RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / AUGUST 2020

FROM *the* EDITOR

Welcome to the August 2020 issue of the *Religious Liberty Law Section Newsletter*.

In the last issue of the Section Newsletter, I chose as the subject of the Great Moments in Religious Liberty History series, the radio address of President Franklin D. Roosevelt to the American people on D-Day, in which he offered – and asked all other Americans to join him in – a prayer for the nation and its armed forces at a time of uncertainty and great national peril. I was reminded then that that particular public exercise of religious faith – protected by religious liberty law – was but one in a long line of national prayers offered in and for the benefit of America. Indeed, 170 years before President Roosevelt's D-Day prayer, the Rev. Duche – an Episcopalian minister – gave the first prayer of the Continental Congress at another time of great national peril, as the 13 original colonies separated from Great Britain and took up arms against what was then the greatest military power in the world. John Adams, writing to his wife Abigail about the prayer, stated that "You must remember this was the next Morning after we heard the horrible Rumour, of the Cannonade of Boston … I must confess I never heard a better Prayer or one, so well pronounced … It has had an excellent Effect upon every Body here." Connecting the founding of America to WWII, spanning 170 years of American history, I have chosen for this issue's Great Moments in Religious Liberty History series, the prayer of Rev. Duche, offered at the First Continental Congress. I find particularly interesting the similarity of sentiments expressed in both prayers, given the fact that they were separated by nearly two centuries of American history.

Also, I want to extend a personal note of thanks to Jennifer Hawks and Ryan Tucker, the authors of this issue's two Feature Articles addressing the Johnson Amendment. Ms. Hawks' article, "The Johnson Amendment Supports the Charitable Sector," argues that the Johnson Amendment helps the charitable sector remain independent, focused and committed to its tax-exempt purposes. Mr. Tucker's article, "It's Time To Fix LBJ's Amendment," argues that the Johnson Amendment muffles the invaluable voice of churches and religious non-profit organizations, and violates their constitutional rights.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"We have no government armed with the power which is capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other"

***— John Adams to Massachusetts Militia*, October 11, 1798**

IN *this* ISSUE

FROM *the* CHAIR

Covid-19 has spun the world, and there is talk about the "new normal." No one expected the complete and abrupt disorientation of life. Going forward, the loss appears staggering. In an instant, everything turned and seemingly, we are now on a random course to some unpredictable end. But, what about the Constitution? Has it too been jettisoned like so much of life as we knew it? Of course not.

The Religious Liberty Law Section remains focused on First Amendment litigation law. We continue to meet our mission to educate, discuss and disseminate information regarding, as well as to advance and to protect, the basic human and constitutional right of religious liberty through law.

As if cognizant of the future, the Founders raised pillars that would sustain the onslaught of adversity from all sides, that they knew would come. They made clear the original meaning, used the plain language, and left nothing to speculation, or worse – the spin. James Madison wrote that "It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promul-gated, or undergo such incessant changes that no man who knows what the law is today can guess what is will be tomorrow." (**Federalist Papers, No. 62, February 27, 1788, https://www.revolutionary-war-and-beyond.com/james-madison-quotes-5.html**)

The Founders intended the Constitution to secure an effective government that would give rise to a formidable and free nation. "We the People of the United States, ordain and establish the Constitution of the United States of America," makes it clear that the law is and always has been by the people and for the people of our country.

So where does the Covid-19 panic leave us? The authority and police powers reserved to the States under the U.S. Constitution to protect health, safety, and welfare during a public health crisis are broad, but power is never unlimited or unrestrained. Sweeping dictates isolating residents for an unknown period, will face legal action. While social distancing may be appropriate, the selection of certain "essential" businesses while excluding others, is even now being challenged. Do the mandatory masks work, or as some contend, are they a means of control bringing about the "new normal?" Of course, we all want to do our part in keeping everyone safe. Just as we do with *H1N1 Flu, Pneumonia*, and all epidemics.

Prohibiting the free exercise of religion and the right to assemble, with the threat of punishment by law for doing so, directly limit First Amendment freedoms. The Founders confronted the subtle intrusions on religious freedom. Its uncanny how their words are still on-point today. Madison wrote, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation. I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom." (**Journal, June 12, 1788, https://www.revolutionary-war-and-beyond.com/james-madison-quotes-5.html**)

The Founders viewed the practice of conscience and faith as rights belonging to an individual. "The Religion then of every man must be left to the conviction and conscience of every man: and it is the right of every man to exercise it as these may dictate." — James Madison, 1785. (Citation omitted.) The Declaration of Independence confirmed the spirit of the Founders and their intent of assuring among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitled them. Their determination is unmistakable.

> *We hold these Truths to be self-evident, that all Men are created Equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed….*

Great changes to our freedoms are taking place. As members of the legal profession, we share the responsibility and sworn duty to assure that the Constitution is preserved, whatever changes are mandated in stopping Covid-19.

Madison advised Thomas Jefferson that: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from the acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." (**Letter to Thomas Jefferson, October 17, 1788, http://www.revolutionary-war-and-beyond.com/james-madison-quotes-5.html**)

Our Constitutional rights rest securely on solid bedrock – impermeable, non-shifting and unchangeable. Who would hazard to violate them? Madison warned that "there are more abridgements of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." (**James Madison Speech to the Virginia Ratifying Convention, June 16, 1788, http://www.revolutionary-war-and-beyond.com/james-madison-quotes-5.html**)

When Governor Ducey declared the statewide emergency, the Arizona Supreme Court acted immediately. On March 16, 2020, Administrative Order 2020-47 was issued directing all Arizona courts to conduct business to reduce the health risk to all. As the magnitude and dangers of Covid-19 became known, unprecedented procedures were implemented – "subject to constitutional requirements."

I was recently told, "that things are different now." I did not disagree, since it is obvious that things have changed. Yet, of two things I am sure: first, the Constitution still protects our freedoms and, second, litigation defending our Constitutional Rights and Religious Liberty are even now filling our nation's courts.

It is a good time to join the Section. Please visit the State Bar of Arizona website at https://www.azbar.org for informa-tion on how to join. It has been my honor to serve as the 2019-2020 Chair of the Religious Liberty Law Section of the State Bar of Arizona – at such a time as this.

Francisca J. Cota

Francisca J. Cota, Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

First Prayer of the Continental Congress, September 7, 1774

O Lord our Heavenly Father, high and mighty King of kings, and Lord of lords, who dost from thy throne behold all the dwellers on earth and reignest with power supreme and uncontrolled over all the Kingdoms, Empires and Governments; look down in mercy, we beseech Thee, on these our American States, who have fled to Thee from the rod of the oppressor and thrown themselves on Thy gracious protection, desiring to be henceforth dependent only on Thee. To Thee have they applied for the righteousness of their cause; to Thee do they now look up for that countenance and support, which Thou alone canst give. Take them, therefore, Heavenly Father, under Thy nurturing care; give them wisdom in Council and valor in the field; defeat the malicious designs of our cruel adversaries; convince them of the unrighteousness of their Cause and if they persist in their sanguinary purposes, O let the voice of Thine own unerring justice, sounding in their hearts, constrain them to drop the weapons of war from their unnerved hands in the day of battle!

Be Thou present, O God of wisdom, and direct the councils of this honorable Assembly; enable them to settle things on the best and surest foundation, that the scene of blood may be speedily closed; that order, harmony and peace may be effectually restored, and truth and justice, religion and piety, prevail and flourish amongst Thy people. Preserve the health of their bodies and the vigor of their minds; shower down on them and the millions they here represent, such temporal blessings as Thou seest expedient for them in this world and crown them with everlasting glory in the world to come

All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior.

Amen

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Patterson v. Walgreen Co.***

589 U.S. ____, 2020 WL 871673 (2020). U.S. SUPREME COURT SHOULD REVISIT THE TITLE VII PRINCIPLE THAT AN EMPLOYER IS EXCUSED FROM PROVIDING A RELIGIOUS ACCOMMODATION TO AN EMPLOYEE IF DOING SO WOULD IMPOSE MORE THAN A DE MINIMIS BURDEN ON THE EMPLOYER.

