religious employers -- and their employees. These Guidelines also do not apply to the conduct of business by chaplains employed by the federal government.

NOW, THEREFORE, by the authority vested in me by the Constitution and the laws of the United States, including 5 U.S.C. \_\_\_\_, it is hereby ordered as follows:

**Section 1. Guidelines for Religion and Religious Expression in the Federal Workplace.** Each department and agency of the executive branch shall apply the following guidance in the federal workplace.

**A. Religious Discrimination.** Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs or views concerning religion.

(1) **Discrimination in Terms and Conditions.** No agency within the executive branch may promote, refuse to promote, hire, refuse to hire, or otherwise favor or disfavor, an employee or potential employee because of his or her religion, religious beliefs, or views concerning religion.

### Examples

- (a) A federal agency may not refuse to hire Buddhists, or impose more onerous requirements on applicants for employment who are Buddhists.
- (b) An agency may not impose, explicitly or implicitly, stricter promotion requirements for Christians, or impose stricter discipline on Jews than on other employees, based on their religion. Nor may federal agencies give advantages

to Christians in promotions, or impose lesser discipline on Jews than on other employees, based on their religion.

- (c) A supervisor may not impose more onerous work requirements on an employee who is an atheist because that employee does not share the supervisor's religious beliefs.

(2) Coercion, or "Quid Pro Quo" Discrimination. 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. Nor may a supervisor insist that an employee refrain from participating in religious activities as a condition of any terms of employment, except pursuant to reasonable time, place and manner restrictions applicable to all employee expression or conduct, regardless of its content or point of view.

Not all forms of supervisors' religious speech or expression about religion is inappropriate. Where a supervisor's religious expression does not carry coercive overtones, 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: like all such speech, it must be permitted except where the government's interest in workplace efficiency demands otherwise. For example, if surrounding circumstances indicate that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Nevertheless, because supervisors have the power to hire, fire or promote, the possibility exists that some employees may perceive their supervisors' religious expression as coercive, even if it was not intended as such. Supervisors should assess their religious conduct to ensure that employees do not perceive an unintended quid pro quo, and should, where necessary, take appropriate steps to dispel such misperceptions.

### Examples

- (a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple.
- (b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend.

- (c) A supervisor wears religious jewelry or garb, or wears a button carrying a generalized religious or anti-religious message. Such conduct or expression typically is not coercive.
- (d) During a wide-ranging discussion in the cafeteria about various non-work-related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the federal workplace in the same way, and to the same extent, as other constitutionally valued speech.
- (e) At a lunch-table discussion about religious views on abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments should reasonably be perceived as coercing employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their views, their expressions are not improper; indeed, they are protected in the federal workplace in the same way, and to the same extent, as other constitutionally valued speech.
- (f) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive, and should be prohibited.
- (g) A supervisor should not announce that those employees who want to succeed at work will seek God's blessings at the temple she attends.
- (h) A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.
- (i) A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday."

(3) Hostile Work Environment and Harassment. No one in the federal workplace should be subjected to a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult, whether by supervisors or fellow workers. Whether particular conduct gives rise to a

hostile environment, or constitutes impermissible religious harassment, will usually depend upon its frequency or repetitiveness, as well as its severity. The use of derogatory language in an assaultive manner can constitute religious harassment if it is severe or invoked repeatedly. A single incident, if sufficiently abusive, might also constitute harassment. A hostile environment is not created by the bare expression of speech with which some employees might disagree. In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree. (Even if particular conduct gives rise to a hostile environment, or constitutes impermissible religious harassment, the question whether the Federal Government would be subject to legal liability for such conduct would depend on the circumstances of the particular situation, including, among other things, the extent to which the agency was aware of the harassment, and the actions taken to address the harassment. The examples set forth below are intended to provide guidance on when conduct or words constitute religious harassment that should not be tolerated in the federal workplace. In a particular case, the question of employer liability would require consideration of additional factors.)

### Examples

- (a) Every time an employee is assigned to work with devout Christians, she makes a derogatory remark to those persons about Jesus. This typically will constitute religious harassment, and an agency should not tolerate such conduct.
- (b) A group of employees should not subject a fellow employee to a barrage of comments about his sex life, knowing that the targeted employee would be discomforted and offended by such comments because of his religious beliefs.
- (c) A group of employees that shares a common faith decides that they want to work exclusively with people who share their views. They engage in a pattern of verbal attacks on other employees who don't share their views, calling them heathens, sinners, and the like. This conduct should not be tolerated.
- (d) Two employees have an angry exchange of words. In the heat of the moment, one makes a derogatory comment about the other's religion. When tempers cool, no more is said. Unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment, this is not religious harassment.
- (e) A majority of employees wear religious jewelry and medallions in a manner that is visible. This conduct alone is not religious harassment of atheist workers or those of different faiths.
- (f) In her private work area, a federal worker keeps a Bible on her private desk and reads it during breaks. Another employee displays a picture of Jesus and the text

of the Lord's Prayer in her private work area. This conduct, without more, is not religious harassment, and does not create an impermissible hostile environment with respect to employees who do not share those religious views, even if they are upset or offended by the conduct.

- (g) During their lunch hour, a group of 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. An agency that accords other groups the same privileges should permit such a gathering, even if other employees might feel excluded or ask that the group be disbanded because the group does not accept their views on how to pray.

**B. Accommodation of Religious Exercise.** An agency should accommodate employees' exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency's operations. Though an agency need not make an accommodation that will result in more than a de minimis cost to the agency, that cost or hardship nevertheless must be real rather than speculative or hypothetical: the accommodation should be made unless it would cause an actual cost to the agency or to other employees or an actual disruption of work, or unless it is otherwise barred by law.

In addition, religious accommodation cannot be disfavored vis a vis other, nonreligious, accommodations. Therefore, a religious accommodation cannot be denied if the agency regularly permits similar accommodation for nonreligious purposes.

#### Examples

- (a) An agency should adjust work schedules to accommodate an employee's religious observance -- for example, Sabbath or religious holiday observance -- if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency.
- (b) An employee should be permitted to wear religious garb, such as a crucifix, a yarmulke, a head scarf, or hijab, if wearing such attire during the work day is part of the employee's religious practice, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.
- (c) An employee should be excused from a particular assignment if performance of that assignment would contravene the employee's religious beliefs and the agency would not suffer undue hardship in reassigning the officer to another detail.

In those cases where an agency's neutral work rule imposes a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that neutral rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest.

### Examples

- (a) A corrections officer whose religion compels hair to be worn long should be granted an exemption from a neutral hair-length policy unless denial of an exemption is the least restrictive means of preserving will detrimentally affect safety, discipline or other important interests.
- (b) An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to sign an oath to "bear true faith and allegiance" to the Constitution unless the signing of such an oath is the least restrictive means of ensuring absolutely necessary to ensure the putative employee's loyalty and trustworthiness.

C. Religious Expression in the Workplace. The federal government generally has the authority to regulate an employee's private speech where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs. Agencies should exercise this authority even-handedly and with restraint, and with regard for the fact that Americans are used to expressions of disagreement on controversial subjects, including religious subjects. Agencies also may, in their discretion, reasonably regulate the time, place and manner of employee speech, provided such regulations do not discriminate on the basis of content or point of view.

Agencies should not, as a general rule, regulate employees' personal religious expression on the basis of its content. In other words, agencies generally may not suppress employees' private religious speech in the workplace while leaving unregulated other private employee speech that has a comparable effect on the efficiency of the workplace, including ideological speech on politics and other topics. Agencies should not deny employees the right to talk to their colleagues about religious matters so long as their peers may discuss other subjects without special restriction, because to do so would be to engage in improper viewpoint discrimination.

Agencies are not required to permit employees to use work time to pursue religious or ideological agendas. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours.

- (1) Expression in Private Work Areas. Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable and content-neutral time, place and manner restrictions: such religious expression should be permitted so long as it does not interfere with the employee's performance of his or her professional ability to carry out his or her responsibilities.

