ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

17 February 2014

Via U.S. Mail & Electronic Mail at rsreynol@iastate.edu

Mr. Richard S. Reynolds
Director, Memorial Union
Iowa State University
2350 Beardshear Hall
Ames, Iowa 50011

Re: Bibles in Memorial Union Guest Rooms

Dear Mr. Reynolds,

It recently came to our attention that Freedom from Religion Foundation (FFRF) sent you a letter, asking you to remove Bibles from your guest rooms because the Establishment Clause of the First Amendment supposedly requires you to do so. We are sorry to hear that you have succumbed to FFRF's misinformation and agreed to its demands. In reality, the First Amendment does *not* require you to remove these Bibles, and by removing them, you may have demonstrated the very viewpoint discrimination and hostility towards religion that the First Amendment prohibits.

By way of introduction, Alliance Defending Freedom is an alliance-building, nonprofit legal organization that advocates for the right of people to live out their faith freely. Among other things, we are dedicated to educating public officials on how the First Amendment commands them both to accommodate religion and not to view anything religious with a jaundiced eye (as FFRF so evidently does).

In presenting its skewed vision of what it wishes the First Amendment meant, FFRF made several critical errors and omissions, which undermine the validity of its demands. First, it does not cite even a single case ruling that government-run guest facilities that provide Bibles in their rooms violate the First Amendment. It does not because it cannot. To our knowledge, no court in the country has ever issued such a ruling. The Memorial Union certainly had no need to adopt the extreme legal opinions of a group like FFRF.

Second, contrary to what FFRF implied, the Establishment Clause does not require government entities to dissociate themselves from everything religious. Indeed, the Supreme Court has repeatedly made it clear that the Constitution does *not* "require complete separation of church and state."[1] Rather, it "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[2] By making Bibles available to guests (or allowing private organi-

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1 *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).
2 *Id.*

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zations to do so upon their request), the Memorial Union was neither advancing nor endorsing a religion; it was merely accommodating the religious needs and desires of many of its guests, which is perfectly constitutional.

Third, by citing only elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.[3] Both courts determined that these prayers serve a secular purpose[4] and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.[5] More importantly, both courts ruled that the First Amendment does not require universities to become "religion-free" zones. As the Sixth Circuit observed, "[t]he people of the United States did not adopt the Bill of Rights to strip the public square of every last shred of public piety."[6] The Seventh Circuit agreed, saying these prayers were "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[7] The Sixth Circuit acknowledged that someone "may f[ind] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional."[8] If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion in the very discrete act of allowing Bibles to be placed in its guest rooms. And just because FFRF finds the Bibles offensive does not make them unconstitutional.

Fourth, when the FFRF targets the Gideons' mission, it is advancing an argument that the Supreme Court and Eighth Circuit have repeatedly rejected. In 1989, the Eighth Circuit ruled that "[t]he mere fact a governmental body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."[9] In 1997, it reaffirmed this principle when it ruled that "the fact that the [school] district's actions"—opening a public school and granting certain exemptions—"coincide with the [religiously-motivated] desires of certain parents does not mean that the Establishment Clause has been violated."[10] The Supreme Court validated these findings when it ruled in 2005 that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[11] Indeed, Justice Breyer

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[3] *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied* 523 U.S. 1024 (1998).

[4] *Chaudhuri*, 130 F.3d at 236; *Tanford*, 104 F.3d at 986 (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

[5] *Chaudhuri*, 130 F.3d at 237–39; *Tanford*, 104 F.3d at 985–86.

[6] *Chaudhuri*, 130 F.3d at 236.

[7] *Tanford*, 104 F.3d at 986 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

[8] *Chaudhuri*, 130 F.3d at 239 (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).

[9] *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989).

[10] *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1075 (8th Cir. 1997); *see also id.* at 1076 ("[T]he district's policy to allow parental requests for exemption from curriculum—even if those requests are motivated by the religious reasons of the parents and the honoring of those requests accommodates those religious beliefs—does not violate the Establishment Clause."); *id.* at 1074–75.

[11] *Van Orden v. Perry*, 545 U.S. 677, 690 (2005); *accord ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005).

warned that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."[12] Hence, the fact that the Gideons are a Christian ministry does not somehow mean that allowing them to place Bibles in your rooms for guests to use violates the First Amendment.