On February 24, 2020, the U.S. Supreme Court denied an employee's petition for writ of certiorari in a Title VII religious accommodation case in which the employer had denied the employee's request to accommodate his sabbath observance practices.

Although the denial of certiorari was unanimous, Justice Alito, joined by Justices Thomas and Gorsuch, filed a concurring opinion in which they stated that – although this case was not a good vehicle for doing so – "we should reconsider the proposition, endorsed by the opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden."

They stated that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship'", noting that "the parties' briefs in *Hardison* did not focus on the meaning of that term; no party in that case advanced the *de minimis* position; and the Court did not explain the basis for this interpretation." Therefore, they wrote, "we should grant review in an appropriate case to consider whether *Hardison*'s interpretation should be overruled."

CASE 2 ***Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, et al.***

140 S.Ct. 1198 (2020). ONCE A GOVERNMENT ENTITY CREATES A PUBLIC FORUM ON A CERTAIN TOPIC, IT CANNOT PROHIBIT RELIGIOUS DISCUSSION ON THAT TOPIC.

On April 6, 2020, the U.S. Supreme Court denied the Archdiocese of Washington's request that the Supreme Court reverse the lower court's decision upholding the constitutionality of the Washington Metropolitan Area Transit Authority's denial of the Archdiocese's application to put religious themed Christmas messages on Transit Authority busses.

Although the denial of certiorari was unanimous, Justice Gorsuch, joined by Justice Thomas, filed a statement stating that, but for the fact that Justice Kavanaugh could not participate in the case, thereby making the case a poor one for review, intervention and reversal would be warranted because the Transit Authority's denial of the Archdiocese's Christmas ads constituted "viewpoint discrimination by a governmental entity and a violation of the First Amendment."

The Justices pointed out that the Court has held on no fewer than three occasions over the past three decades that governmental entities cannot impose "no-religious speech" policies on public forums. The Justices stated that "once the government allows a subject [such as Christmas] to be discussed, it cannot silence religious views on that topic." So, for example, once the government opens a forum for art or music, it cannot ban religious art or music from the forum. Likewise, as was the case here, once the Transit Authority opened a forum for Christmas expression, it could not then ban Christmas expressions that are religious. Banning expression on a topic because it is religious is viewpoint discrimination. In closing the Justice wrote that "The First Amendment requires government to protect religious viewpoints, not single them out for silencing."

CASE 3 ***South Bay United Pentecostal Church, et al. v. Newsom, et al.***

590 U.S. ___ (2020), 2020 WL ____. UNDER CURRENT CONDITIONS, STATE GUIDELINES

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RESTRICTING ATTENDANCE AT RELIGIOUS WORSHIP SERVICES TO 25% OF BUILDING CAPACITY OR 100 WORSHIPPERS, WHICHEVER IS LESS, APPEAR CONSISTENT WITH THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT. Due to the COVID-19 pandemic, California limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. In response, the South Bay United Pentecostal Church sought injunctive relief from the attendance order.

In an opinion written by Justice Kagan and concurred in by Chief Justice Roberts, the Court denied the application, stating that "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment," noting that, under the Order, "similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."

After noting that "[o]ur Constitution principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect,'" the Court stated that "when those officials 'undertake [] to act in areas fraught with medical and scientific uncertainties," their latitude 'must be especially broad'" – especially when, as here, the public officials are reacting to rapidly changing facts and circumstances on the ground.

Justice Kavanaugh, joined by Justices Thomas and Gorsuch, dissented, stating that they would grant the church's request because California's safety guidelines "discriminate against places of worship and in favor of comparable secular businesses."

"[T]he basic constitutional problem," the dissenting Justices pointed out, "is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."

After noting that "[t]his court has stated that discrimination against religion is 'odious to our Constitution,'" and that to justify its discriminatory treatment of religious worship services, "California must show that its rules are 'justified by a compelling governmental interest' and 'narrowly tailored to advance that interest, '"… "what California needs is a compelling justification for distinguishing between (1) religious worship services and (2) the litany of other secular businesses that are not subject to an occupancy cap." The dissent concluded that "California has not shown such a justification."

Noting that California could have addressed its concerns through imposing on religious worship services the same sorts of hygiene and distancing requirements it imposes on secular businesses – or could have imposed its 25% occupancy cap on both religious and secular gatherings – it did not do so. And that "[] absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories and offices while imposing stricter requirements on places of worship."

Acknowledging that "the State has substantial room to draw lines, especially in an emergency," the dissent wrote that "the Constitution imposes one key restriction on that line-drawing: the State may not discriminate against religion," and concluding that "California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment."

CASE 4 *Roberts, et al. v. Neace*

___F.3d ___, 2020 WL 2316679 (6th Cir. 2020). A GOVERNOR'S ORDERS THAT PROHIBITED THE GATHERING OF PEOPLE FOR RELIGIOUS ACTIVITIES BUT ALLOWED THE GATHERING OF PEOPLE FOR SECULAR ACTIVITIES VIOLATED THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

On May 9, 2020, the U.S. Court of Appeals for the 6th Circuit enjoined the Governor of Kentucky from enforcing orders prohibiting in-person services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for "life-sustaining" entities.

In response to the COVID19 pandemic, the Governor of Kentucky entered an order prohibiting "[a]ll mass gatherings" "including but not limited to … faith based … events." However, the order specifically excepted "normal operations at airports, bus and train stations, … shopping malls and centers, … "and typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." A second order required all organizations that are not "life-sustaining" to close. Although religious organizations were not listed as "life-sustaining" and, therefore, fell under the closing order, over 100 other sorts of businesses and organizations were exempted from the closure order as being

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"life-sustaining," including laundromats, accounting services, law firms, airlines, landscaping businesses, hardware stores, and grocery stores.

After some congregants attended an Easter service at the Maryville Baptist Church – some of whom entered the church and others of whom attended in their cars and listening to the service on a loudspeaker, they were cited for what amounted to a criminal act. The congregants challenged the Governor's order as a violation of the Free Exercise Clause of the U.S. Constitution.

In analyzing the plaintiffs' claims, the Court first determined that the Governor's restriction on in-person worship services likely prohibits the free exercise of religion in violation of the First and Fourteenth Amendments to the U.S. Constitution and that "a law that discriminates against religious practices usually well be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'"

The Court stated that the Governor's orders probably fell on the prohibited side of the line because although the Court did not believe the Governor's orders were motivated by animus toward people of faith, and the orders did not single out faith-based practices for special treatment, the four pages of exceptions to the orders removed them from the safe harbor of generally applicable laws.

In particular, the Court was struck by the fact that many of the orders' exceptions for secular activities "pose comparable public health risks to worship services" and yet those secular activities were not prohibited. The Court noted that the Governor's orders allowed laundromats, liquor stores, gun shops, law firms, and airlines to operate as long as hygiene and social distancing rules were followed, but did not allow faith services to operate, even if they followed the public health guidelines the secular activities were required to follow. The Court stated that "the Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same."

Noting that government neutrality, not the absence of religious bigotry, is the constitutional benchmark, the Court stated that "The law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones" and that that is what appears to be the case with respect to the challenged orders.

For this reason, the Court found that the Governor's orders do not satisfy the strictures of strict scrutiny. Although the Court found that the Governor has a compelling interest in combatting the spread of the virus, the challenged orders were not the least restrictive means of achieving that goal. The Court asked "Why not insist that the congregants adhere to social distancing and other health requirements and leave it at that – just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith."

Finally, the Court concluded that "… the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot coexist with a society which places religious freedom in a place of honor in the Bill of Rights: the First Amendment."

"While the law may take periodic naps during a pandemic, we will not allow it to sleep through one."