### Examples

- (a) An employee may keep a Bible on her private desk and read it during breaks.
- (b) An agency may ban all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer cannot single out religious or anti-religious posters for harsher treatment.

(2) Expression Among Fellow Employees. Employees should be permitted to engage in private religious expression amongst fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral ~~time, place and manner~~ restrictions: such expression should not be infringed so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

#### Examples

- (a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it should likewise permit equally controversial religious expression.
- (b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Insofar as they do not convey to the public any governmental endorsement of religion, religious messages may not be singled out for suppression; rather, they are protected to the same extent as, and should be subject to the same rules as generally apply to, messages that will have a comparable effect on the workplace.
- (c) A majority of employees wear religious medallions over their clothes or wear them so that they are otherwise visible. Typically this alone should not affect workplace efficiency, and therefore is protected.

(3) Expression Directed at Fellow Employees. Employees are permitted to engage in private religious expression directed at ~~discuss religious topics with~~ fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent that those employees may engage in comparable speech not involving religion. Some religions strongly encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherents' workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech. Employees may urge a colleague to participate or not to participate in religious activities to the same extent they may urge their colleagues to engage or refrain from

other personal endeavors. But employees also should respect the prerogative of fellow employees to ask that the discussion stop. When an employee asks that the discussion directed at him or her stop, it should be stopped. The discussion may resume if the unwilling listener indicates a desire to resume the conversation. This general rule, reflecting a principle of civility in the federal workplace, should apply equally to religious and nonreligious speech.

### Examples

- (a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.
- (b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected (and does not constitute harassment), but the employee should honor the request that no further invitations be issued.
- (c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his colleague whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though religious expression such as that described in these examples will, standing alone, be protected in the same way, and to the same extent, as other constitutionally valued speech in the federal workplace, such expression should not be permitted to escalate to the point where it becomes part of a larger pattern of verbal attacks on fellow employees (or on a specific employee), which could give rise to a hostile work environment. For example, if a group of employees sharing a common faith engage in a pattern of attacks on employees who do not share their views -- persistently calling them derogatory names -- this could constitute religious harassment, and an agency should not tolerate such a pattern of conduct.

(4) Expression in Areas Accessible to the Public. Where the public has access to the federal workplace, supervisors and employees must refrain from any religious expression that would leave the public with the reasonable impression that the government is sponsoring, endorsing, disparaging or disfavoring, religion. This is particularly important in agencies with adjudicatory functions. However, not all private employee religious expression is forbidden, even in workplaces open to the public. For example,

federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent other art and literature may be displayed, so long as the viewing public would reasonably understand the religious expression to be that of the employee acting in her personal capacity, and not that of the government itself. Similarly, employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

**Sec. 2. Guiding Legal Principles.** In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles.

**A. Religious Discrimination and Burdening the Exercise of Religion.** Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for employers, both private and public, to "fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The federal government also is bound by the Equal Protection component of the Due Process Clause of the Fifth Amendment, which bars intentional discrimination on the basis of religion.<sup>1</sup> Moreover, the prohibition on religious discrimination in employment applies with particular force to the federal government, for Article VI, clause 3 of the Constitution bars the government from enforcing any religious test as a requirement for qualification to any Office.<sup>2</sup> In addition, if a government law, regulation or practice facially discriminates against employees' private exercise of religion or is intended to infringe upon or restrict private religious exercise, then that law, regulation or practice implicates the Free Exercise Clause of the First Amendment, and, at least insofar as the governmental action substantially burdens the private party's exercise of religion, it can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest.<sup>3</sup>

Moreover, the Religious Freedom Restoration Act of 1993 provides that the government may not substantially burden the exercise of a person's religion unless the government has a compelling interest for doing so and has employed the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

**B. Coercion and "Quid Pro Quo" Discrimination.** The ban on religious discrimination is broader than simply guaranteeing nondiscriminatory treatment in formal employment decisions such as hiring and promotion. It applies to all terms and conditions of employment. It follows

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<sup>1</sup> See United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (citing Ostley v. Boles, 368 U.S. 448, 456 (1962)).

<sup>2</sup> See, e.g., Feminist Women's Health Center v. Codispoti, 69 F.3d 399 (9th Cir. 1995) (Noonan, J.).

<sup>3</sup> See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-33 (1993); McDaniel v. Paty, 435 U.S. 618 (1978).

that the federal government may not require or coerce its employees to engage in religious activities.<sup>4</sup> For example, a supervisor may not demand attendance at (or a refusal to attend) religious services as a condition of continued employment or promotion, or as a criterion affecting assignment of desirable job duties. Quid pro quo discrimination of this sort is illegal. Indeed, wholly apart from the legal prohibitions against such coercion, supervisors may not insist upon employees' conformity to religious behavior in their private lives any more than they can insist on conformity to any other private conduct unrelated to employees' ability to carry out their duties.

C. Discriminatory Harassment. Employers violate Title VII's ban on discrimination by creating or tolerating a "hostile environment" in which an employee is subject to discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.<sup>5</sup> This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is exposed to intimidation, ridicule, and insult to which persons of other religions are not exposed.<sup>6</sup> The hostile conduct -- which may take the form of speech -- need not come from supervisors or from the employer. Fellow employees can create a hostile environment through their own words and actions. ~~An employer's knowing failure to stop such conduct when it is, or should be, aware of it, can be unlawful under Title VII.~~

The existence of some offensive workplace conduct does not necessarily constitute harassment under Title VII. Occasional and isolated utterances of an epithet that engenders offensive feelings in an employee typically would not affect conditions of employment, and therefore would not in and of itself constitute harassment. A hostile environment, for Title VII purposes, is not created by the bare expression of speech with which one disagrees. For religious harassment to be illegal under Title VII, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Whether conduct can be the predicate for a finding of religious harassment under Title VII depends on the totality of the circumstances, such as the nature of the verbal or physical conduct at issue and the context in which the alleged incidents occurred. As the Supreme Court has said in an analogous context:

[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes within an employee's work performance. The effect on the employee's

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<sup>4</sup> See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975). In addition to Title VII, such coercion would raise concerns under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment. See generally Torcaso v. Watkins, 367 U.S. 488 (1961). Cf. Lee v. Weisman, 505 U.S. 577 (1992).

<sup>5</sup> Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993).

<sup>6</sup> Cf. id. at 372 (Ginsburg, J., concurring) (in context of sexual harassment).

psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. [Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 371 (1993).]

The use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly. In particular, repeated religious slurs and negative religious stereotypes, or continued disparagement of an employee's religion or ritual practices, can constitute harassment. It is not necessary that the harassment be explicitly religious in character or that the slurs reference religion: it is sufficient that the harassment is directed at an employee because of the employee's religion. That is to say, Title VII can be violated by employer tolerance of repeated slurs, insults and/or abuse not explicitly religious in nature if that conduct would not have occurred but for the targeted employee's religion.<sup>7</sup>

D. Accommodation. Title VII requires employers "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).<sup>8</sup> For example, by statute, if an employee's religious beliefs require her to be absent from work, the federal government must grant that employee compensation time for overtime work, to be applied against the time lost, unless to do so would harm the ability of the agency to carry out its mission efficiently. 5 U.S.C. § 5550a.<sup>9</sup>

Though an employer need not incur more than de minimis costs in providing an accommodation,<sup>10</sup> the employer hardship nevertheless must be real rather than speculative or hypothetical.<sup>11</sup> Religious accommodation cannot be disfavored relative to other, nonreligious, accommodations. If an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable religious accommodation: "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986).<sup>12</sup>

In the government workplace, if neutral workplace rules -- that is, rules that do not single out religious or religiously motivated conduct for disparate treatment -- impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act

<sup>7</sup> See, e.g., Turner v. Barr, 811 F. Supp. 1, 4 (D.D.C. 1993); Finnemore v. Bangor Hydro-Electric Co., 645 A.2d 15, 17 (Maine 1994).

