



June 29, 2020

Lieutenant Colonel Matthew Garvin
Commander, Air Force Element
Naval Post Graduate School

Re: Request for Religious Accommodation

Dear Lieutenant Colonel Garvin:

Major Daniel Schultz, USAF, has retained First Liberty Institute in this matter. Please direct all correspondence on this matter to me at the contact information provided below. As explained below, this letter constitutes Major Schultz's request for religious accommodation.

BACKGROUND

Although he is an Air Force officer, Major Schultz is currently assigned to a Navy command. Accordingly, he is subject to Navy rules and regulations. On June 24, 2020, the U.S. Navy issued the enclosed order in response to COVID-19 restricting certain activities that are protected under the U.S. Constitution. Specifically, the order states:

Service members are prohibited from visiting patronizing, or engaging in . . . off-installation specific facilities, services or activities . . . to include indoor religious services.

The order further states that failure to obey it may be punished by adverse or disciplinary action as a violation of 10 U.S. Code § 892. In other words, service members who attend religious services in violation of the order may be court-martialed.

Notably, the order permits several categories of non-religious activities, such as the use of mass transit, post offices, laundromats, and retail outlets. Most ironic, and problematic, is that the order permits in-residence social gatherings of *any* size. In other words, Major Schultz cannot attend religious services at his church, but he can host a party at his house with the same number of people that attend his church.

Major Schultz is a devout Christian, and his sincerely held religious beliefs compel him to participate in religious services at his church, in person. Further, as a member of his church's worship team, Major Schultz is part of his church leadership, and his attendance and participation is vital to his faith. Because it bans him from attending church and participating on the worship team, the Navy order substantially burdens Major Schultz's sincerely held religious beliefs.

THE NAVY ORDER IS UNLAWFUL

While we recognize the unique challenges the COVID-19 pandemic has presented to our armed forces, it is imperative that the very freedoms our service members exist to protect do not join its list of victims. Ensuring service member health and welfare is certainly a noble and laudable goal. But it cannot come at the expense of the Constitution. “Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are ‘open’ and which remain ‘closed.’” *Spell v. Edwards*, 2020 U.S. App. LEXIS 19148 at *11 (5th Cir. June 18, 2020) (Ho, J., Concurring).

The Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. §§ 2000bb – 2000bb-4, prohibits the federal government from substantially burdening an individual’s sincerely held religious beliefs without a compelling interest that is furthered by the least restrictive means. Here, the Navy order substantially burdens Major Schultz’s sincerely held beliefs.

In a unanimous decision, the United States Supreme Court stated that forcing one to choose between religious exercise and “serious disciplinary action” constitutes a substantial burden. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Here, the Navy forced Major Schultz to choose between religious exercise and the possibility of adverse or disciplinary action. This constitutes a substantial burden on his religious free exercise.

When the government seeks to impose such a substantial burden, RFRA requires the government demonstrate that its actions constituted the least restrictive means of furthering a compelling government interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Federal courts have stated that “‘RFRA requires the government to explain how applying the statutory burden to the person whose sincere exercise of religion is being seriously impaired furthers the compelling governmental interest.’ Therefore, ‘general statements of its interests’ are not sufficient to demonstrate a compelling governmental interest; rather, the interests need to be closely tailored to the law.” *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (internal citations omitted). Furthermore, it is a particularized inquiry; the balancing test must be “satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 430–431 (2006) (quoting §2000bb–1(b)).

No compelling interest has been cited as a basis for banning Major Schultz and other service members from the right to freely exercise religious beliefs via in-person religious services. And even if the Navy can establish that its order is necessary to advance a compelling government interest, it cannot satisfy RFRA by proving that an outright ban on religious service attendance is the least restrictive means of advancing that interest. The Navy has the burden of proving that the action it seeks to take—prohibiting in-person religious services—would be the least restrictive means of furthering the compelling interest. Showing that an action is the “least restrictive means” is an “exceptionally demanding” test. *Hobby Lobby*, 134 S.Ct. at 2780.

Nothing in the order reflects that the Navy ever performed any balancing test to determine whether burdening service members' sincerely held religious beliefs occurred through the least restrictive means to meet any asserted compelling governmental interest. Had such a test been performed, it would be clear that the Navy cannot meet this threshold. In short, the Navy order violates the First Amendment and RFRA, and it should be rescinded.

Nevertheless, although we encourage the Navy to rescind this unlawful order, if the Navy truly believes it has a compelling interest in banning church attendance, then the least restrictive means of furthering that interest is to grant Major Schultz a religious accommodation.

REQUEST FOR RELIGIOUS ACCOMMODATION

In accordance with Department of Defense Instruction (DODI) 1300.17 and Secretary of the Navy Instruction (SECNAVINST) 1730.8B, Major Schultz requests a religious accommodation to attend in-person religious services at his church. Granting Major Schultz's request accords with the U.S. Constitution, federal law, and Department of Defense regulations.

Under DOD Regulations, the Religious Accommodation Must Be Granted

Section 532(a) of the Fiscal Year (FY) 2014 National Defense Authorization Act (NDAA), entitled "Protection of Rights of Conscience of Members of the Armed Forces and of Chaplains of Such Members," states:

Unless it could have an adverse impact on the military readiness, unit cohesion, and good order and discipline, the Armed Forces *shall accommodate* individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such expression of beliefs as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment. (Emphasis added)

In January 2014, the DOD revised DODI 1300.17 to implement several changes that Congress directed under Section 533 of the FY13 NDAA, and Section 532 of the FY14 NDAA, respectively. DODI 1300.17, paragraph (4)(b) provides that, "unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Military Departments *will accommodate* individual expressions of sincerely held beliefs . . ." (Emphasis added) DODI 1300.17 further directs each service branch to implement service-specific regulations consistent with Congress' intent.

DODI 1300.17 is implemented in the Navy via SECNAV Instruction 1730.8B. Although the Navy Instruction has yet to be revised in accordance with DODI 1300.17, Paragraph 5 states that Navy policy is to "accommodate the doctrinal or traditional observances of the religious faith practiced by individual members when those doctrines

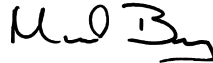
or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion, safety, discipline, or mission accomplishment.” Accordingly, both DODI 1300.17 and SECNAV Instruction 1730.8B require the Navy to accommodate Major Schultz’s religious exercise unless the Navy can demonstrate an adverse impact as described therein.

Failure to Grant the Religious Accommodation Violates Federal Law

CONCLUSION

For the reasons stated herein, the Navy must grant Major Schultz’s request for a religious accommodation to attend in-person religious services at his off-base church. In accordance with Paragraph 5c of SECNAVINST 1730.8B, requests for religious accommodation that can be approved by the commanding officer must be approved or denied within one week. Therefore, we request a response within one week of your receipt of this request. I am available to answer any questions you may have. Please do not hesitate to contact me at your convenience.

Sincerely,



Michael Berry
General Counsel

Copy to:
Commander Paul Rasmussen