CASE 5 *Kondrat'yev, et al. v. City of Pensacola, et al.*

___ F.3d ___, 2020 WL 813251 (11th Cir. 2020).

A 34 FOOT LATIN CROSS LOCATED IN A PUBLIC PARK AND MAINTAINED BY THE CITY DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In 1941, the National Youth Administration erected a wooden cross in Pensacola, Florida's Bayview Park, to be the focal point of an annual Easter sunrise service. In 1949 the Jaycees built a bandstand in front of the cross. And in 1969 the Jaycees replaced the wooden cross with a 34-foot concrete Latin cross, which was dedicated at the 29th annual Easter sunrise service. Later, the Jaycees donated the cross to the City. Since then, the City has lit and maintained the cross. In addition to the annual Easter service, the cross has served as a venue for other activities as well, such as remembrance services on Veterans and Memorial Days.

In 2018, the U.S. Court of Appeals for the 11th Circuit affirmed a district court's decision ordering the removal of the cross. The district court had ordered the removal on the ground that the cross violated the Establishment Clause of the U.S. Constitution.

However, in 2019, following its decision in *American Legion v. American Humanist Association*, the U.S. Supreme Court granted cert. on an appeal of the 11th Circuit's *Kondrat'yev* decision, vacated the decision, and remanded the case back to the 11th Circuit for further consideration in light of its *American Legion* decision.

On remand, the 11th Circuit unanimously reversed its previous decision, finding that – under the principles enunciated in the Supreme Court's *American Legion* decision – "the cross's presence on city property doesn't violate the Establishment Clause."

In reconsidering its prior ruling, the Court first revisited

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whether the plaintiffs had standing to challenge the cross. The Court determined that at least one of the plaintiffs did because *American Legion* did not address standing and 11th Circuit precedent had determined that it is enough to support standing that a plaintiff claim to have suffered metaphysical or spiritual injury. Given the fact that the plaintiffs had alleged that they had been offended and felt excluded on account of the cross, the Court held that that would seem to qualify as the sort of metaphysical or spiritual injury 11th Circuit precedent required.

The Court then turned its attention to the substance of the case. In doing so, the Court found that the *American Legion* case did two important things that effected the 11th Circuit's previous decision. First, it jettisoned *Lemon v. Kurtzman*, on which the 11th Circuit's previous decision was based, in cases involving religious references and images in public displays, including crosses. And, second, it established a strong presumption of constitutionality for established, religiously expressive displays.

With respect to the *Lemon* test, the Court found that, in *American Legion*, six Justices "clearly rejected the proposition that *Lemon* provides the appropriate standard for religious-display cases like this one." Instead, the Court stated, "*American Legion* makes reasonably clear [] that history and tradition play a crucial role in Establishment Clause analysis."

The Court also noted that five Justices agree "that an established religious display or monument is entitled to a formal [] 'presumption of constitutionality.'"

For those reasons, the Court concluded that the case on which it had rested its original decision striking down the cross – *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) – "no longer controls and that we must assess the cross's constitutionality afresh under *American Legion*" – and that "[w]hen we apply *American Legion* rather than *Rabun*, we conclude that the Bayview Park cross does not violate the Establishment Clause."

In reversing its prior decision, the Court applied *American Legion*'s presumption of constitutionality. In doing so, the Court questioned whether the four considerations the Supreme Court enunciated when discussing the presumption were a test for determining whether a particular established religious display qualified for the presumption, or were merely the underlying rationale for why the presumption arose categorically in all established religious display cases. In the final analysis, however, the Court determined that – in this case – it didn't matter because under either approach the Bayview Park cross qualified for the presumption. As the Court noted, (1) identifying the cross's original purpose is especially difficult, (2) the purposes of the cross multiplied over time, (3) the message the cross convened changed over time, and (4) given the time the cross has been in existence, removing it may not appear neutral but, instead, hostile to religion.

Having determined that the cross was presumptively constitutional, the Court further determined that the presumption of constitutionality had not been overcome. The Court rejected the plaintiffs' argument that the presumption was overcome due to the cross's "blatant[] religious purpose" and because the cross was not a war memorial. The Court noted that *American Legion* had specifically rejected the idea that because a Latin cross was a Christian symbol, its presence on public property violated the Establishment Clause. And the Court further noted that the Supreme Court did not base its *American Legion* decision on the fact that the cross was a war memorial – although, in any event, although the Bayview Park cross was not originally established as a war memorial, it was in fact used for war memorial purposes over the years.

For these reasons, the Court concluded that "[h]aving reconsidered the case in light of *American Legion*, we conclude, as the Supreme Court did there, that 'the Cross does not offend the Constitution.'"

Judge Newsom wrote a concurring opinion on the issue of standing. He wrote that the "offended observer" theory of standing "is just plain wrong." He argued that the Supreme Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S.464 (1982) held "in no uncertain terms, that 'the psychological consequence presumably produced by observation of [religious] conduct with which one disagrees' is 'not an injury sufficient to confer standing under Art[icle] III, even though the disagreement is phrased in constitutional terms.'" Judge Newsom asked whether it can "really be that, as *Valley Forge* clearly holds, 'psychological' harm is *not* sufficient to establish Article III injury in an Establishment Clause case, and yet somehow … 'metaphysical' and 'spiritual' harm are?" He stated that the *Rabun* decision – on which the 11th Circuit was basing its standing finding in this case – was "utterly irreconcilable" with *Valley Forge*, and threatened the very principles the standing requirement is meant to serve – including preventing judicial process from being used to usurp the powers of the political branches of government. For those reasons, Judge Newsom stated that the 11th Circuit should convene en banc "in order to bring our own Establishment Clause standing precedent in line with the Supreme Court's and to clarify that 'offen[se],' 'affront[],' and 'exclu[sion]' fail to satisfy Article III's injury-in-fact requirement."

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CASE 6 ***United States of America v. Brown*** ___ F.3d ___, 2020 WL 97845 (11th Cir. 2020). TRIAL COURT DID NOT ERR WHEN IT DISMISSED A JUROR AFTER THE JUROR STATED THAT HE HAD RECEIVED DIRECTION FROM GOD THAT THE DEFENDANT WAS NOT GUILTY. In *United States of America v. Brown*, the U.S. Court of Appeals for the 11th Circuit – in a two to one decision – affirmed the decision of the trial court, in a criminal trial, dismissing a juror during deliberations based upon the juror's statement that God had told him that the defendant was not guilty on all charges.

After a fellow juror had reported her concerns that another juror had stated that he had been directed by a higher power that the defendant was not guilty on all counts, the trial judge interviewed the juror. In answer to the judge's inquiries, the juror stated "I prayed about this, I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today – or this past two weeks." When the judge asked the juror who he had received the information from, the juror responded: "My Father in Heaven." When the judge asked: "Did you say words, A higher being told me that [the defendant] was not guilty on all charges?" the juror responded: "No. I said the Holy Spirit told me that."

Thereafter, the trial judge made a factual determination that there was no substantial possibility that the juror was capable of rendering a verdict rooted in the evidence and that the juror would instead, irrespective of the evidence, base his verdict on what he deemed to be a divine revelation from the Holy Ghost. Based on that finding, the trial judge dismissed the juror.

In affirming the trial judge's dismissal of the juror, the majority started its analysis by noting that the trial court was uniquely situated to evaluate the juror's credibility and that the trial judge had carefully questioned the juror as to his statements.

Zeroing in on those statements, the majority noted that the juror had made his statement early in the deliberations and characterized what he had received from God as "a directive or conclusion" and "what [he] was told to do" as opposed to mere guidance. Taking into account all these observations and the juror's own words, the majority stated that it was not left with the definite and firm conviction that the district court made a mistake when it concluded that the juror's belief, that the Holy Spirit had told him that the defendant was innocent, prevented the juror from fulfilling his duty to follow the court's instructions about the law and base his verdict on the evidence presented at trial.

With respect to the trial court's dismissal of the juror, the majority noted that "a juror must base his verdict upon the evidence presented at the trial" and that "[a]n inability to follow that rule serves as good cause for district court to excuse a juror." Consequently, the majority held, "once the district court permissibly determined that there was no substantial possibility Juror 13 could reach a verdict rooted in the trial evidence, excusing the juror was the only correct course of action to preserve the integrity of the jury's fact-finding function."