<sup>8</sup> See generally 29 C.F.R. Part 1605.

<sup>9</sup> See 5 C.F.R. § 550.1002.

<sup>10</sup> See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

<sup>11</sup> See, e.g., Brown v. Polk County, 61 F.3d 650, 655 (8th Cir. 1995) (en banc).

<sup>12</sup> If Title VII required accommodation for religious observance and practice greater than accommodation provided for non-religious reasons, it would raise serious Establishment Clause questions. See Estate of Thornton v. Calder, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring).

would require the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

E. Religious Expression. It is well-established that, under the Free Speech Clause of the First Amendment, the government in its role as employer has broader discretion to regulate its employees' speech in the workplace than it does to regulate speech among the public at large.<sup>13</sup> Employees' expression on matters of public concern can be regulated if the employee's interest in the speech is outweighed by the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>14</sup> Governmental employers also possess substantial discretion to impose time, place and manner rules regulating private employee expression in the workplace (though they may not structure or administer such rules to discriminate against particular viewpoints). Furthermore, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise,<sup>15</sup> or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately.<sup>16</sup>

The Free Speech Clause prohibits the government from singling out religious expression for disfavored treatment: "[P]rivate religious speech, far from being a First Amendment orphan,

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<sup>13</sup> See Wabaunsee County Board of County Commissioners v. Umbehr, 116 S. Ct. \_\_\_\_, \_\_\_\_, 1996 WL 354032, at \*6 (June 28, 1996); Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

<sup>14</sup> Waters, 114 S. Ct. at 1884 (citing Connick, 461 U.S. at 142).

<sup>15</sup> Rankin, 483 U.S. at 388.

<sup>16</sup> See, e.g., Lumpkin v. Jordan, 1994 WL 669852, at \*4-\*5 (N.D. Cal. 1994) (member of city human rights commission could be discharged for religious speech condemning homosexuals, where that speech called into question his ability to enforce the policies of the mayor); See also, e.g., Rankin, 483 U.S. at 389 (employee speech could be restricted if it "demonstrated a character trait that made [the employee] unfit to perform her work"); Branti v. Finkel, 445 U.S. 507, 517 (1980) ("First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency . . . [where] an employee's private . . . beliefs would interfere with the discharge of his public duties"); Sims v. Metropolitan Dade County, 972 F.2d 1230, 1237-38 (11th Cir. 1992) (permissible to suspend community affairs employee whose job it was to build racial rapport and harmonious community relations, as result of his statements in private sermon criticizing widespread use of Spanish in public facilities and imploring blacks to stop doing business with Hispanic establishments); Mings v. Department of Justice, 813 F.2d 384, 389 (Fed. Cir. 1987) (permissible to fire INS employee whose job it was to deal with numerous Hispanic and Catholic aliens and fellow employees, because letter he wrote with virulent anti-Hispanic, anti-Catholic epithets demonstrated a strong bias calling into question his ability to perform his duties in fair and unbiased manner).

is as fully protected under the Free Speech Clause as secular private expression."<sup>17</sup> Accordingly, in the government workplace religious expression should be treated like expression on issues of public concern: in a particular case, an employer can discipline an employee for engaging in speech if the value of the speech is outweighed by the employer's interest in promoting the efficiency of the public services it performs through its employees,<sup>18</sup> but religious expression cannot be regulated because of its religious character content,<sup>19</sup> and religious speech cannot be singled out for harsher treatment than other comparable expression.

Many religions strongly encourage their adherents to spread the faith by persuasion and example at every opportunity, a duty that can extend to the adherents' workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech.<sup>20</sup> Therefore, in the governmental workplace, proselytizing should not be singled out because of its content for harsher treatment than nonreligious expression.

F. The Establishment Clause. The Establishment Clause of the First Amendment prohibits plays a role in the regulation of government employees' religious expression in cases where the public has access to the federal workplace: the government -- including its employees -- from acting in a manner that would lead a reasonable observer to conclude that the government is sponsoring, endorsing, disparaging, or disfavoring, religion.<sup>21</sup> For example, where the public has access to the federal workplace, employee religious expression should be

<sup>17</sup> Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440, 2446 (1995). See also, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2516-20 (1995).

<sup>18</sup> Cf., e.g., Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995) (en banc) (religious expression in public workplace analyzed pursuant to Connick/Rankin analysis); Baz v. Walters, 782 F.2d 701, 708 (7th Cir. 1986) (same). In virtually every case, such Waters/Connick protection will be broader than Title VII's protection of religious expression: accordingly, if an employer can prevail under Waters/Connick by demonstrating a harm to workplace efficiency, then it will easily satisfy the "undue burden" test of Title VII. Moreover, RFRA does not provide any greater protection for religious expression than the Waters/Connick test: Congress indicated clearly that it did not intend RFRA's protections for religious expression to extend beyond the content-neutrality guarantee of the Free Speech Clause. See H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 13 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1903. Congress's measured conclusion in this regard was well-considered, because if RFRA had provided religious speech any protections not given to comparable nonreligious employee speech, it would have implicated serious Establishment Clause and Free Speech Clause questions. See, e.g., Rosenberger, 115 S. Ct. at 2516; Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458-59 (1994); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

<sup>19</sup> Rankin, 483 U.S. at 390.

<sup>20</sup> See, e.g., Rosenberger; Lamb's Chapel; Cantwell v. Connecticut, 310 U.S. 296 (1940).

<sup>21</sup> See, e.g., Pinette, 115 S. Ct. at 2454-56 (O'Connor, J., concurring); id. at 2457-62 (Scouter, J., concurring); Allegheny County v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989); id. at 630-35 (O'Connor, J., concurring).

prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the government favors or disfavors private religious speech.<sup>22</sup> The Establishment Clause also forbids federal employees from using government funds or resources for private religious uses.<sup>23</sup>

**Sec. 3. General.** This order is intended to be consistent with and informed by the Constitution and existing laws of the United States. This order is intended to govern the internal management of the executive branch. It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

THE WHITE HOUSE,

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<sup>22</sup> See, e.g., Langlotz v. Picciano, 683 F. Supp. 1041 (E.D. Va. 1988) (county outreach counselor could be discharged for engaging in religious counseling with clients), aff'd mem., 905 F.2d 1530 (4th Cir. 1990); Kelly v. Municipal Court of Marion County, 852 F. Supp. 724, 733-35 (S.D. Ind. 1994) (bailiff could be discharged for failing to heed judge's admonitions not to read bible in reception area of court and not to discuss his religious beliefs with visitors to the court).

<sup>23</sup> Cf., e.g., Brown, 61 F.3d at 655 (director of county department appropriately disciplined for directing a secretary to type his bible study notes). See generally Rosenberger, 115 S. Ct. at 2525 (O'Connor, J., concurring); Bowen v. Kendrick, 487 U.S. 589, 611-12, 621 (1988); id. at 623 (O'Connor, J. concurring); id. at 624 (Kennedy, J., concurring, joined by Scalia, J.); id. at 634-35 (four dissenting Justices); Grand Rapids School Dist. v. Ball, 473 U.S. 373, 381; Tilton v. Richardson, 403 U.S. 672, 683 (1971).

## THE EXERCISE OF RELIGION AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE

The Constitution and federal statutory law permit a greater degree of religious exercise and expression in the federal workplace than many Americans may understand. The government may not discriminate in the workplace against private religious expression during the workday. Although application of the law might be complicated in specific factual contexts and will require careful consideration in particular cases, certain principles are clear and permit the establishment of guidelines with respect to the role of private religious exercise and religious expression in the federal workplace.

The following are guidelines for civilian Executive Branch agencies, officials, and employees in the federal workplace. These guidelines address employees' exercise of religion and religious expression when the employees are acting in their personal capacity within the federal workplace. The Guidelines are principally concerned with situations where the public has no regular exposure to the workplace.<sup>1</sup>

### I. LEGAL PRINCIPLES

#### A. Prohibition on Governmental Religious Discrimination

Executive Branch agencies and supervisors in such agencies may not discriminate against persons because of their religion or lack thereof in matters of hiring or discharge, or in imposing other terms, conditions, and privileges of employment. Nor may they explicitly or implicitly require or coerce federal employees or applicants for employment to engage in religious activities.

