MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CIVIL LITIGATION DIVISION

PAUL WATKINS
DIVISION CHIEF COUNSEL

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VIA E-MAIL AND U.S. MAIL

Madeline Ziegler
Freedom from Religion Foundation
P.O. Box 750
Madison, WI 53701
mziegler@ffrf.org

Ms. Ziegler,

I write in response to your June 24, 2016 letter to Tim Jeffries, Director of the Arizona Department of Economic Security (DES). You complained about emails Mr. Jeffries sent to employees of DES about what you called a "personal religious trip," and claimed that Mr. Jeffries' actions were unconstitutional. We reviewed those emails[1] and the applicable case law, and disagree with your legal conclusions for the reasons outlined below.

Background

On April 10, 2016, Mr. Jeffries sent an internal email to all DES employees with the subject line "Lourdes." In that email, he stated that he was a member of the Order of Malta, which is focused on "global works for the poor and the sick." Mr. Jeffries noted that he and his wife planned to travel to Lourdes, France in order to serve the "seriously afflicted and dying" for eight days. Mr. Jeffries offered to carry "special intentions" from employees to the grotto at Lourdes, and encouraged employees to electronically send him those intentions if the employees were "comfortable" with him doing so.

Mr. Jeffries later sent several other internal emails that mentioned his trip. Before the trip, he thanked employees for sending special intentions and noted that his assistant was keeping track of the intentions so that Mr. Jeffries could carry all of them to France. During the trip, he

[1] We have reviewed the following emails from Mr. Jeffries: April 10, 2016 "Lourdes"; April 12, 2016 "My heartfelt thanks, and the 2016 Colleague Survey"; April 20, 2016 "Four quick yet important things!!"; April 25, 2016 "FW: Arizona DES Director.....Riles Secular Group"; April 28, 2016 "Big things, and bigger things"; May 1, 2016 "More Moments from this Special Place"; May 4, 2016 "Re: More Moments from this Special Place".

provided updates from France regarding his interactions with the sick and dying people he had traveled there to serve.

In an April 25, 2016 article in the Phoenix New Times, Mr. Jeffries clarified that all of the special intentions were printed out at his home (not at DES) and that his assistant is focused on "colleague engagement, collaboration, and assistance."

Analysis

Even assuming Mr. Jeffries' emails endorse religion, a dispositive preliminary question is whether Mr. Jeffries' emails are government speech or private speech. For the reasons explained below, the emails are private speech.

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) Years later, seven justices of a divided Supreme Court agreed with this statement. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765-66, 774 (1995) (opinions of Scalia, J., and O'Connor, J.). A majority also held that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760 (opinion of the Court).

Employees at state agencies, including DES, are not prohibited from using work email accounts to send and receive personal emails. State employees regularly receive personal emails from other employees (including executive staff) regarding a variety of subjects. Such emails often encourage participation to support a charitable cause, such as a food drive, or to promote a limited-time opportunity, such as the appearance of a food truck. Those emails sometimes contain various opinions (e.g. best food truck in town) or expressions of belief (e.g. we should help the poor). Every employee is free to handle these personal emails and the views and opportunities presented as they please.

Mr. Jeffries' email is plainly personal. As you acknowledge, Mr. Jeffries was planning a personal trip. He talked about his personal involvement in a group conducting a charitable endeavor to help people with serious illnesses. He offered to personally take notes from employees on his trip. And he stated that employees should only give him notes if they are "comfortable" with doing so. At no time did Mr. Jeffries state that DES is sponsoring or endorsing his emails, his trip, or his beliefs.

An instructive case on point is *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996). In *Tucker*, the Ninth Circuit struck down a government agency policy banning "any religious advocacy, either written or oral, during the work hours or in the workplace." *Id.* at 1208-09. Writing for the Court, Judge Stephen Reinhardt held that the Constitution protects religious speech by employees in the workplace and that "employees could not be forced to relinquish their First Amendment rights simply because they had received the benefit of public employment." *Id.* at 1210. An agency desiring to regulate such speech must justify its action and show that its interests outweigh the employee's interests. *Id.*