The majority made clear that "Nothing about our decision requires or even permits the dismissal of a juror simply because of the proclaimed strength of his religious beliefs … Our holding today is a very narrow one, based on the particular facts of this record. That record reflects that the district court was very careful to ensure it was not dismissing Juror 13 because of Juror 13's faith or because Juror 13 had prayed for and thought he had received guidance in evaluating the evidence and in actually making a decision based on that evidence … these things are allowed under our system and continue to be permitted fully under our decision today, whether jurors believe they communicate with a higher being or not … as long as the juror is willing and able to root his verdict in the evidence."

The majority rejected the argument that, in excusing the juror, the court violated RFRA, the First Amendment, and the Sixth Amendment.

With respect to the RFRA claim, the majority concluded that "[e]nsuring that jurors in criminal cases are 'able to follow the law and apply the facts in an impartial way' is surely a compelling government interest … And 'excluding jurors who are unable to' impartially follow the law and apply the facts of a case – even if it is on account of their constitutionally protected religious beliefs – is the 'least restrictive means to achieve that end.'"

With respect to the First and Sixth Amendment claims – based on the argument that the dismissed juror had a right to serve on a jury without disqualification on the basis of his religious beliefs – the majority stated "the district court did not dismiss Juror 13 because of Juror 13's religion. Rather, it dismissed him because if found him incapable of rendering a verdict rooted in the evidence."

Therefore, the court affirmed the district court's dismissal of the juror.

Judge Conway filed a special concurrence, stating "I write separately to emphasize that this is not a case which turns on a juror's religious beliefs or religious freedom to engage in prayer or seek guidance during deliberations when applying the law to the evidence in the case. Rather, … [w]henever a district court determines that any factor extrinsic to the trial – whether a juror's stubborn unwillingness to follow

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the law or evasive answers about that obligation – has so strongly influenced a juror that there is 'no substantial possibility' he will base his decision on the evidence in the case, the decision to dismiss the juror is not an abuse of discretion."

Judge Pryor filed a dissenting opinion, stating that "[b]y approving his dismissal, the majority erodes the 'tough legal standard' governing the removal of deliberating jurors and imperils the sanctity of the right to trial by jury."

Judge Pryor's concerns were threefold: first, he believed that the majority's position failed to adhere to precedents imposing a "beyond a reasonable doubt" standard of proof before a district court can eliminate a deliberating juror; second, he believed the majority misconstrued the juror's religious statements; and, third, he thought the majority's opinion "makes it far more difficult for the citizens of our Circuit to be judged by juries that represent a cross-section of their communities" and provides discriminating lawyers with a tool to target and eliminate certain demographics from jury service – such as Africa American and evangelical Christians, who are more likely than others to believe that God speaks to them.

With respect to the standard of proof, Judge Pryor doubted whether the trial court could have found "beyond a reasonable doubt" that the juror could not have based his verdict on the evidence, because "[t]he record establishes that Juror No. 13 repeatedly referenced the evidence in explaining his deliberative process." And Judge Pryor noted that the juror drew a direct and specific connection between his religious duty and his legal duty as a juror to base his decision on the evidence. Indeed, Judge Pryor stated: "it is hard to imagine what kind of evidence could prove more convincingly that a deeply religious juror should *not* be dismissed. After all, the original and traditional purpose of the juror's oath, as of all official oaths, is 'to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience' against misuse of his office."

With respect to the juror's religious statements, Judge Pryor thought the majority had erroneously conflated divine guidance with outside influence, stating that: "Juror Nos 13's statement that God had communicated with him described an internal mental event, not an external instruction," noting that "[w]hat distinguishes the religious-spiritual understanding of prayer from the secular-psychological one is the premise that God is present, at least potentially, in the deepest recesses of the human heart and mind," and noting that "[o]ne common goal of prayer is to attune the mind to received God's internal guidance." Judge Pryor pointed out that "if religious jurors may pray for God's guidance, it follows that they must be entitled to *receive* God's guidance." Therefore, "[f]or a juror to receive and rely on divine guidance is not misconduct." "As long as the object of her prayers is an honest attempt to discern the facts from the evidence and to apply the law to those facts, the prayerful meditations of such a juror are no less valid a form of deliberation than any other."

With respect to his concerns that the majority's opinion would eliminate certain sorts of religious citizenry from jury service, Judge Pryor stated that "[c]ommunicating with God is most common among evangelical Protestants and those in the historically black Protestant tradition" and that to those religious believers, in particular, speaking to God as if interacting with a friend "is as familiar to millions of Americans as water is to a fish." "That large numbers of Americans believe they experience God's guidance in the form of direct personal communication" he said "should not and does not disqualify them from jury service." And, yet, Judge Pryor contended, that is exactly what the majority's opinion might do. He stated that there were two distinct dangers afoot. First, is that "our nation's religious diversity carries the risk of misunderstanding between people of different worldviews and from different walks of life." The second is that judges might misinterpret religious language – which is what Judge Pryor thought had occurred here – because "'the Federal Judiciary is hardly a cross-section of America'" so that "there is good reason to worry that members of our credentialed judicial elite, even with the best intentions, may not be ideally equipped to infer at once the true nature of a juror's thought process from the face of his statements about prayer." Thus, Judge Pryor contended, "for all that the district court knew, [the juror's statement that] 'the Holy Spirit told me that Corrine Brown was not guilty on all charges' was nothing more than Juror No. 13's way of saying in his own personal or cultural idiom that he had asked God to help him weigh the evidence and that he thought God was leading him strongly toward acquittal. He could very well have meant no more than what other religious believers would have expressed in less vivid and direct language: for example, 'I've prayed about this, and I feel that I have to vote not guilty.'" Therefore, Judge Pryor concluded, "[b]y affirming the dismissal of Juror No. 13, the majority creates the opportunity for whole swathes of citizens to be perfunctorily excluded from the jury pool at the outset during voir dire, and in doing so, provides cover for a discriminating attorney to obfuscate his invidious motives." And "[b]ecause more African Americans and evangelical Christians believe God communicates with them, these two demographics will likely bear the brunt of the majority's decision."

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CASE 7 *Satanic Temple, et al. v. City of Scottsdale, et al.*

___F.Supp.3d___. 2020 WL 587882 (D.Ariz. 2020). THE CITY OF SCOTTSDALE DID NOT UNLAWFULLY DISCRIMINATE AGAINST SATANISTS WHEN IT DENIED THE SATANISTS' REQUEST TO GIVE THE INVOCATION AT A CITY COUNCIL MEETING ON THE GROUND THAT, IN VIOLATION OF THE CITY'S LONGSTANDING PRACTICE, THE SATANISTS DID NOT HAVE A SUBSTANTIAL CONNECTION WITH THE CITY.

The Satanic Temple sued the City of Scottsdale after the City denied the Temple's request to give an invocation at a City Council meeting. The Temple alleged the denial violated its rights under the Establishment and Equal Protection Clauses of the U.S. Constitution.

In coming to its conclusion, the U.S. District Court for the District of Arizona first turned its attention to the law governing legislative prayer, citing *Marsh v. Chambers* for the proposition that "[t]he City Council's invocations are a form of legislative prayer, which occupies a unique place in Establishment Clause jurisprudence" and *Greece v. Galloway* for the proposition that "[t]he relevant inquiry in legislative prayer cases … is 'whether the prayer practice in [question] fits within the tradition long followed in Congress and the state legislatures.'"

The Court concluded that a government, in exercising its right to have invocations, "cannot pick and choose from among religions – it cannot favor some and disfavor others" and that when it does so it violates the Establishment Clause.

Therefore, the Court stated, in order to prevail on their Establishment Clause and Equal Protection claims the plaintiffs had to prove, by a preponderance of the evidence, that Scottsdale's denial of the Temple's request to give an invocation was based on the Temple's religious beliefs.