Executive Branch agencies and supervisors in such agencies may not require federal employees to work in a discriminatorily hostile or abusive environment, whether that environment is created by supervisors or fellow employees. In the context of religious harassment, a discriminatorily hostile or abusive environment exists only if, at a minimum, a reasonable person would perceive the work environment as hostile or abusive in a manner that discriminates against employees on the basis of their religion or lack thereof. A hostile or abusive environment, for purposes of statutory law, is not created by an isolated utterance that engenders offense in an employee.<sup>2</sup>

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<sup>1</sup> The Guidelines do not address whether and when government employers may, in their official capacity, engage in religious speech or other activities directed at the public. They also do not address the exercise of religion and religious expression in the military. Nor do these Guidelines define the rights and responsibilities of non-government employers -- including religious entities -- and their employees. Finally, these Guidelines also do not address the conduct of business by chaplains employed by the federal government.

<sup>2</sup> Whether a hostile environment exists for purposes of statutory law depends upon consideration of all of the pertinent circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes within an employee's work performance. The unlawful conduct need not be explicitly religious in character; it is sufficient that the harassment be directed at an employee because of the employee's religion or lack thereof.

## B. Accommodation of Employees' Exercise of Religion

All Executive Branch agencies must reasonably accommodate an employee's religious observance or practice unless such accommodation would impose an undue hardship -- that is, more than de minimis costs -- on the conduct of the employer's business. What is more, if an agency's rules or regulations impose a substantial burden on a particular employee's exercise of religion, the agency must grant the employee an exemption from that rule or regulation, unless the agency has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. An agency may not disfavor religious accommodation relative to other, nonreligious, personal accommodations that impose a comparable burden on the agency.

## C. Employees' Religious Expression in the Workplace

Personal religious speech, including proselytizing, is as entitled to constitutional protection as secular private expression. As a general matter, an employee's personal expression in the government workplace on matters of public concern or on religious matters can be regulated or sanctioned by the federal government only if the employee's interest in making the speech is outweighed by any injury the speech predictably could cause to the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>3</sup> The federal government also has substantial discretion to impose time, place and manner rules regulating its employees' personal expression in the workplace, though the government may not structure or administer such rules in order to discriminate against disfavored viewpoints or in favor of preferred viewpoints.

## D. Prohibition on Governmental Endorsement of Religion

The federal government may not act in a manner that would lead a reasonable observer to conclude that the government is endorsing a particular religion or religion in general. Therefore, while federal employees typically may engage in personal religious expression in the workplace on their own time (subject to the government's limited authority as an employer, described in section C, above, to regulate its employees' workplace expression), agencies and supervisors must take steps sufficient to ensure that such personal employee expression would not, under the circumstances, cause a reasonable observer to conclude that the expression is the government's own, or that the government favors or endorses the employee's private religious speech. In addition, federal employees may not use government funds or resources for private religious uses.

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<sup>3</sup> For purposes of this balancing test, the government's legitimate interests could be implicated if, for example, a particular instance of employee religious expression in the workplace: impairs discipline by superiors or harmony among co-workers; has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise; or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately.

## II. APPLICATIONS TO EMPLOYER AND EMPLOYEE CONDUCT

### A. Hiring, Promotion, Discharge, and Other Terms and Conditions of Employment

In hiring, promotion, discharge, compensation, work assignments, and other terms and conditions of employment, a federal employer cannot, explicitly or implicitly, favor or disfavor an employee because of his or her religion, religious beliefs, views concerning religion, or participation or nonparticipation in religious activities. For example, a supervisor may not recommend or give promotions or preferred office space to employees because they attend the supervisor's church or are of a particular faith. Similarly, a supervisor cannot give undesirable work assignments to an employee because the supervisor dislikes the employee's religion or objects to the employee's religious views.

### B. Employee Leave for Religious Purposes

In a context in which an agency routinely permits employees to take leave for most nonreligious purposes, it should not deny comparable leave to employees for religious purposes. Federal employers should allow employees to take leave or otherwise adjust work schedules, to the extent reasonably practicable, to accommodate employees' ability to exercise their religion. For example, if an employee needs to be absent from work to attend religious services or to observe a religious holiday, an agency must allow the employee to do so in exchange for compensatory overtime work (or, if the employee prefers, by using accrued annual leave), unless that would disrupt or impede the agency's work. Similarly, if an employee requests an adjustment in work schedules so that she may avoid work on her Sabbath, an agency must permit such an adjustment if the employee's absence would not impose an undue burden on the agency -- for example, if a voluntary substitute with substantially similar qualifications is available. And, in all cases, if denial of leave for religious purposes would impose a substantial burden on an employee's religious exercise, such leave must be permitted unless denial of such leave is the most narrowly tailored way of satisfying a compelling agency interest.

### C. Employee Prayer

Employees are permitted to pray at work on their own time. They also may use facilities such as an empty conference room for personal religious purposes, such as group prayer, to the same extent that employees may use the facilities for other purposes unrelated to work. However, where a reasonable observer would conclude that a particular case of employee prayer was officially endorsed, an agency should not allow that prayer unless it can take steps sufficient to prevent or dispel such perceived endorsement. Such steps might include, for example, clearly indicating that the prayer is private employee conduct not sanctioned by the government and that employees are free to dissociate themselves from it or, where such steps are insufficient to dispel the reasonable perception of government endorsement, requiring that employees confine their prayer to settings where there is no such threat of perceived endorsement. A person holding supervisory authority over another

employee may not explicitly or implicitly require or coerce the employee to pray or engage in other religious activities, whether at work or outside of work.

#### D. Employees' Religious Attire, Jewelry, and Buttons

Absent special circumstances, employees may wear religious attire, jewelry, or medallions, since such conduct typically will not impair workplace efficiency. Employees also may display religious messages, such as on buttons, to the same extent that they are permitted to display other personal messages that would have a comparable effect on the workplace, as long as that display does not convey any governmental endorsement of religion. What is more, where workplace restrictions on employees' religious attire, jewelry or display would substantially burden such employees' religious exercise, the employing agency must relax such restrictions unless the agency has a compelling interest that cannot be advanced in any manner less restrictive than by imposing the restrictions.

#### E. Employees' Religious Expression in their Private Work Areas

Employees may engage in personal religious expression in private work areas to the same extent that they may engage in nonreligious personal expression in those areas: subject to reasonable and content-neutral standards and restrictions, such religious expression should be permitted so long as it does not interfere with the employee's productivity or performance of his or her responsibilities or convey to the reasonable observer a message of governmental endorsement of the religious expression. For example, an employee may keep a Bible on her private desk and read it during breaks. On the other hand, an agency may, for example, ban all personal posters of a certain size in private work areas or require that posters be displayed facing the employee, and not on common walls; but the employer cannot single out religious or anti-religious posters for harsher or preferential treatment.

#### F. Informal Religious Expression Among Employees

In informal, non-work-related discussions among employees, an employee may discuss religion, or bring religious perspectives to bear on other topics, to the same extent that the employee may engage in comparable nonreligious private expression: subject to reasonable and content-neutral standards and restrictions, such expression should not be infringed so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate employees' personal speech based on reasonable predictions of disruption, they should not restrict religious speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency. For example, in informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another in the same manner that they are permitted to engage in other personal expression.