Fifth, when FFRF focuses on the Gideons, it misconstrues the single case it cites. In 2009, the Eighth Circuit did limit the Gideons' distribution of Bibles in one school district, but only because the court concluded—based on facts unique to that case—that the district had endorsed a religion by having the distribution occur in a classroom with teacher or administrator supervision and approval.[13] But even in that situation, the court noted that its ruling did "not forever preclude the District from allowing distribution of Bibles at South Iron Elementary under all circumstances."[14] And it explained at great length how district's new policy, creating "a limited public forum for the distribution of a wide variety of literature," did not facially violate the Establishment Clause.[15] In the process, it observed that the "Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education *only when the purpose of the use is to advance a particular religious belief.*"[16] Here, the Memorial Union was not distributing Bibles to guests, but merely allowing them to be placed in a drawer. And it was doing so not to promote religion, but merely to serve its guests' needs and desires while traveling. All of this is completely constitutional.

Last, FFRF fails to note that numerous courts across the country have affirmed the Gideons' right to distribute Bibles in schools,[17] and even more have affirmed private citizens' right to share religious literature at public schools on equal terms with those promoting non-religious literature.[18] For example, in one school district, the Gideons placed Bibles on a table for students to pick up if they wished.[19] The Fourth Circuit upheld this practice, ruling that "the state does not violate the Establishment Clause when it permits private parties to passively offer the Bible or other religious materials to secondary school students."[20] In the process, it concluded, like the

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12 *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring).

13 *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 559, 561 (8th Cir. 2009).

14 *Id.* at 561 n.3; *accord id.* at 561 ("The injunction does not address, and therefore does not categorically prohibit, other ways in which the District might, in a neutral manner, facilitate Bible distribution by private parties . . . ."); *id.* at 564.

15 *Id.* at 563–64.

16 *Id.* at 564 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) (Powell, J. concurring)) (emphasis added).

17 *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) (ruling that parents lacked standing to challenge Bible distribution because the school did not "expend[] any funds on the Gideons' Bible distribution," "the Gideons do not address the students, the school does not make any announcement informing the students about the Bibles, and no school district employees handle the Bibles"); *Schanou v. Lancaster Cnty. Sch. Dist. No. 160*, 62 F.3d 1040 (8th Cir. 1995) (dismissing challenge to the distribution of Gideon Bibles at school on standing and mootness grounds).

18 *See, e.g., Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 535–36 (3d Cir. 2004); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Sch.*, 373 F.3d 589, 602 (4th Cir. 2004); *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 424 (6th Cir. 2004); *Hill v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297–98 (7th Cir. 1993).

19 *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 276–77 (4th Cir. 1998).

20 *Id.* at 288.

Eighth Circuit, that government officials do not unconstitutionally advance religion simply because they respond to religiously-motivated requests.[21] Here, the Memorial Union had done nothing different. Bibles were simply placed in guest rooms, which is the same sort of "passive distribution" the Fourth Circuit upheld. And like the students there, guests could either use the Bibles or not, depending on their own desires.

However, by succumbing to FFRF's demands, you may have exposed yourself and the Memorial Union to potential liability. Presumably, your guest rooms include a variety of printed materials, including magazines, phone books, and information about the campus and guest facility. By removing the Bibles because they are religious, you may have engaged in viewpoint discrimination, which is "an egregious form of content discrimination" and a "blatant" violation of the First Amendment.[22] The Supreme Court and numerous other federal courts have repeatedly condemned efforts to exclude or restrict religious materials and activities as viewpoint or content discrimination, both at universities[23] and elsewhere.[24]

In short, we urge you to reject FFRF's baseless assertions, restore the Bibles to your guest rooms, and continue to allow religious groups who request to place sacred texts in your rooms to do so. In so doing, you will fulfill the best of our nation's history of accommodating religion, and you will avoid manifesting the viewpoint discrimination and hostility towards religion that the First Amendment prohibits. Of course, if you wish to discuss this matter further, we would be happy to do so. Please do not hesitate to contact us.

Sincerely,

Travis Christopher Barham
Litigation Staff Counsel
ALLIANCE DEFENDING FREEDOM

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[21] *Id.* at 281.

[22] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[23] *See, e.g., id.* at 831 (excluding a religious newspaper from the student fee forum constitutes viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (excluding a religious student group seeking to worship from a university building constitutes content discrimination); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 778–79 (7th Cir. 2010) (excluding events involving prayer, worship, and proselytizing from a student fee forum constitutes viewpoint or content discrimination).

[24] *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also CEF of N.J., Inc.*, 386 F.3d at 526–30 (excluding religious materials from a school flyer forum constitutes viewpoint discrimination); *CEF of Md., Inc.*, 373 F.3d at 593–94 (same).