Having sketched out the parameters of its analytic framework, the Court then turned its attention to whether the Satanic Temple's beliefs were religious beliefs for purposes of standing. Although the Court determined that the Temple's proposed invocation was secular, rather than religious – because it did not invoke the aid of a divine being and the Temple representative had testified that The Satanic Temple holds nontheistic beliefs, not even believing in a literal Satan – the Court concluded that courts have held that denial of a secular invocation can satisfy the requirements of standing. Further, the Court held that the beliefs of the Temple's representative satisfied three of the four factors recognized in the 9th Circuit decision in *Alvarado v. City of San Jose* as being indicators of whether or not a belief was religious and, therefore, that the beliefs and practices of the Temple's representative "are religious for purposes of her religious discrimination claims" and sufficient to provide her with prudential standing.

However, in turning its attention to the substance of the Temple's claims, the Court determined that the evidence at trial did not prove that Scottsdale denied the Temple's invocation request because of its religious beliefs.

Instead, the Court found that "the City had a longstanding practice of permitting invocations only by organizations that have substantial ties to the City" and that the Plaintiffs – being from Tucson – lacked any substantial connection to Scottsdale. Further, the Plaintiffs, after having been apprised that the Temple's request was denied because of its lack of connection with Scottsdale, never asserted that it did have a substantial connection to the City.

Therefore, the Court concluded that the City of Scottsdale did not deny the Temple's request to give an invocation because of the Temple's religious beliefs, but because the Temple's request did not meet the City's longstanding practice of requiring that invocation givers – regardless of their religious beliefs – have a substantial connection to Scottsdale. For that reason, the Court held that the Temple failed to prove that its religious beliefs played a part in the City's denial of the Temple's request to give an invocation and, therefore, the Temple's claim that Scottsdale wrongfully discriminated against it on the basis of its religious beliefs failed.

CASE 8 *Swart, et al. v. City of Chicago*

___F.Supp.3d___, 2020 WL 832362 (N.D.Ill. 2020). A CITY ORDINANCE APPLIED IN SUCH A WAY AS TO PROHIBIT PEOPLE FROM ENGAGING IN RELIGIOUS SPEECH IN A PUBLIC PARK WAS UNCONSTITUTIONAL.

The Plaintiffs – four Christian college students who were members of a Christian outreach ministry – were ordered by Park security that they could not evangelize by speaking and handing out religious literature in Chicago's Millennium Park because to do so violated the Park rules that prohibited "[c]onduct that objectively interferes with visitor's ability to enjoy the Park's artistic displays" or that was outside areas of the Park that were specifically designated as speech and literature distribution areas.

The Plaintiffs sued the City to enjoin enforcement of those Park rules.

The U.S. District Court for the Northern District of Illinois first found that the Plaintiffs had standing to sue because the City's opposition to their evangelizing activities – including threats of arrest – chilled their speech, which

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"undoubtedly constitutes an injury supporting standing."

The Court then turned its attention to the Plaintiffs' likelihood of success on the merits.

Under that analysis, the Court first noted that "the First Amendment protects religious speech" and that "[i]ndeed, such speech lies at the very heart of the First Amendment.

Second, the Court found that the Park was a traditional public forum, rejecting the City's argument that, due to the fact that the Park was "'designed and maintained' as a 'space of refuge' from the surrounding urban areas and contains 'curated art and natural plantings,'" the Park was not a run-of-the-mill public park, noting that if a curated design was sufficient to transform the nature of an otherwise public forum, any park with a statue could lose its First Amendment protection.

Having concluded that the Park was a traditional public forum, the Court then turned its attention to the level of judicial scrutiny applicable to the challenged Rules, and determined that, although the Rules were facially content-neutral, they were *applied* in a content-based way, and that, therefore, the appropriate level of scrutiny to apply was strict scrutiny. In coming to this conclusion, the Court noted that the City had testified that the definition of speech-making in the Rules had to be assessed by looking to the intent of the speaker, which the Court determined necessarily required an evaluation of the content of the speech. And another City witness's testimony led the Court to conclude that the City would not have invoked the Rules to prohibit someone from passing out copies of *Moby Dick*, but had applied the Rules to prohibit the Plaintiffs from passing out religious literature. Thus, the Court found that, despite the Rules' facial-neutrality, "the City enforces [the Rule]s' vague provisions in a discriminatory manner based upon the intent of the speaker and content of the speech."

Having found the Rules to be content-based, the Court applied strict scrutiny analysis. In doing so, the Court rejected the City's claim that preserving the Park's aesthetics and protecting visitors' enjoyment of the Park were compelling governmental interests, noting that "[a]lthough the Supreme Court has recognized that aesthetic interests constitute *significant* government interests, it has not found such interests to be *compelling*" and that "some federal appellate courts have explicitly rejected classifying aesthetics as a compelling interest." The Court also noted that courts have rejected the argument that protecting visitors from artistic disruptions can constitute a compelling government interest. Further, the Court pointed out that the City had conceded during oral argument that it lacked any evidence that open air evangelizing disturbed anyone and that the record contained no evidence that the Plaintiffs' activities "unreasonably interfered with the Park's art or unduly disrupted others' enjoyment of art or other programming." Hence the Court found that the City failed to show a compelling state interest to justify its Rules.

The Court also found that the City failed to demonstrate that its Park Rules were narrowly tailored and that "one could easily conceive a variety of less restrictive (and content neutral) alternatives for achieving [the City's] goal."

The Court also found that the Rules were unconstitutionally overbroad, because a wide range of lawful activity was swept into the Rules.

And, finally, the Court found the Rules unconstitutionally vague because they do not provide fair notice of what type of conduct the Rules are prohibiting and allow the City to enforce the Rules in a discretionary and arbitrary manner. In conclusion, the Court granted the Plaintiffs' request for preliminary injunctive relief.

(Note: In addition to the four Plaintiffs discussed in this summary, there were also four Intervenors who challenged the Rules on the ground that the Rules unconstitutionally limited their right to circulate petitions in the Park. Their interests were not separately discussed.)

CASE 9 *Hart v. Thomas*

___F.Supp.3d___, 2019 WL 5967947 (E.D. Ky 2019). THE STATE'S DENIAL OF A VANITY PLATE READING "IM GOD" WAS UNCONSTITUTIONAL AS APPLIED.

Kentucky has a vanity license plate program that allows vehicle owners to request, for a fee, a license plate for their vehicle "with personal letters or numbers significant to the applicant." The Plaintiff requested a plate that would have read "IM GOD." The state denied the request because the statutes authorizing vanity plates provided that no such plate "shall have as its primary purpose the promotion of any specific faith, religion, or anti-religion." The Plaintiff claimed that the state's denial of his requested plate violated his free speech rights under the U.S. Constitution.

In analyzing the case, the Court first addressed the issue of whether messages on vanity plates were government or private speech, noting that the Free Speech Clause regulates only private, not government, speech.

After the Court considered the U.S. Supreme Court case of *Walker v. Sons of Confederate Veterans*, which held that license plate *designs* constitute government speech, the Court held that license plate *designs* and vanity plate *messages* were different, because whereas license plate *designs* have historically been used to communicate messages from the state, vanity plate *messages* convey personalized messages specific to the vehicle's owner. The Court rejected

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the State's argument that – because the State must review and approve vanity plate messages – vanity plate messages are government speech, noting that the State approves "many unseemly" and "contradictory" vanity plate messages and that, certainly, the State was not speaking when it approved – as it had – vanity plates espousing such messages as "UDDER," "BOOGR," "JUICY," "W8LOSS," and "FATA55." Hence, the Court found that vanity plate messages are private, not government, speech.

Having determined that vanity plate messages are private speech, the Court next turned its attention to forum analysis. In doing so, the Court found that vanity plates were nonpublic forums, because license plates are government property upon which the State has allowed some limited private expression.

The Court then applied nonpublic forum analysis, which holds that government may restrict speech in a nonpublic forum, provided such restrictions are reasonable and viewpoint neutral. In other words, the government need not open up the government forum for speech, but if it does and "has permitted some speech on a particular subject matter or topic, it may not then regulate speech in ways that favor some viewpoints or ideas at the expense of others."