Employees may even attempt to persuade fellow employees of the correctness of their religious views on the same terms as they are permitted to approach fellow employees regarding other matters unrelated to work activities. Some religions strongly encourage adherents to attempt to spread the faith to fellow employees. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech: it should be permitted in the government workplace unless it would interfere with workplace efficiency. However, employees should respect the prerogative of fellow employees to ask that a discussion stop, and they should be sensitive to fellow employees' indications that they do not welcome such discussions. This general rule, reflecting a principle of civility in the federal workplace, should apply equally to religious and nonreligious expression. Moreover, under circumstances where a reasonable observer would interpret employees' proselytizing or other religious activities as official government endorsement of religion, agencies must restrict such activities, unless they are able to take steps sufficient to dispel or prevent such perceived endorsement.

#### G. Derogatory Language and Insults

Religious epithets and personal insults, like other epithets and insults, are inconsistent with, and antithetical to, the mission of the federal government, and therefore are never appropriate in the federal workplace. Derogatory language directed at a fellow employee because of his or her religion or lack thereof also has no proper place in the federal workplace.

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evidence in the record to support determination that restriction is reasonable).

We conclude that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials. The challenged ban not only prevents employees from posting non-controversial information that might interest some or all employees--such as bulletins announcing the time and location of church services, invitations to children of employees to join a church youth group, and newspaper clippings praising Billy Graham, Mother Theresa or Cardinal Bernardin--it would also ban religious messages on controversial subjects such as abortion, abstinence of various types, family values, and the v-chip. Material that addresses controversial topics from a non-religious viewpoint would, however, be permissible, as would signs inviting employees to motorcycle rallies, swap meets, x-rated movies, beer busts, burlesque shows, massage parlors or meetings of the local militia. The prohibition is unreasonable not only because it bans a vast amount of material without legitimate justification but also because its sole target is religious speech.

\*10 The state's strongest argument is that allowing the posting of religious material on the interior space of the building in question would give the appearance of government endorsement of religious messages. Such endorsement would, of course, be unconstitutional. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-601, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). [FN7] Even considering the government's greater interest in its wall-space, we find the rationale it offers for the order unpersuasive. Although the government states that "CDE's [California Department of Education's] facilities are public facilities," there is nothing in the record that would indicate that the public has access to or ever goes into the office areas where Tucker and the other employees of the Child Nutrition and Food Distribution Division do their work. Even if there were, the sweeping ban on the posting of all religious information would clearly be

unreasonable. Reasonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed. Certainly a total ban on posting religious information of any kind is an unreasonable means of obviating such a concern. This case is different from *Monterey Cty. Democratic Central Comm. v. U.S. Postal Serv.*, 812 F.2d 1194 (9th Cir.1987), where we upheld a narrow ban on partisan political activity on the walkway area around a post office--an area we determined was a non-public forum, although it was widely used by the public. There, we had reason to be concerned that the public might believe that the government endorsed the particular activity sought to be carried on. Here, that is simply not the case. [FN8]

The government need not choose the least restrictive alternative when regulating speech in a nonpublic forum. *Swanner v. United States*, 937 F.2d 1478, 1482 (9th Cir.1991). However, "its failure to select ... simple available alternative[s] suggests" that the ban it has enacted is not reasonable. *Multimedia Publishing*, 991 F.2d at 161. The state has simpler and far less restrictive alternatives available to it, such as setting up employee bulletin boards and limiting all employee postings to those sites, or permitting postings generally in the parts of the building not ordinarily visited by the public. Reasonable content-neutral restrictions on the space to be used and the duration of the posting would not be inconsistent with the first amendment. Any regulations would of course be subject to the principles governing content and viewpoint discrimination. The state might also, in a properly drawn order, ban the exhibition of religious symbols, artifacts or other similar items, which might reasonably convey an impression of state endorsement--or at least it might do so in areas outside of the employees' private office space. The constitutionality of any such order would depend of course on all of the circumstances involved in the particular case. Nevertheless, the availability of simple alternatives which infringe much less on the First Amendment rights of employees further supports our

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conclusion that the challenged order is unreasonable. *Id.*

\*11 Finally, although the line between content and viewpoint discrimination is a difficult one to draw, [FN9] we are also concerned that the order may constitute viewpoint discrimination because it has the effect of preventing not only messages that discuss religion generally, but also of silencing religious perspectives on controversial subjects in general. For example, as we have suggested above, the ban would appear to prevent a sign stating that "gay marriage is a sin," and quoting passages from the Bible to support that position. However, an employee could post a sign advocating a person's right to choose whatever mate he or she wishes, if he omitted any reference to biblical or other religious support for that position. While we hold the order unreasonable for other reasons, we note that Tucker has raised a colorable claim that it constitutes impermissible viewpoint based discrimination. See, e.g., *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 2147, 124 L.Ed.2d 352 (1993) (holding that "permit[ting] school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint," was impermissible viewpoint discrimination.); *Cornelius*, 473 U.S. at 812 (viewpoint discrimination unreasonable even in a non-public forum).

We should note that there is a legitimate state interest in preventing displays of religious objects that might suggest state endorsement of religion. The state has a legitimate interest, for example, in preventing the posting of Crosses or Stars of David in the main hallways, by the elevators, or in the lobbies, and in other locations throughout its buildings. Such a symbol could give the impression of impermissible government support for religion. See *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). For the same reasons, the state may have a legitimate interest in regulating, or perhaps banning displays of religious artifacts and symbols in various

parts of its office buildings. However, banning the posting of all religious materials and information in all areas of an office building except in employees' private cubicles simply goes too far. It is not a reasonable means of achieving the state's legitimate ends.

### OVERBREADTH

Tucker contends that the order banning religious advocacy and the order banning religious postings are overbroad. [FN10] We will not hold provisions facially overbroad where a suitable limiting construction is possible or where the overbreadth is not both "real, [and] substantial as well, judged in relation to the [provision's] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 600, 613, 615 (1973).

We will discuss each order in turn, briefly. In the case of the order banning religious advocacy, we conclude that the overbreadth is real and substantial. The order prevents free expression by employees, whenever they are in the workplace, even during lunch breaks, coffee breaks, and after-hours. [FN11] Moreover, the undefined term "religious advocacy" encompasses a wide range of speech, much of it permissible. We need not repeat the illustrations here.

\*12 The state has pointed to no narrowing construction of this order or of similar enactments by its courts or any state official. While we attempt to interpret state enactments to avoid constitutional problems, e.g., *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.1982), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982), we can discern no obvious interpretation of the order that will eliminate its overbreadth. We also see no way to sever the order or excise certain words from it in order to leave a legitimate portion in place, see *Brockett v. Spokane Arcades*, 472 U.S. 491, 504-05, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), and it is not within the province of this court to "rewrite" the order to cure its substantial constitutional infirmities. See *Treasury Union*, --- U.S. at --- and n. 26, 115 S.Ct. at 1019 and n. 26; *Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct.



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1919, 114 L.Ed.2d 524 (1991).

Our analysis as to the second order is similar; the order covers the posting on bulletin boards of a wide range of materials, from notices of church services to articles about all sorts of topics from a religious perspective. There appears to be no possible narrowing construction, and were we to attempt to sever the order in a manner that might minimize its constitutional deficiencies--so that, for example, it prohibited only the posting or display of religious artifacts--we would inevitably strip it of a substantial part of its purpose and effect. The state has not asked us to take any such step and we question whether it would be appropriate for us to do so. Here, unlike a case in which a statute is declared overbroad, the state can easily promulgate a new order that complies with the Constitution if it so wishes.

#### CONCLUSION

Although we recognize that the state has a legitimate interest in avoiding the appearance of supporting religion and in furthering the efficiency of the workplace, the state interests here are insufficient to support the ban on religious advocacy, and the order prohibiting the posting of religious materials is clearly unreasonable. Moreover, both orders are overbroad. The order granting summary judgment for the defendant-appellees is reversed with directions to enter summary judgment for plaintiff-appellant and to afford such relief as may be appropriate.