In *Tucker*, California attempted to justify its rule by arguing that employee speech within the workplace could violate the separation of church and state, but Judge Reinhardt ridiculed this argument as "entirely specious." *Id.* at 1212. Distinguishing between rules regarding employees speaking to the public in their official capacity and rules regarding employees advocating their views within the workplace, Judge Reinhardt found that the speech at issue "clearly would not appear to any reasonable person to represent the views of the state." *Id.* at 1213; *see id.* ("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.") Like Tucker, Mr. Jeffries was merely participating in office discourse, not making statements to the public. Even if special rules were imposed on internal emails from the Director, such as making clear that the emails represented personal views and that employee participation in opportunities is optional, Mr. Jeffries' emails would still be permissible.

The *Tucker* Court also pointed out that allowing government employees "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." *Tucker*, 97 F.3d at 1213. Please consider the following hypothetical, inspired by *Tucker*.

Imagine Mr. Jeffries emailed employees regarding an upcoming trip to visit Lambeau Field, home stadium for the Green Bay Packers, and offered to shout the names of employees from the stands. No reasonable person would conclude that this email violated the Constitution. But drawing a distinction between this email and the email Mr. Jeffries actually sent is more difficult than it may first appear.

First, as any Wisconsin organization is likely aware, many people venerate Lambeau Field as a sacred shrine to the Packers (the Packers' official website proudly refers to Lambeau Field as "Hallowed Ground" and as "one of the most revered stadiums in the country"). Would your constitutional objections remain if Mr. Jeffries waxed rhapsodic about his reverence for the "hallowed ground" of Lambeau Field and offered to prayerfully whisper each employee's name while watching video highlights of Aaron Rodgers' successful "Hail Mary" passes from the 2015-2016 season? Conversely, many people view Lourdes as a small town in France worth visiting for reasons that have nothing to do with the Roman Catholic faith. Would Mr. Jeffries' emails have been unconstitutional in your mind if he had stated that he was planning on visiting Lourdes to study the architecture of the buildings there, and offered to bring back postcards?

Ultimately, distinguishing between these examples would force the government to delve into the "real" reasons for personal vacations, the religious significance of various vacation destinations, and the sincerity of the trip-taker's religious belief – a sensitive inquiry that itself would raise First Amendment concerns. *See Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (where proselytization or disparagement has not occurred, the Court should not "embark on a sensitive evaluation or . . . parse the content of a particular prayer").

Second, even if a distinction between types of trips could somehow be maintained, the end result you suggest is that emails about "personal religious trips" should not be permitted, and emails about "personal non-religious trips" should be permitted. You opine that government employees cannot "use their government-furnished email to recount details of [a] personal

religious trip to all employees" (emphasis added). But your letter also emphasized "government neutrality ... between religion and nonreligion." If your rule was instituted, Mr. Jeffries' hypothetical paean about his Lambeau Field trip would be permitted, but his email about his Lourdes trip would not be permitted. As such, government plainly would not be neutral. It would be favoring nonreligion.

This truth becomes even clearer when one tries to puzzle out how your suggested rule would work if Mr. Jeffries expressed intent to go to Lourdes to disparage Roman Catholic visitors of the town and offered to collect insults from employees for that purpose. Would this be permitted, because Mr. Jeffries would be recounting details of a personal non-religious or anti-religious trip? Or would it be prohibited because religion would be involved in the choice of destination and the purpose of the trip? What if Mr. Jeffries went to serve the sick and dying in Lourdes with the Red Cross, but did so because of his religious beliefs?

The obvious alternative to the morass of impermissible inquiries and impossible line-drawing described above is for an agency to permit personal emails in the workplace, whether secular or religious in nature. An agency could, of course, ban personal emails altogether. But if it allows personal emails, it cannot have a rule censoring religious beliefs while non-religious beliefs may be freely expressed. Such a rule would violate the First Amendment, not protect it. *See Pinette*, 515 U.S. at 760 ("private religious speech ... is as fully protected under the Free Speech Clause as secular private expression"); *Tucker*, 97 F.3d at 1212 ("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.").