The State argued that banning religious references on vanity plates is reasonable because it promotes highway safety by prohibiting controversial messages that could lead to confrontations or distractions on the State's roadways. However, the Court rejected that contention because the State "has been so inconsistent in its application of [the statutes] that it has ceased to be 'consistent with [Kentucky's] legitimate government interest' in any way." In particular, the Court noted that, if the State really wanted to avoid controversy or distraction by banning religious messages, the State would not have approved – as it had – vanity plates with messages such as "IM4GOD," "ASKGOD," "GR8GOD," and "LUVGOD." Therefore, the Court determined that the State's denial of the Plaintiff's requested vanity plate message of "NO GOD" was neither reasonable nor viewpoint neutral and, therefore, constituted an impermissible restriction on the Plaintiff's First Amendment rights.

Having determined that the State's actions were unconstitutional as applied, the Court declined to address the Plaintiff's contention that the State's vanity plate restrictions were facially unconstitutional, finding such an inquiry unnecessary to the adjudication of the Plaintiff's complaint.

FEATURE ARTICLE

It's Time To Fix LBJ's Amendment

By Ryan Tucker

There is little more controversial when it comes to church tax law than the Johnson Amendment. Added by then-Sen. Lyndon B. Johnson in 1954, the Amendment prohibits nonprofit organizations with 501(c)(3) status, including churches, from becoming directly involved in political campaigns.[1] Specifically, churches and other nonprofits cannot advocate for or against political candidates or political parties. And the penalties are steep. A church can face heavy fines or even lose their tax-exempt status for repeated offenses.

Over time, many have come to accept the Johnson Amendment simply because it has been on the books for decades. But in reality, the Johnson Amendment raises profound constitutional concerns. It gives the IRS the power to impose financial penalties on pastors and churches that engage in whatever the IRS deems "political" speech. In this way, it censors what the church can do in the public sphere.

Pastors have a duty to minister to their congregation by addressing current events and public issues facing our country. But they cannot do that if they must constantly worry about the financial risks of saying something too "political" or too closely tied to an election. Many constitutional scholars see the clear free exercise of religion and free speech violations here. And many citizens recognize that we all lose in the marketplace of ideas when pastors are barred from full engagement in public discourse. Yet, the Johnson Amendment lives on.

Background

Limitations on 501(c)(3) non-profits first appeared in 1934 with a ban on excessive lobbying efforts. But in 1954, in the midst of a contentious election cycle, then Sen. Johnson ballooned those restrictions to bar all 501(c)(3) tax-exempt organizations from supporting or opposing candidates.[2] Some evidence suggests that Senator Johnson did not have churches in mind at all when he proposed the amendment, but rather sought to use the Amendment to settle political scores and protect personal political interests.[3] But the Johnson Amendment has become even more dangerous.

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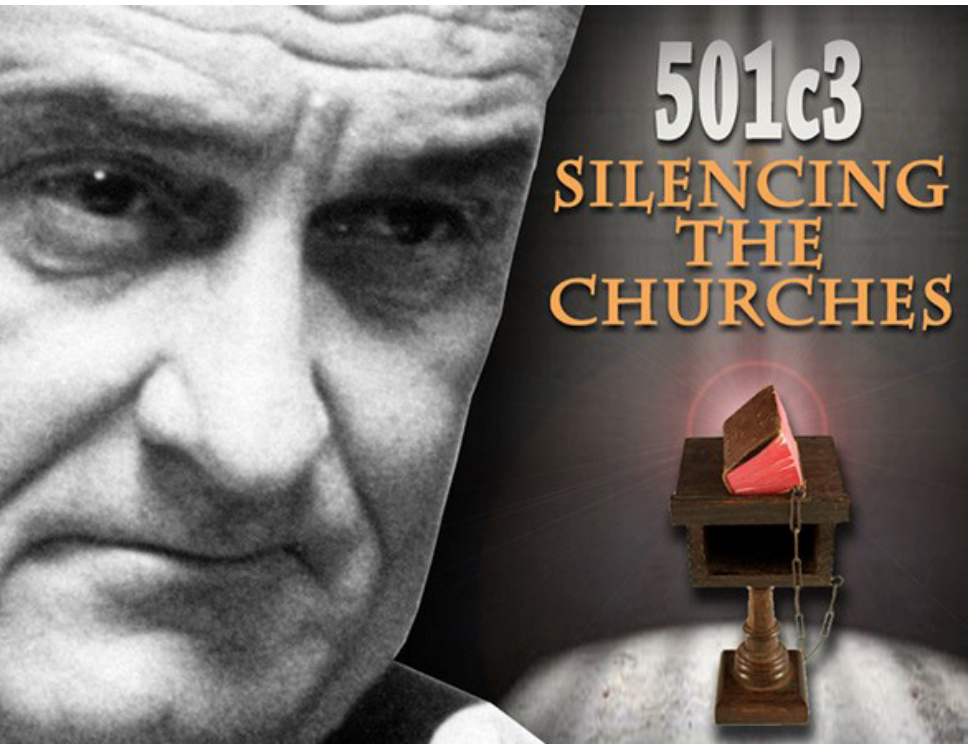
ABOUT THE AUTHOR

Ryan J. Tucker serves as senior counsel and director of the Center for Christian Ministries with Alliance Defending Freedom. He oversees all litigation efforts to maintain and defend the constitutionally protected freedom of churches, Christian ministries, and religious schools to exercise their rights under the First Amendment. Tucker earned his Juris Doctor at Baylor Law School, where he was a senior editor of the *Baylor Law Review.*

He obtained his Bachelor of Business Administration in management at Texas A&M University, where he graduated *cum laude.* Ryan is a member of the state bars of Texas and Arizona and is admitted to practice in the U.S. Supreme Court as well as multiple federal district and appellate courts.

Virtually unchanged since its enactment, the law currently demands that tax exempt churches and nonprofits "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[4] In other words, it eliminates the freedom of thousands of churches and pastors to address political candidates and related political issues.



But why were churches tax exempt in the first place? Because they provide important social and economic value. And that has long been recognized. Tax exemption of churches, which was later extended to other religious institutions, predates the American experiment by a long shot. Many cultures, for many centuries, exempted churches and religious entities from the duty to pay taxes.[5] Since our own country's founding, churches have occupied a special place in society.[6] They have long been recognized as society's conscience.[7] And for the unique role that they play in our system, "the First Amendment itself … gives special solicitude to the rights of religious organizations."[8] From the start, that special solicitude included exempting churches and religious entities from taxes.[9]

What's more, along with the intangible benefits churches bring to society, congregations spend billions of dollars each year on social programs.[10] They are "economic catalysts," meaning churches benefit local communities by multiplying the effect of every dollar that the congregation spends. One study estimates that religious organizations offer over $300 billion in economic value to our country each year.[11]

Why Change the Johnson Amendment?

Although the Johnson Amendment needs fixing for many reasons, three reasons stand out.

First, applying the Johnson Amendment to prohibit pastors from speaking on issues of faith, political or otherwise, violates those pastors'—and their churches'—rights. That includes violations of the religion clauses, free speech, and the unconstitutional conditions doctrine.[12] The Johnson Amendment is especially offensive because it challenges the rights of churches, which are specifically protected by the First Amendment, and because it seeks to restrict speech on religious beliefs by sleight of hand in calling it political speech.[13]

Second, churches provide an important and essential voice of faith-perspective in our public discourse and the Johnson Amendment chills their valuable speech.[14] Defenders of the Johnson Amendment sometimes argue that churches should "know their place," and focus on the eternal, while avoiding the temporal.[15] But these arguments rest on an errant, preconceived notion of how churches should behave. In reality, the Church needs to perform its conscience-shaping role in society, and when great moral dilemmas arise, we expect it to do so.[16]

Politics is an inherently moral enterprise because it answers questions of how we ought to order our lives.[17] Churches answer those questions both in their deeds and through their speech. They provide crucial services to society and their influence serves as a cause for better government.[18] Churches brought about positive changes to society, including childhood education, establishment of hospitals, and in the area of women's rights.[19] They were leading voices for the abolition of slavery and during the civil rights movement. But despite that history, Johnson Amendment supporters advocate acts to censor their remarks and positions.