#### REVERSED AND REMANDED.

FN\* The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

FN1. Tucker does not challenge the February 7, 1989 order banning the use of acronyms on official department work or any of the June 9, 1988 orders. He apparently accepts the February 7, 1989 acronym ban, and the state has represented that it will not seek to enforce the June 9, 1988 orders if we invalidate the orders appealed here. Tucker's complaint raises a federal question and the district

court had jurisdiction under 28 U.S.C. § 1343. He is challenging the substance of the April 1991 grant of partial summary judgment. While partial summary judgment is generally not a final appealable order, we have jurisdiction under 28 U.S.C. § 1291 because the July 22, 1994 district court order dismissing the remaining adjudicated claims and entering final judgment constitutes an appealable final judgment.

FN2. The determination of whether public employee speech is protected under the First Amendment is a question of constitutional law that we review de novo. *Hyland v. Wonder*, 972 F.2d 1129, 1134 (9th Cir.1992), cert. denied, 508 U.S. 908, 113 S.Ct. 2337, 124 L.Ed.2d 248 (1993). When the district court upholds a restriction on speech as constitutional, we conduct a de novo review of the facts. *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988).

FN3. The government has not set forth facts tending to show that Tucker spent more time than other employees in non-work related conversation, or that "advocacy" or use of religious acronyms diverted him from doing his job effectively. If the government had made such a showing, it might provide the basis for disciplinary action against Tucker but still not the broad orders challenged here.

FN4. The Supreme Court faced a similar issue in *Widmar v. Vincent*. 424 U.S. at 275-76. The Court did not reach the broad question of whether a state interest derived from its constitution could "ever outweigh free speech interests protected by the Constitution." It simply held that in the case before it, where the Missouri courts had never ruled that an "open-forum" policy violated Missouri's Constitution, the state's interest was not sufficient to overcome the students' First Amendment rights. *Id.*

FN5. Section 4 of article I guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

FN6. The only case it cites concerning the California Constitution is *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir.1994), which stands for the laudable but general proposition that the California Constitution protects religious liberty even more strongly than the United States



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Constitution. It tells us nothing that could be of assistance to the state in this proceeding.

FN7. In *Capitol Square Review & Advisory Bd. v. Pinette*, — U.S. —, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), the endorsement test was supported, once again, by five of the justices. See Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 *Conn.L.Rev.* 243, 253 (1996).

FN8. There is also nothing in the record to indicate that religious materials are more likely to disrupt harmony in the workplace than any other materials on potentially controversial topics such as same-sex marriage, labor relations, and even in some instances sports. Thus, this case is unlike *Cornelius* where there was evidence in the record—thousands of letters complaining about the inclusion of advocacy groups in the fund drive—that supported the inference that the restriction in question would serve the government's legitimate concern about disruption in the workplace. 473 U.S. at 810-11.

FN9. Compare *Rosenberger v. Univ. of Virginia*, — U.S. —, — — —, 115 S.Ct. 2510, 2516-18, 132 L.Ed.2d 700 (1995) with *id.* at 2547-51 (Souter, J., dissenting).

FN10. Overbreadth challenges are a form of facial challenge that applies specifically to the First Amendment. In First Amendment cases, unlike in other areas of the law, a party may challenge a statute or order on the ground that it is unconstitutional as applied to someone else, even if it could be constitutionally applied to the party before the court. See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *Yale L.J.* 853, 859-60 (1991). In addition, a party whose speech may not be constitutionally prohibited may also challenge a statute as overbroad if the speech of others would be chilled. *Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir.1994), cert. denied sub nom *Wang v. Lind*, — U.S. —, 115 S.Ct. 902, 130 L.Ed.2d 786 (1995). One of the purposes of the doctrine is to prevent the "chilling" of the speech of others who are not before the court. See *Board of Airport Comm'rs. v. Jews for Jesus*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987).

FN11. The district court concluded that the order

only prohibited religious advocacy during work hours. The order prohibits religious advocacy "during work hours or in the workplace." (emphasis added). We interpret this to mean that the ban applies at any time in the workplace.

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interpreted the no preference clause ... to require that not only may a governmental body not prefer one religion over another, it also may not appear to be acting preferentially." *Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir.1991), cert. denied, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992). The highest state court has interpreted article XVI, § 5 to prohibit any official involvement that promotes religion. *Morongo*, 281 Cal.Rptr. 34, 809 P.2d at 820. While the California Constitution imposes stricter prohibitions on government support of religion than does the Federal Constitution, id., we find that difference of no consequence here.

The state has cited no case that supports its argument that the California Constitution justifies the Department of Education's banning the advocacy of religion in private discussions between co-workers in the Child Nutrition and Food Distribution Division. [FN6] And, because it appears to us that it would be unreasonable to do so, we do not believe that the California courts would so interpret the constitution. Based on the analysis that we have already explicated, we conclude that allowing employees to write or speak favorably in the workplace about religion would, at least in the large majority of instances, not be inconsistent with any of the state's duties under its constitution.

### Conclusion

Because the state's justifications for the ban are meritless, we hold that its asserted interests do not outweigh "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression". *Treasury Employees*, --- U.S. at ---, 115 S.Ct. at 1014. Nor does the banned expression have a "necessary [adverse] impact on the actual operation of the Government." *Id.* (quoting *Pickering*, 391 U.S. at 571). Accordingly, we hold that the order violates the free speech clause of the Constitution.

II. THE ORDER BANNING THE STORAGE OR DISPLAY OF ANY

### RELIGIOUS ARTIFACTS, TRACTS, INFORMATION, AND MATERIALS

\*9 Our analysis of the second challenged order, which prevents the display of religious materials outside employees' cubicles or offices, is similar to our analysis of the restrictions on religious advocacy. There are, however, important distinctions between restricting employees' speech at the workplace and prohibiting employees from using the state's walls, tables or other space to post messages or place materials. The government has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it, especially when its employees are engaged in private conversation among themselves. There is a greater likelihood that materials posted on the walls of the corridors of government offices would be interpreted as representing the views of the state than would private speech by individual employees walking down those same corridors.

The interior walls of the offices of the Child Nutrition and Food Distribution Division are neither a public forum, nor a limited purpose public forum. See *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. We have applied the "reasonableness" test on a number of occasions. E.g., *Jacobsen v. Postal Serv.*, 993 F.2d 649, 657 (9th Cir.1992). The test requires more of a showing than does the traditional rational basis test; i.e., it is not the same as "establish[ing] that the regulation is rationally related to a legitimate governmental objective, as might be the case for the typical exercise of the government's police power." *Multimedia Pub. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir.1993); see also *Searcey v. Harris*, 888 F.2d 1314, 1322 (11th Cir.1989) (requiring



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Monte D. TUCKER, Plaintiff-Appellant,  
v.  
STATE OF CALIFORNIA DEPARTMENT  
OF EDUCATION; James L. Phillips;  
Maria R.  
Balakshin; Terry Proschold, Defendant-  
Appellees.

No. 94-16267.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Dec. 7, 1995.

Decided Oct. 4, 1996.

Appeal from the United States District  
Court for the Eastern District of California  
Edward J. Garcia, District Judge, Presiding

Steven R. Burlingham, Gary, Till &  
Burlingham, Sacramento, California, for the  
plaintiff-appellant.

Joyce O. Eckerm, California State  
Department of Education, Sacramento,  
California, for the defendant-appellees.

Before: BOOCHEVER, REINHARDT,  
Circuit Judges, and KING, District Judge.  
[FN\*]

REINHARDT, Circuit Judge:

\*1 Monte Tucker, the plaintiff-appellant, is a deeply religious man who works as a computer analyst in the California State Department of Education. He contends that orders promulgated by his supervisors that forbid employees in his division from engaging in any oral or written religious advocacy in the workplace and displaying any religious artifacts, tracts or materials outside their offices or cubicles violate his rights to freedom of speech guaranteed by the First Amendment. Although the government may have legitimate interests in preventing a number of the activities in which Tucker has engaged or wants to continue to engage, the challenged orders are overbroad and impermissibly infringe on First Amendment

rights. Accordingly we reverse the district court order granting summary judgment for the government and direct that summary judgment be issued in favor of Tucker.

