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Via Email

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Re: Legal Demand for Secular Oath

Dear commanding officers,

This letter is written on behalf of [REDACTED] who is currently stationed at Creech Air Force Base. He wishes to reenlist and was informed that he must swear to God in order to do so. Specifically, the military personnel flight would not accept his reenlistment contract because he omitted "so help me God." On or about August 25, 2014, [REDACTED] was told that his options were to say "so help me God" or to leave the Air Force. Further, he was told he must sign the religious oath portion of the enlistment form without adjustment. Requiring [REDACTED] to take an oath containing this religious affirmation violates his clearly established constitutional rights under the First Amendment. This letter demands that you immediately allow [REDACTED] to reenlist using a secular affirmation and that the Air Force accept his written enlistment form in a way that reflects his secular affirmation (i.e., by line-out and initial of the "oath" and "So Help me God" portions of DD Form 4).

The American Humanist Association ("AHA") is a national nonprofit organization with over 30,000 members and supporters across the country, 181 chapters and 80 affiliates nationwide, and an online following of over 315,000. The Appignani Humanist Legal Center, AHA's legal arm, includes a network of cooperating attorneys from around the country. The center has litigated cases involving church-state separation and the rights of Humanists, other

non-theists, as well as Christians, in state and federal courts nationwide. [REDACTED] is also a member of the Military Association of Atheists & Freethinkers, which represents nontheists in the military and over 3,500 current and former military personnel worldwide who are entitled to secular and humanist accommodation in military procedures and services.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Not only must the government not endorse, advance, promote, affiliate with, or favor any particular religion, it "may not favor religious belief over disbelief." *Id.* at 593 (citation omitted). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed.*, 330 U.S. 1, 31-32 (1947). Separation "means separation, not something less." *McCollum v. Bd. of Ed.*, 333 U.S. 203, 231 (1948).

It is well settled that the government cannot compel a person to take an oath that invokes a supreme being. The Establishment Clause specifically prohibits the government from requiring a non-believer to take an oath that affirms the existence of God. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling that the government could not require persons who qualified for office to declare their belief in the existence of God). In *Torcaso*, the Supreme Court made clear that "[n]either a state nor the federal government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" *Id.* at 495. More generally, the government cannot "impose requirements which aid all religions as against non-believers," or aid "those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.*¹ The Court held that doing so violates the mandate of "separation between church and State." *Id.* Hence, the requirement that [REDACTED] take an oath that affirms the existence in God violates the Establishment Clause.

Any attempt to coerce an atheist "to take an affirmation despite [his] sincere religious objections [is also] a violation of the Free Exercise Clause." *Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991).² The "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the . . . government may not compel affirmation of religious belief." *Employment Div. v. Smith*, 494 U.S. 872, 876-877 (1990) (citing *Torcaso*, 367 U.S. 488). The Supreme Court has recognized that the

¹ Furthermore, the Supreme Court in *Torcaso* recognized: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, *Secular Humanism* and others." *Id.* at n.11 (emphasis added).

² *See also Ferguson v. Commissioner*, 921 F.2d 588, 590-91 (5th Cir. 1991) (holding that requiring a witness to swear or affirm when doing so is against that person's sincerely held beliefs violates the Free Exercise Clause); *Gordon v. Idaho*, 778 F.2d 1397, 1401 (9th Cir. 1985) (holding that an oath or affirmation burdens free exercise); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (holding that an oath or affirmation with a reference to God burdens free exercise). *See also Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 56-58 (M.D. Ala. 1972) (required oath containing words "so help me God" violates Free Exercise Clause); *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997) (holding that a state statute requiring "so help me God" at the conclusion of an oath of office for public notary violated the No Religious Test Clause). *See also Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing *Torcaso*) (Free Exercise Clause does not allow government to "compel affirmation of a repugnant [religious] belief").

First Amendment “on the subject of religion has a double aspect.” *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940). It explained:

On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, - freedom to believe and freedom to act.

Id. As such, the government cannot make the stating of oath, which includes “so help me God,” a condition of employment or office, lest it be in violation of the Free Exercise Clause:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981).

For instance, in *Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991), the court held that a judge’s attempt to coerce an atheist “to take an affirmation despite her sincere religious objections, was a violation of the Free Exercise Clause.”

The forced oath to a supreme being further violates equal protection principles. *See State v. Powers*, 51 N.J.L. 432, 433 (Sup. Ct. 1889). In *Powers*, the court held that a witness could not be denied the right to testify in his own behalf on the ground that he did not believe that God would punish perjury. The court reasoned:

One of the great causes which led to the settlement of the American colonies was the desire of the immigrants that their government should not make discriminations against them because of their religious tenets. It was not so much that they esteemed any particular privilege denied to them as of value sufficient to warrant their expatriation, but they insisted upon the more general doctrine that their belief *or disbelief* on religious topics *should not debar them from rights which the laws afforded to other subjects*.

Id. at 435 (emphasis added).

The object in view was to guarantee to every one *that his religious principles should never, under any circumstances*, be made the ground of denying to him any civil right which, with different religious principles, he might lawfully claim.

Id. (emphasis added).

Furthermore, Article VI of the Constitution provides that, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. Const. art. VI, cl. 3. Forcing ██████ to swear to a supreme being as a condition of his reenlistment is tantamount to a “religious test” and is therefore violative of this constitutional provision as well.

Naturally, the Constitution trumps any statutory or regulatory language or requirements to the contrary. The fact that 5 U.S.C. 3331, 10 U.S.C. 502, and 10 U.S.C. 304, include the surplus phrase “so help me God” does not mean that the Air Force must require officer candidates or enlistment/re-enlistment candidates to state those words. To the contrary, as applied to an objector, that portion of the statute is unconstitutional and therefore without effect.³ The right to omit these words is not only recognized by the courts, but has also been recognized by the Air Force itself. See, for example, AFI 36-2606 (“5.6. Active Duty Oath of Enlistment”) which previously provided that “[a]irmen may omit the words —So help me God, if desired for personal reasons.”⁴

In view of the foregoing authorities, the Air Force must allow ██████ to reenlist without saying, “so help me God” or making any other oath to a supreme being. If ██████ is not administered a secular oath, the commanding officers may be sued in federal court for injunctive and declaratory relief. In addition, because the law in this area is well established, those commanders may be sued in their *individual* capacities and be personally liable for damages along with attorneys’ fees.

Sincerely,
Monica Miller, Esq.

³ See Article VI, cl. 2, of the Constitution, which makes the “Constitution . . . the supreme Law of the Land.”

⁴ However, it is our understanding that this provision has recently been removed from the policy. We ask that you replace the note regarding the right to affirm without the “so help me God” language in both the officer and enlistment oath regulations to avoid further confusion and to ensure constitutional rights of non-theists are not violated in the future.