Lastly, potential enforcement of the Johnson Amendment still poses a risk for ministers and churches. Despite the Trump Administration's assurances that it will ease some of the Johnson Amendment's pressures, the current statutory arrangement gives the government—and whoever currently controls it—unbridled discretion to determine exactly when a pastor or a church crosses the line.[20] As a result, the IRS has

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historically pursued enforcement actions based on alleged Johnson Amendment violations in an uneven manner.[21]

Given that churches do and ought to enjoy significant autonomy in society, the status quo exposes churches to a great risk of abuse. Consider, for example, that within recent memory partisans weaponized the IRS and wielded its audit power to punish political opponents.[22] There is no guarantee that churches will enjoy fair treatment.[23]

Responding to Objections to Changing the Johnson Amendment

Despite the constitutional, legal, and political concerns, many people—and indeed many churches—have come to accept the status quo. They often justify the status quo with vague sentiments stating that churches should not "get political", and should steer clear of opining on particular candidates.[24] Some support the Johnson Amendment out of a general hostility to religion and an extension of their general opposition to religious exemptions in the first place. Others view the Johnson Amendment as protective of churches' integrity by keeping them "above the fray" and out of the muck of politics.[25] And some even worry that without the Johnson Amendment churches will devolve into tax-exempt Super-PACs.[26]

But those concerns are misguided and not based in fact. First, consider that the Johnson Amendment was spawned by political pettiness and self-interest, not the high-minded ideals that others cite to justify its existence.[27] The Johnson Amendment was not enacted in response to a real problem of overly-politicized churches. Second, members of Congress have identified workarounds that protect the speech rights of pastors and churches, while preventing concerns about abuse of campaign finance laws.[28] And whether or not it is prudent for pastors to support or oppose particular candidates, those concerns do not justify violating churches' rights through federal statute.

Conclusion

In the end, churches play an important and unique role in American society. They provide moral guidance and have been an important voice on public issues dating back to the founding of our country. It's time to fix the Amendment and let churches again freely speak their beliefs without fear of financial penalties or government reprisal.

ENDNOTES

1. *See* 26 U.S.C. § 501(c)(3).
2. Robert M. Penna, *The Johnson Amendment: Fact-checking the Narrative*, Stan. Soc. Innovation Rev. (Aug. 24, 2018), https://bit.ly/36m91vj.
3. Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 Regent U. L. Rev. 237, 243 (2012) ("The history behind the enactment of the lobbying restriction parallels that of the Johnson Amendment in that both were adopted in the midst of campaigns by powerful senators in an effort to silence their opposition."); *see also id.* at 247 ("The ban on electioneering is not rooted in constitutional provisions for separation of church and state.")
4. 26 U.S.C. § 501(c)(3).
5. Stanley, *supra* note 3, at 241-42.
6. *See* James T. Schleifer, *Tocqueville, Religion, and Democracy in America: Some Essential Questions*, 3 Am. Pol. Thought 254 (2014) (describing Alexis de Tocqueville's observations about religion's unique role in American life).
7. *See, e.g.*, Samuel Zane Batten, *The Church as the Maker of Conscience*, 7 Am. J. Soc. 611 (1902).
8. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S. Ct. 694, 697 (2012).
9. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) (observing that "an unbroken practice of according the exemption to churches, openly and by affirmative state action,… is not something to be lightly cast aside.").
10. Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. of Res. on Religion 3 (2016).
11. *Id.* at 13.
12. Stanley, *supra* note 3, at 260; *see also* Mark A. Goldfeder & Michelle K. Terry, *To Repeal or Not Repeal: The Johnson Amendment*, 48 U. Mem. L. Rev. 209, 233 (2017) (recognizing same issues).
13. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010).
14. *Id.* (striking down political contribution statute because it chilled political speech).
15. Rev. Alejandro Alfaro-Santiz, *Why 4,000 church leaders want to keep politics out of the pulpit*, Des Moines Reg. (Sept. 21, 2017), https://bit.ly/2X1kSKE; *But see* Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America (1984) (criticizing the historically unsupported view that religious voices should be kept out of the public square).
16. *See, e.g.*, David Kertzer, *What the Vatican's Secret Archives Are About to Reveal*, The Atlantic (Mar. 2, 2020), https://www.theatlantic.com/ideas/archive/2020/03/what-vaticans-secret-archives-are-about-reveal/607261/ (explaining that more than seventy five years later, a debate rages on over whether Pope Pius XII and the Catholic Church did enough to speak out against Adolf Hitler, National Socialism in pre-war Germany, and the atrocities committed in the Holocaust).
17. *See* Scott Rae, Moral Choices: An Introduction to Ethics (Zondervan Academic, 4th ed. 2018) ("[M]orality is fundamental to politics, since politics and law concern the way people ought to order their lives together in society.").
18. *See. e.g.*, Manya A. Brachear, *3 Dioceses Drop Foster Care Lawsuit*,

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ENDNOTES
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Chi. Trib. (Nov. 15, 2011), https://bit.ly/368iRkf (noting that the work of Catholic Charities and other religious nonprofits in adoption and foster care eventually inspired the State of Illinois to create the Department of Child and Family Services).

19. Penna, *supra* note 2.
20. Elizabeth Dias and Zeke Miller, *President Trump Plans to Loosen Rules on Political Organizing by Churches*, Time (May 3, 2017), https://time.com/4766166/donald-trump-johnson-amendment-churches-executive-order/.
21. Stanley, *supra* note 3, at 255.
22. *See* Peter Overby, *IRS Apologizes For Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.
23. *See* Religious Landscape Study, Pew Res. Center, https://www.pewforum.org/religious-landscape-study/party-affiliation/.
24. Ruth McCambridge, *National Council of Nonprofits Launches Coalition Campaign to Oppose Repeal of Johnson Amendment*, Non Profit Q.: Policy (Mar. 2, 2017), https://nonprofitquarterly.org/national-coalition-nonprofits-launches-campaign-oppose-repeal-johnson-amendment/.
25. *Losing the Johnson Amendment Would Destroy the Unique Political Role of Nonprofits*, NON PROFIT Q. (Feb. 26, 2017) https://nonprofitquarterly.org/losing-johnson-amendment-destroy-unique-political-role-nonprofits/.
26. Goldfeder & Terry, *supra* note 12, at 254.
27. Penna, *supra* note 2.
28. Goldfeder & Terry, *supra* note 12, at 252 n.246 (comparing the Free Speech Fairness Act, H.R. 781, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/781/text, with The Free Speech Fairness Act, S. 264, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/264/text). *See also*, Free Speech Fairness Act, H.R. 949, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/949?s=1&r=9.

FEATURE ARTICLE

The Johnson Amendment Supports the Charitable Sector

By Rev. Jennifer Hawks

Before the global COVID-19 pandemic, the 2020 presidential election cycle dominated American news and culture. Campaign ads flooded social media; campaign rallies led the nightly news; campaign debates took over our television channels; campaign rhetoric inflamed partisan passions. Going to church was a respite from the partisanship. This is not to say that my church shares a common political ideology. We do not. Lifelong Republicans sit side-by-side with lifelong Democrats and independents from across the political spectrum. But, in our small groups, handbell practice and corporate worship, we are not partisans. We are Christians and seekers eager to learn from one another as we walk our spiritual journeys. We don't shed our political differences at the church door, but breaking bread together allows us to see past the stereotypes. The Johnson Amendment protects and helps foster this interaction beyond political labels throughout the charitable sector.