**FACTS AND PROCEDURAL HISTORY**

Tucker has worked as a computer analyst for the State Department of Education since 1977. He is currently employed in the Child Nutrition and Food Distribution Division. His religious beliefs command him to give credit to God for the work he performs. In 1988, he decided to comply with this command by placing the phrase "Servant of the Lord Jesus Christ" and the acronym "SOTLJC" after his name on the label of a software program he was working on. The program, with the acronym, was distributed within the department. Tucker began placing the acronym on other material he was working on. Shortly thereafter, his supervisor, James Phillips, instructed him not to use the acronym. After a series of orders and warnings, Tucker was suspended for five days in May 1988.

On June 9, 1988 Tucker met with a number of his supervisors, including Phillips and Maria Balakshin, who gave him the following orders:

1. You are to refrain from using a name, acronym, or symbol with religious connotations on any document in the work place. This prohibition of the use of religious names, acronyms or symbols in the work place applies but is not limited to:
  - a). all written correspondence (letters/memorandums)[sic] prepared in either draft or final format on State letterhead or plain paper.
  - b). any written correspondence circulated within your work unit, division, branch or department.
  - c). all data keyed into the computer (including logos on computer software applications)
2. You are to refrain from initiating or promoting religious discussions during the course of your work day. Breaks and lunch periods are excluded, provided such prohibited activity takes place outside the



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work place.

3. You are to refrain from displaying or promoting religious books, pamphlets, tracts, brochures, pictures, etc., outside the inner perimeter surfaces of the partitions that define your office space.

On February 7, 1989 Balakshin issued the following orders to all employees of the Child Nutrition and Food Distribution Division, including Tucker, which provide that they may not:

\*2 1. Store or display any religious artifacts, tracts, information or other materials in any part of the workplace other than in their own closed offices or defined cubicles;

2. Engage in any religious advocacy, either written or oral, during the work hours or in the workplace.

3. Place any personal acronym, title, symbol, logo, or declaration unrelated to the business of the Department on any official communication or work product.

In May 1989 Tucker filed an action in federal district court against the California Department of Education and his supervisors alleging both constitutional and statutory (Title VII) causes of action. In 1990 the district court denied Tucker's motion for a preliminary injunction. In April 1991 the court granted partial summary judgment for the defendants on the question of Tucker's facial challenge to the constitutional validity of the department's orders and denied summary judgment on the Title VII claim. In 1994, the parties stipulated to the dismissal of Tucker's remaining unadjudicated claims under Federal Rule of Civil Procedure 41(a), and the court directed the clerk to enter judgment for the defendants. Tucker filed a timely appeal in which he challenges the validity of two of the February 7, 1989 orders. [FN1]

#### I THE ORDER BANNING RELIGIOUS ADVOCACY

We consider first the order banning religious advocacy, written or oral, in the workplace. [FN2] Both in their briefs and at oral argument the parties disagreed as to the relevant cases and doctrinal framework to be

applied to the issues before us. The parties both discuss areas of First Amendment jurisprudence that are of no relevance in addition to those that are directly applicable. Although we must look to the most appropriate precedent and doctrine, we are also aware of the dangers of reducing the First Amendment to a series of doctrinal cubbyholes and of warping different fact situations to fit into the boxes we have created. "First Amendment doctrines are manifold, and their diverse facts and analyses may reveal but one consistent truth with respect to the amendment--each case is decided on its own merits." *Bishop v. Aronov*, 926 F.2d 1066, 1070 (11th Cir.1991), cert. denied, 505 U.S. 1218, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992).

Our first step is to try to separate the doctrines that are applicable here from those that are not. Tucker contends that the orders must pass strict scrutiny because the government has created a limited purpose public forum in its offices by allowing its employees both to discuss "public questions when they assemble informally at their desks, drinking fountains, lunch rooms, copy machines, etc." and to display written materials in and around their offices and cubicles. We reject that argument. In *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), the Court stated, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." (emphasis added). Assuming that Tucker and his co-workers talked about whatever they wanted to at work (before the passage of the challenged order), and that they posted all sorts of materials on the walls, that still would not show that the government had intentionally opened up the workplace for public discourse.

\*3 We also reject the state's argument that the orders should be considered time, place and manner restrictions. The time, place and manner test is only applicable to speech regulations that are content neutral. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221



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(1984). Because the orders here regulate only a certain type of expression, based on its content-religious expression-they are not content neutral. *Id.* (stating that restrictions on expression are content neutral if they are "justified without reference to the content of the regulated speech").

The state also cites cases that concern the Free Exercise Clause and appears to argue that we should analyze the orders as generally applicable restrictions that incidentally restrict Tucker's religious practice. This argument is also obviously wrong. These orders are no more "generally applicable" regulations that incidentally burden Tucker's exercise of religion than they are content neutral speech regulation: they specifically target religious speech and no other.

Finally, we reject the state's contention, which it makes without citing any supporting cases, that employee speech about religion is not on matters of public concern and thus is not protected workplace speech. This circuit and other courts have defined public concern speech broadly to include almost any matter other than speech that relates to internal power struggles within the workplace. *E.g.*, *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir.1989) ("Speech that can fairly be considered as relating to any matter of political, social, or other concern to the community is constitutionally protected.") In *National Treasury Employees Union v. United States*, 990 F.2d 1271 (D.C.Cir.1993), *aff'd* in relevant part, *rev'd* in part on other grounds, --- U.S. ---, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), the D.C. Circuit wrote:

The contrast, [between public concern speech and non-public concern speech], then was between issues of external interest as opposed to ones of internal office management. Accordingly, we read the "public concern" criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche.

*Id.* at 1273 (citation omitted); see also *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983) ("Speech by public employees

may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances.") (citations omitted) The Supreme Court has also made it clear that an employee need not address the public at large, for his speech to be deemed to be on a matter of public concern. See *Rankin v. McPherson*, 483 U.S. 378, 384-87, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (employee statement made only to co-worker concerning President Reagan was speech on a matter of public concern). Here, the speech is religious expression and it is obviously of public concern.

\*4 Casting these red herrings aside, we look instead to applicable doctrine, which is found in the case law governing employee speech in the workplace. In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Court made it clear that employees could not be forced to relinquish their First Amendment rights simply because they had received the benefit of public employment. Nevertheless, the Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Despite the government's greater interest in regulating workplace speech, when it restricts such speech it bears the burden of justifying its action, *Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th Cir.), *cert. denied*, 115 S.Ct. 2610 (1995), and its interests must outweigh those of the employee. *Id.*

Most of the workplace speech cases involve disciplinary action taken by an employer in response to statements by employees. Here, however, Tucker challenges the validity of orders that apply to all the employees of the division and ban all speech on a broad and important topic. It is clear that the government's burden when seeking to justify a broad deterrent on speech that affects an entire group of its employees is greater than when it is defending an individual disciplinary decision. *National Employees Treasury Union*, --- U.S. ---, ---, 115 S.Ct. 1003, 1014,



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130 L.Ed.2d 964 (1995) ("[U]nlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens."); see also NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("Broad prophylactic rules in the area of free expression are suspect.") (citations omitted). In cases involving a broad ban on group speech, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Treasury Employees, --- U.S. at ---, 115 S.Ct. at 1014 (quoting Pickering, 391 U.S. at 571). This is indeed an exacting standard.

#### The State's Asserted Interests

The state asserts a number of interests to justify its order prohibiting religious advocacy: (i) promoting the efficiency of the workplace, (ii) protecting the "liberty interests" of other employees not to be subjected to religious advocacy, (iii) "meeting the expectations of the taxpayers that their tax dollars are being used to support legitimate State business and not to promote religion,"; (iv) fulfilling its duty to comply with the Establishment Clause of the United States Constitution; and (v) fulfilling its duty to comply with the religion clauses of the California Constitution. We conclude that the state has failed to demonstrate that its "interests" are substantial, individually or in combination, or that they outweigh the employees' interests in free expression. Nor has it made any showing that the expression to be prohibited has a "necessary [adverse] impact on the actual operation of the government."

