

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434 / 978 - 1789
www.rutherford.org

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Environmental Matters Committee
Rm. 251, House Office Bldg.
Annapolis, MD 21401-1912

Attention:	Del. Maggie McIntosh, Chair	Del. Jay A. Jacobs
	Del. James E. Malone, Jr., Vice Chair	Del. Stephen W. Lafferty
	Del. Pamela G. Beidle	Del. Herb McMillan
	Del. Elizabeth Bobo	Del. Doyle L. Niemann
	Del. Rudolph C. Cane	Del. H. Wayne Norman, Jr.
	Del. Alfred C. Carr, Jr.	Del. Anthony J. O'Donnell
	Del. Barbara A. Frush	Del. Charles J. Otto
	Del. James W. Gilchrist	Del. A. Shane Robinson
	Del. Cheryl D. Glenn	Del. Dana M. Stein
	Del. Anne Healy	Del. Cathleen M. Vitale
	Del. Patrick Hogan	Del. Michael H. Weir, Jr.
	Del. Marvin E. Holmes, Jr.	Del. C. T. Wilson

Re: H. B. 132

Dear Delegates:

The Rutherford Institute¹ was asked by Rhonda Winkler, a resident of Woodbine, Maryland, to intercede on her behalf with the Maryland State Highway Administration (SHA) regarding its agents' removal of a small United States flag honoring the military from the grassy median of a roundabout at the intersection of MD 94 and Old Frederick Road in Woodbine.

We believe H.B. 132 and S.B. 382 represent the necessary statewide resolution of this issue. Indeed, the need for a policy permitting the patriotic display of flags in the traffic medians has now been widely acknowledged, as has the potential for dissension and costly litigation so long as the issue remains unresolved.

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

As a constitutional attorney with more than 30 years of experience in First Amendment law, I can attest to the fact that flying the American flag on land that is tantamount to a small public park constitutes clearly protected expression under the First Amendment. However, under current Maryland law, anyone desiring to obtain a permit to display the American flag in a state-owned circular island at the center of a traffic roundabout must navigate a lengthy, cumbersome permit process that, by its very nature, discourages all but those who are well-versed in dealing with such bureaucratic red tape. It is in the best interest of state workers who must maintain these public thoroughfares and members of the Maryland community who wish to display the American flag in state-owned roundabouts as a show of steadfast support for American troops abroad that the permit process be simplified.

This issue recently came to a head when officials with the Maryland State Highway Administration (SHA) removed an American flag from the grassy median of a traffic roundabout at the intersection of MD 94 and Old Frederick Road in Woodbine, Md. The flag was placed there by a Maryland family, the Winklers. The flag symbolized the community's patriotism and gratitude, serving as a warm welcome for sons and daughters of Woodbine as they returned home from difficult and dangerous assignments on foreign soil that were undertaken in a spirit of service and sacrifice.

That the flag has been flown from that circle for the past three years, replaced periodically with a new flag provided by the American Legion Gold Star Post 191 in Mount Airy, is undisputed. That the flag has not been a cause for concern, safety or otherwise, over the course of the three years it has flown in the circle, is also undisputed, given that it took three years for it to "com[e] to the attention of SHA District 7 management."² Also undisputed, as I noted previously, is the fact that flying the American flag on land that is tantamount to a public park, albeit a small one, constitutes clearly protected expression under the First Amendment, a right recognized by the courts.

Our analysis of the situation leads us to believe that should the Winklers choose to pursue a legal challenge over their right to display an American flag in the grassy median, they have a number of strong arguments in their favor. First, the safety concern raised by the SHA—that the flag "posed a safety threat to motorists"³—appears to be a flimsy argument and a losing one, at that, especially in light of the fact that the SHA waited three years to raise it as a safety concern. At this point, the burden rests with SHA to prove the safety concern.

Second, the SHA has stated as another reason for the flag's removal the fact that it "was installed without permit"⁴ and that it reportedly "constituted trespassing on state property."⁵ By

² "Flag Controversy Spreads Misinformation," Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

³ "Flag Controversy Spreads Misinformation," Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

⁴ "Flag Controversy Spreads Misinformation," Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

suggesting that the acquisition of a permit would have made the display of the flag acceptable, the SHA essentially acknowledges the grassy median to be a forum, which moves the discussion to a different level altogether. A citizen's right of access to public property for purposes of engaging in expression protected by the First Amendment is governed by a forum analysis. Depending on the nature, history and public policies connected with the public property, that property can be considered either a traditional, designated or non-public forum. In this case, the traffic circle is not technically a designated forum because it has not been set aside for First Amendment activities by any particular rule or policy. Thus, it would be either a traditional or non-public forum.

