

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

06CV004503

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION
itself and on behalf of its members,
MARK ZIDEK, and ILIR SINO

Plaintiffs,

Case No. _____

v.

DAVID A. CLARKE, JR.,
EDWARD BAILEY, and
MILWAUKEE COUNTY

Case Code: 30703

Case Type: Unclassified

Defendants.

**BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

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The above-named plaintiffs, by their attorneys, Jonathan Cermele and Eggert & Cermele, S.C., submit this brief in support of their Motion for Temporary Restraining Order and Preliminary Injunction.

SUMMARY OF ARGUMENT

The grounds for this motion are simple and straightforward. The plaintiffs, employees in the Milwaukee County Sheriff's Office, are asserting their unequivocal right to a workplace that is free from religious endorsement. Although plaintiffs ultimately seek a judgment on the merits, injunctive relief is warranted because the defendants' actions are unlawful, and the plaintiffs are threatened with irreparable harm.

ARGUMENT

To obtain a Preliminary Injunction, the plaintiffs, as the moving party, must demonstrate a sufficient probability that the future conduct of the defendant will violate a right and injure the plaintiff. *Pure Milk Products Coop. v. Nat'l Farmer's Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). Additionally, a Preliminary Injunction will generally not be issued without a showing of lack of adequate remedy at law and irreparable harm. *Joint School Dist. Number 1, City of Wis. Rapids, et al. v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 308, 234 N.W.2d 289, 299 (1976). If the moving party meets that threshold burden, then the competing interests will be balanced, and the moving party must satisfy the Court that equity favors issuing the injunction. *Pure Milk Products Coop.*, 90 Wis. 2d at 800.

I. THE LAW WITH WHICH DEFENDANTS WERE REQUIRED TO ADHERE.

The First Amendment to the United States Constitution, contains an "Establishment Clause." Our Supreme Court has determined that clause was meant to erect a "wall of separation" between church and state. *Everson v. Board of Ed.*, 330 U.S.1, 15-16, 67 S.Ct. 504, 511-512, 91 L.Ed. 71 (1947). As a minimum, the Establishment Clause prohibits government from abandoning secular purposes in favor of placing an imprimatur on one religion, or to favor the adherents of any sect or religious organization. As far as an establishment of religion is concerned, the First Amendment requires the separation of church and state to be unequivocal and complete. *Zorach v. Clauson*, 343 U.S.306, 313-314, 72 S.Ct. 679, 684-685, 96 L.Ed. 954 (1952). The Establishment Clause therefore stands for the proposition that, when governmental activities touch on the religious sphere, they must be secular in purpose, even handed in operation, and neutral in primary impact. *Gillette v. U.S.*, 401

U.S. 437, 450, 91 S.Ct. 828, 836, 28 L.Ed.2d 168 (1971), reh'g denied, 403 U.S. 934, 91 S.Ct. 1521, 28 L.Ed.2d 869 (1971).

The touchstone in any Establishment Clause analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 91 L.Ed. 711 (1947). When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality – and there is no neutrality when the government's ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). By showing a purpose to favor religion, the government "sends the ... message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members' " *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-310, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (CONNOR, J., concurring)).

II. DEFENDANT FAILED TO ADHERE TO THAT LAW.

Simply put, the defendants have chosen to violate the First Amendment, by specifically furthering one religion over another. That decision – and the act(s) in furtherance thereof – simply cannot stand.

In choosing to allow the "Fellowship of Christian Centurians" to speak at roll call, the defendants necessarily espoused the benefits of that sectarian organization over others. In so doing,

they placed their “imprimatur” on Christianity in general, and the specific teachings of the “Fellowship of Christian Centurians.” That involvement not only impermissibly shows the government’s entanglement in religious opinions and activities, but also demonstrates Milwaukee County’s direct support of the “Christian” religion, to the exclusion of all others – an action the State simply may not take.

There is no question in this case that the irreparable harm will occur if this Court does not enjoin the defendants’ conduct, as “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976),

III. THE THREAT THAT NEEDS TO BE PROTECTED AGAINST.

The Supreme Court long ago recognized that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 40 L.Ed.2d 547 (1976). While that statement was made in the context of the loss of protected speech.¹ “[r]eligious freedom is as precious as free speech.” *ACLU v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986), and “injunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages.” *Nat’l People’s Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990).

¹ Based on the high value that is placed on free speech, and the consideration that speech delayed may be speech destroyed. *Elrod*, 427 U.S. at 374, n.29, 96 S.Ct. at 2690, n.29.

If defendants' actions in this regard are not enjoined, then two additional "roll calls" will be subject to the state sponsored support of the "Fellowship of Christian Centurians" - that are scheduled for May 16, 2006 at 1500 hours (i.e., 3:00 p.m.), and 2300 hours (11:00 p.m.).

If those "roll calls" are allowed to proceed with presentation by the "Fellowship of Christian Centurians," the Deputies in attendance will be subjected to being "told" what religion their Sheriff supports - clearly, what the Establishment Clause was designed to prevent.

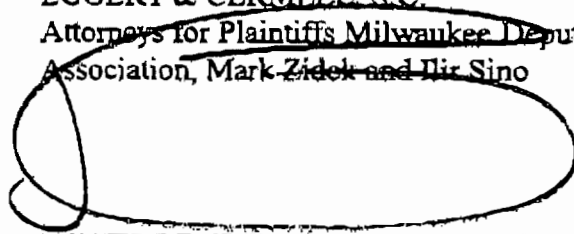
Moreover, as the employer has sponsored this initiative, and clearly identified what he (i.e., the Sheriff) feels to be the appropriate religion for his deputies to follow, real and serious adverse employment consequences could result to those who choose to exercise their right to be free from such state sponsored religious persuasion, by either walking out of the roll call, not taking the "suggested reading" (*See Felber Aff., at Exhibit B*) or failing to sign up for the "Fellowship of Christian Centurians" Seminar.

CONCLUSION

For the above-stated reasons, plaintiff's respectfully request that this Court: 1) issue a Temporary Restraining Order enjoining defendants from directing or even allowing the "Fellowship of Christian Centurians," or any other non-secular organization, from attending and speaking at any Milwaukee County Sheriff's Department roll call; 2) issue an Order directing defendants to appear before the Court at a time to be fixed by the Court to show cause, if there be any, why a Preliminary Injunction should not be issued, and; 3) issue a Preliminary Injunction making the Temporary Restraining Order the Court's Preliminary Injunction pending final adjudication of this case on its merits.

Dated this 15th day of May, 2006 in Milwaukee, Wisconsin.

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