##### i. The State's Asserted Efficiency Interest

\*5 We first consider the state's asserted interest in "efficiency." The government has failed to show that its broad ban on religious advocacy is necessary to further its interest in discipline and efficiency. In the first place, it makes at most only a minimal showing that one individual's speech has disrupted the

workplace, or threatens to do so. Roth v. Veteran's Admin., 856 F.2d 1401, 1407 (9th Cir.1988). The district court based its efficiency decision in large part if not entirely on the fact that Phillips, Tucker's immediate supervisor, "has had to devote" "hundreds of hours to plaintiff's religious conduct," principally to the acronym issue. The only other evidence in the record going to real or threatened disruption in the workplace is Phillips' statements that only he had "been impacted" by Tucker's use of a religious acronym and that the orders were handed down in response to "what might occur in the future, what Monte [Tucker] might do."

We conclude that the time spent by Tucker's supervisor trying to restrict his religious speech does not constitute disruption. It affected only the supervisor himself, did not threaten morale in the department generally and for the most part did not concern the issues involved in the two orders before us. The separate order regarding acronyms remains in effect and is not challenged in this appeal. [FN3] In addition, it was part of the supervisor's regular functions to deal with problems of this nature. In any event, the time Phillips spent dealing with Tucker's expressive behavior cannot justify imposing a ban on religious advocacy by all employees. There is not only no evidence of disruption in general, but there is no evidence that any employee other than Tucker ever engaged in any kind of "religious advocacy." In short, the government has utterly failed to justify its broad prohibition on efficiency grounds. See Roth, 856 F.2d at 1407; cf. National Treasury Employees, --- U.S. at ---, 115 S.Ct. at 1017-18 and ns. 11 and 21.

##### ii. The State's Asserted Interest in Protecting Its Employees' Interests

The state asserts that it has an interest in protecting the liberty interests of its employees, but it never explains exactly what these liberty interests are. Nor does the state cite cases that speak to the existence of such an interest, much less cases that support its claim that this interest justifies restricting employee speech in advance by a flat ban

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against an entire category of speech. Moreover, there is no evidence in the record that any of his co-employees have complained about Tucker's speech, that any have complained about religious advocacy generally, or that any have asserted that their liberty interests have been affected in any way.

iii. The State's Asserted Interest in Protecting the Taxpayers

There is no basis in the record or otherwise for the state's asserted interest in protecting the public weal. Nor is there any evidence that the taxpayers' expectations that government money will be spent on the government's business, not on supporting religion, have been frustrated. There is no showing that any members of the public have been exposed to any religious speech or displays or expressed any concern or complained about Tucker or any other employee's conversations about religion or display of religious materials. Only Phillips, a supervisor, has spent any significant amount of the government's time dealing with Tucker's activities (and he, of course, was dealing mainly with the acronym issue.) Therefore, as in the case of the other assertions of the state's interests, the government has failed to meet its burden of showing that there is anything more than speculation or fancy to support its order banning religious advocacy. Johnson, 48 F.3d at 422 (government bears the burden of justifying a restriction on employee speech).

iv. The State's Asserted Interest in Avoiding the Establishment of Religion.

\*6 The state primarily relies on its contention, which the district court found persuasive, that the order serves the state's compelling interest in remaining neutral on religious matters and avoiding the establishment of religion. It also argues that because the order concerns the Department of Education it is justified in light of the Supreme Court's special concern for maintaining church-state separation in public schools. The last point, which the state

pressed vigorously at oral argument, is entirely specious.

While the Supreme Court has not considered the constitutionality of a flat ban on religious speech by and among employees who work in a government office, we have little doubt as to how it would rule. In a far more difficult case, the Court rejected the argument that allowing all student groups, including religious groups, to hold meetings on the campus of a public university has a primary effect of advancing religion. The Court stated such an "open-forum" policy does not confer any "imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 273, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). In *Rosenberger v. University of Virginia*, --- U.S. ---, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court said that there must be a "plausible fear" that the speech in question would be attributed to the state, and rejected an Establishment Clause argument because there was "no real likelihood" that the speech would seem to be "either endorsed or coerced by the State." *Id.* at 2523. The challenged regulation here prohibits all sorts of employee speech that could in no way create the impression that the state has taken a position in support of a religious sect or of religion generally. For example, if one employee suggested to another during the course of a private conversation at the office that he should consider being baptized or circumcised, or, while at his work station, wrote a letter to his sister suggesting that she enter a convent or convert to Judaism, his conduct would not carry or give the impression of carrying the impermissible "imprimatur of state approval on religious sects or practices." In fact, most of the conduct covered by the orders is speech that could in no way cause anyone to believe that the government endorsed it.

The state contends that as a result of the Supreme Court's particular concern about church-state separation in schools, the order is justified because it applies to employees in the Department of Education. The truth is that the state has adopted a rule that might have some basis in reason if it applied to teachers acting in their role as teachers, or to



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department employees addressing the public in their official capacities; instead the state has made it applicable exclusively to the employees of a division that performs no educational function whatsoever. Quite plainly, the order does not apply to those persons in the department whose performance of their official duties has the most potential for creating public misperception of the state's role.

\*7 A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy. See *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir.1994), cert. denied, --- U.S. ---, 115 S.Ct. 2640, 132 L.Ed.2d 878 (1995); accord *Bishop v. Aronov*, 926 F.2d at 1076. Similarly, the department may, at least under some circumstances, prevent at least some of its employees from advocating religion in the course of making public speeches on education. However, as the Fifth Circuit has recognized, speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state. *Texas State Teachers Assoc. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046 (5th Cir.1985), aff'd 479 U.S. 801, 107 S.Ct. 41, 93 L.Ed.2d 4 (1986). In *Garland*, the court struck down a policy that prevented teachers from discussing the teachers' organization during non-class time. The court found no merit in the government's contention that the restriction was necessary to uphold the Texas Education Code's policy of "neutrality" towards groups and organizations. *Id.* at 1055.

What Tucker, a computer analyst in the Child Nutrition and Food Distribution Division, discusses in his cubicle or in the hallway with other computer analysts, clearly would not appear to any reasonable person to represent the views of the state. Certainly, nothing Tucker says about religion in his office discourse is likely to cause a reasonable person to believe that the state is speaking or supports his views. Allowing employees of the Child Nutrition and Food Distribution Division to discuss whatever subject they choose at work, be it religion or football, may

incidentally benefit religion (or football), but it would not give the appearance of a state endorsement. There is simply no legitimate basis for the state's singling out the employees of the Child Nutrition and Food Distribution Division and subjecting them alone to an order prohibiting all advocacy of religion in the workplace on the ground that it is necessary to avoid the appearance that the state is favoring religion.

v. The State's Asserted Interest in Complying with the Religion Clauses of the California Constitution.

The government also contends that its interest in meeting the California Constitution's command of "strict neutrality by public officials on matters of religion" justifies the orders. If the California courts had held that limitations on speech such as those challenged here are necessary in order to insure compliance with the California Constitution, we might be required to address the question whether a state interest derived from its constitution provides a legitimate justification to restrict employee speech protected under the First Amendment, or whether the Supremacy Clause precludes reliance on the state constitution. [FN4] We do not need to reach that issue, however, because we conclude that the state constitution neither requires nor justifies the ban at issue.

\*8 The California Constitution contains an establishment clause akin to that in the United States Constitution. In *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863, 281 Cal.Rptr. 34, 809 P.2d 809 (Cal.1991), cert. denied, 505 U.S. 1218, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992), the California Supreme Court stated that federal cases interpreting the federal Establishment Clause provide guidance for interpreting the California Establishment Clause, but that the state courts must "independently determine its scope." *Id.* at 820. The state constitution also contains a "no preference clause" [FN5] and a clause prohibiting any government appropriation for religion. Cal. Const. art. XVI, § 5. "The California courts have