Although state agencies have not banned personal emails, as a general rule, state agencies have restricted supervisors from tasking their assistants with taking care of the employees' personal matters. Therefore, as you suggest, Mr. Jeffries assistant likely should not have collected special intentions. But this conclusion is driven by universally applicable state agency policies, not by constitutional concerns or special rules targeting religion – the result would be the same if Mr. Jeffries assistant collected cheesehead orders for the Lambeau Field trip.

Three other points from your letter merit discussion. First, you imply that Mr. Jeffries' emails "exploited" government power "to proselytize." This is wrong both legally and factually.

Legally, you cite to *Marsh*, 463 U.S. at 792-94, in which the Supreme Court *upheld* the State's employment of a paid chaplain to open all public sessions of the Nebraska Legislature with prayer, which he apparently always offered "in the Judeo-Christian tradition." If that is not an exploitation of government power to proselytize, how can an internal, non-public email about a personal trip possibly fall into that category?

Factually, a workplace email about a personal trip is not an "exploitation" of "government power" merely because the workplace is a government agency. To say otherwise ultimately would result in a prohibition against *any* government employee from referencing *any* religious belief in *any* email composed on a government computer, regardless of the content or the recipients. In contrast, government employees expressing non-religious beliefs would be free to speak and send emails as they pleased. This result would violate the First Amendment.

Furthermore, interpreting Mr. Jeffries' emails as proselytization is uncharitable at best. Although Mr. Jeffries mentions the Order of Malta, he says the purpose of the Order is to serve the poor and the sick. He also mentions the grotto at Lourdes, but makes no mention of the religious significance of that location to Roman Catholics. Overall, the emails demonstrate that Mr. Jeffries discussed a personal, charitable trip and were not attempts to convert others to his faith. He did not ask others to join the Roman Catholic faith and did not disparage other beliefs. Instead, he stated that other employees could participate in a limited way only if they were "comfortable" doing so. And Mr. Jeffries consistently emphasized that the purpose of the trip was to serve the seriously afflicted and dying, a common cause to religious and nonreligious people alike.

Second, you suggest that Mr. Jeffries' email was an "official action" that "convey[ed] a message of endorsement or disapproval of religion," but this simply does not comport with the facts. As noted above, the emails did not convey a message of State endorsement or disapproval. And Mr. Jeffries sent an internal email about a personal trip – hardly an "official action." In the cases you cite, the "official actions" at issue were: (1) school district orders that a teacher could not read his Bible silently in class or offer two Christian books in the classroom library (*Roberts v. Madigan*); (2) a statute mandating a daily period of silence in schools (*Wallace v. Jaffree*); (3) school district programs financing classes for nonpublic schools, including sectarian schools (*Grand Rapids v. Ball*); (4) an annual Christmas display in a park (*Lynch v. Donnelly*); and (5) a statute providing aid to church-related schools (*Lemon v. Kurtzman*). All of these cases involved formal decisions affecting members of the public. None of these situations remotely resemble the one here.

Third, you claim that Mr. Jeffries sent "several updates replete with religious references." Mr. Jeffries' updates primarily discuss not his religion, but his interactions with the sick and dying who Mr. Jeffries flew overseas and spent a week of vacation time to serve. Indeed, his updates further demonstrate that Mr. Jeffries sought to inspire, not to proselytize or disparage. He described his mother's decision to forgive his brother's killers, which Mr. Jeffries noted is a miracle "whether you are of Faith or not." He also included a Mahatma Gandhi quote about serving others, and Gandhi, of course, was not Roman Catholic. Finally, to the extent that you are referring to Mr. Jeffries' consistent use of "Ditat Deus" (latin for "God Enriches") in his signature line, you may not be aware "Ditat Deus" is the Arizona state motto. As such, a state agency director can hardly be faulted for using it. *See Kotterman v. Killian*, 193 Ariz. 273, 289-90, 972 P.2d 606, 622-23 (Ariz. 1999) (recognizing the motto and noting that "it is apparent that religion has never been hermetically sealed off from other institutions in this state, or the nation").

Conclusion

Mr. Jeffries' internal emails about his personal trip were private speech, did not bear the endorsement of the State, and did not violate the Constitution. Furthermore, if DES were to adopt a rule banning religious speech in internal workplace emails, as you suggest, it would violate the First Amendment.

Sincerely,

Paul Watkins

Civil Division Chief Counsel