One can make the argument that the traffic circle constitutes a traditional public forum, which includes parks, streets and sidewalks. Depending on the size of the circle and its use, it could be considered like a park. However, this particular circle in question is more likely to be considered within the street and highway right-of-way, which some cases have found to fall within the classification of streets and therefore constitute traditional public forums. In fact, The Rutherford Institute recently obtained the acquittal of a man charged with trespassing because he was carrying a protest sign while in a public highway right-of-way. Institute attorneys pointed out in that case that highways, streets and their accompanying rights-of-way are places where persons are presumptively entitled to engage in activities protected by the First Amendment.⁶ Another recent case from Texas held that sidewalks and other areas within public rights of way constitute traditional public forums.⁷

Within a traditional public forum, a regulation on speech must be content neutral and must be narrowly tailored to serve a significant government interest. Time, place and manner regulations are allowed in traditional public forums. In this case, the state of Maryland is asserting a public safety interest in the restriction on the flag. However, it is unreasonable to suggest that the safety of any person was jeopardized by this particular display. Taking into consideration the particular location and placement of the flag in question and the fact that the flag has not triggered any dangerous situations in the past three years, safety concerns cannot justify its outright removal.

Thus, what is needed right now is an acceptable remedy that both addresses the permit concerns of the SHA and accommodates the desire of the members of the Woodbine community to maintain a patriotic display at this location as long as Americans are fighting overseas. SHA officials have already publicly acknowledged that a statewide solution is needed. David Buck, an SHA spokesman, is quoted by the *Baltimore Sun* as saying that "he hopes there is a solution to be found, just as one was found when more and more people began hanging flags from highway

⁵ Editorial, "State should find a way to allow flags in traffic circles," *Baltimore Sun* (Jan. 5, 2012), http://articles.baltimoresun.com/2012-01-05/explore/ph-ho-cf-editorial-0105-20120103_1_american-flag-new-flag-flag-controversy. Accessed on Jan. 9, 2012.

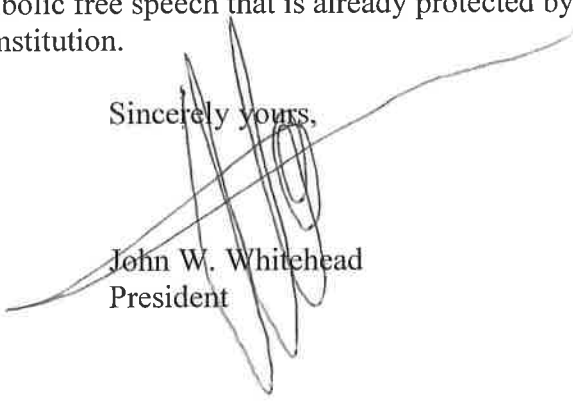
⁶ "Addressing free speech principle," *The Daily Progress* (July 25, 2011), <http://www2.dailyprogress.com/news/2011/jul/25/addressing-free-speech-principle-ar-1195463/> (accessed January 9, 2012)

⁷ *Lauder, Inc. v. City of Houston, TX*, 2010 WL 460437 (S.D. Tex. 2010).

overpasses after Sept. 11, 2001, and the administration drafted a policy to allow them to do so. 'This would have to be a full, statewide policy that would have to apply to more than just roundabouts, but we did get there with overpasses,' he said."⁸ Moreover, SHA's own statement on its website notes that "SHA would have welcomed the opportunity to support the community's desire to honor our troops by working with its representatives to find a safe, protected location for our country's symbol of freedom."⁹

This legislation is a means by which the Maryland General Assembly can show its steadfast support for American troops who risk their very lives to secure our freedoms. Moreover, this law would enhance those same freedoms by ensuring the right of citizens to express their patriotism through symbolic free speech that is already protected by the First Amendment to the United States Constitution.

Sincerely yours,



John W. Whitehead
President

cc: Governor Martin O'Malley
Del. Gail Bates
Del. Warren Miller
Ms. Melinda B. Peters, Administrator, SHA
Beverly K. Swaim-Staley, Transportation Secretary
Rhonda Winkler

⁸ Kevin Rector, "Removal of American flag from Woodbine traffic circle sparks patriotic rally," *Baltimore Sun* (Dec. 27, 2011), <http://www.baltimoresun.com/explore/howard/news/community/ph-ho-cf-flag-rally-1229-20111227,0,4161766,full.story>. Accessed on Jan. 9, 2012.

⁹ "Flag Controversy Spreads Misinformation," Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.