The Johnson Amendment Enjoys Wide Support and Serves a Practical Purpose

The Johnson Amendment prohibits all charitable organizations, religious and secular, from engaging in partisan politicking for local, state and federal elections. Charities, including churches, that are 501(c)(3) organizations may "not participate in, or inter-vene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[1]

The Johnson Amendment protects the missions of charitable organizations by keeping them focused on their tax-exempt purpose, not divided by the rancor of partisan politics in primary and general election seasons. It allows these organizations to be one of the few places in society where we are united around solving problems instead of settling political scores.

The Johnson Amendment does not prevent clergy and other leaders in the charitable

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sector from personally engaging in any partisan activity, including donating to campaigns, endorsing candidates or even running for office themselves. It simply prevents the charitable organization from using its resources to do so.

Despite numerous repeal attempts, limiting the partisan activities of the charitable sector remains a relatively uncontroversial proposition. More than 100 national and state religious denominations support the ban on all 501(c)(3) organizations from engaging in partisan endorsements[2] while none have advocated for the repeal of the Johnson Amendment. Support has also come from more than 5,800 nonprofits,[3] more than 4,500 faith leaders,[4] and the National Association of State Charities Officials.[5] Polling confirms that the majority of Americans support the common sense prohibition: 76% of U.S. adults say clergy should not endorse candidates (2020),[6] 89% of evangelical leaders oppose pastors endorsing candidates from the pulpit (2017),[7] 71% of Americans and all major religious groups oppose allowing churches to endorse political candidates while retaining their tax-exempt status (2017)[8] and 79% of Americans say it is inappropriate for pastors to publicly endorse political candidates during a church service (2016).[9] In 2020, Utah joined a few other states in adding the Johnson Amendment prohibition to its state laws.[10]

In addition to its widespread popularity, the Johnson Amendment also plays a very practical role in ensuring our free and fair elections. The most recent repeal effort was in the 2017 Tax Cuts and Jobs Act. The Joint Committee on Taxation scored the proposed repeal provision as costing taxpayers $2.1 billion as political donors would be incentivized to redirect billions of dollars in political spending from candidates and political action committees to churches and charities where campaign donations would, for the first time, be tax deductible.[11] This nonpartisan assessment of the legislation demonstrates that changing the law would have a seismic impact on campaign finance.

The Johnson Amendment is a Product of the Legislative Process Repeatedly Strengthened by Congress

The story of the adoption of the Johnson Amendment, as told by those who seek its repeal, often begins and ends in 1954. At that time, then-Senate Minority Leader Lyndon B. Johnson introduced it as a floor amendment to a tax bill that was adopted without debate or fanfare. The sparse legislative record contains the following statement from Sen. Johnson:

> Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.[12]

Many opponents of the Johnson Amendment end their review of the record at this statement and assert that the amendment cannot possibly be meaningful because Sen. Johnson was trying to sideline charitable organizations unfriendly to his political aspirations. Even if one cedes Johnson's personal motivations, that would not undercut the provision's legitimacy. Political self-interest sometimes aligns with the best policy.

The roots of the Johnson Amendment, however, trace back much further than 1954. In 1913, the newly ratified 16th Amendment gave Congress the power to levy income taxes on individuals and corporations. This new taxation power raised new questions including what the appropriate interplay between charities and politics should be as common law held

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that "political purposes are not charitable purposes."[13] In 1919, the Treasury Department enacted a regulation finding that organizations seeking "to disseminate controversial or partisan propaganda are not educational within the meaning of the statute."[14] In 1930, Judge Learned Hand held that lobbying was contrary to charitable tax exemption saying "[p]olitical agitation as such is outside the statute, however innocent the aim."[15] In 1934, Congress endorsed these findings from the executive and judicial branches and limited, but did not ban, the amount of legislative lobbying charities could perform.[16]

Between 1952-54, two House special committees held numerous public hearings investigating the political activities of charitable organizations. One committee, known as the Reece Committee, was specifically charged with investigating whether charitable organizations and foundations were "using their resources for purposes other than the purposes for which they were established" including "for political purposes; propaganda, or attempts to influence legislation."[17] The Reece Committee's final report concluded that the political activity limitations in the Tax Code were too lenient and urged stronger language which would ban all political activity from permitted charitable activities.[18] Properly seen in its historical context, Sen. Johnson's amendment to ban electioneering was not surprising to the 83rd Congress. Rather, it was the culmination of years of consideration in all three branches of government that partisanship is not a charitable purpose.

The story continues after the adoption of the provision. In 1958, the Treasury Department issued a regulation that charitable deductions were not permitted for organizations engaging in partisan campaign activity. Agreeing with Treasury's interpretation, Congress codified the regulation in 1969.[19] Congress again returned to the Johnson Amendment in 1987, strengthening it in many ways, not least of which was to clarify that the prohibition also applied to opposing candidates for political office.[20] The full legislative history shows Congress taking its time to investigate, debate and increasingly clarify the important issue of political activity in the charitable sector.

Free Speech Fairness Act Creates More Problems Than it Solves

Several pieces of legislation have been proposed over the years that would weaken or repeal the Johnson Amendment. None of these, including the Free Speech Fairness Act (FSFA), would be an improvement over the law that has been in effect for more than six decades. While the FSFA would technically leave the Johnson Amendment in place, it creates an exemption that swallows the rule and invites increased government entanglement.

The FSFA would create an exception to the Johnson Amendment to permit statements supporting or opposing political candidates if the partisan campaign statement "is made in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose" and "results in the organization incurring not more than de minimis incremental expenses."[21] Key terms are undefined. For example, would hanging a campaign poster in the lobby, including campaign flyers in the weekly bulletin or broadcasting a campaign commercial during the worship service be acceptable "statements"? What is an organization's "ordinary course"? When is an activity regular but not customary? What is the threshold for "de minimis incremental expenses"? This last ambiguity is perhaps most troubling of all for churches and denominations because they are not required to file 990s. Without an annual 990, the IRS would have no baseline of information for determining this threshold forcing an examination of the church's books to confirm campaign statements fell within the statutory exception. A church with a $100,000 budget will presumably reach this threshold faster than a church with a $5,000,000 budget.

Some supporters of the FSFA argue that an exemption to the bright-line rule is needed so the IRS is not policing the speech of pastors and other nonprofit leaders. If this is the criticism, the FSFA exacerbates the problem rather than solving it. The FSFA ultimately would require the IRS to police the partisan campaign speech of the charitable sector because some statements would be okay while others would remain prohibited. By creating a new, vague standard, the FSFA would actually increase the IRS's authority to intrude into the operation of churches and give it more opportunity to do so. Under the FSFA, if the IRS found that an organization had made a partisan campaign statement, it would be required to continue the investigation into the church's practices and finances to see if all the statutory limitations are present.

Changing the Law is Unnecessary, Unwise and Unwanted

The Civil Rights Movement might be the greatest modern example of the charitable sector illuminating the policy path for politicians to follow. In a 2002 floor speech opposing an earlier attempt "to allow our houses of worship to become vehicles for partisan political activity," Rep. John Lewis recounted the leadership role of clergy and churches in the Civil Rights Movement and said that "[a]t no time did we envision or even contemplate the need for our houses of worship to become partisan pulpits."[22] "The church," he said

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"was the heart and soul of our efforts because ministers had the moral authority and respect to stand against immoral and indefensible laws, bad laws, bad customs, bad tradition."[23] The Rev. Dr. Martin Luther King, Jr. famously said that "[t]he church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and critic of the state, and never its tool."[24] If the church is to be the conscience of the state, it can't be beholden to a political party; it shouldn't be split up into Republican and Democratic churches.

Throughout American history, charitable organizations have played a foundational role in forming the American identity. Churches and charities can, and should, discuss the issues of the day. Issues become political because they are impacting people in some way, and the charitable sector should never shy away from issues affecting our communities.

Boldly addressing political issues, however, does not include telling people who they should or should not vote for. Religious leaders should be our modern prophets speaking boldly and freely about all issues as protected under current law. They should give us a moral framework to consider the issues and then let us apply that framework at the voting booth.

By keeping partisan campaigning out of the charitable sector, the Johnson Amendment helps the sector remain independent, focused and fully committed to their tax-exempt purposes.

ENDNOTES

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5. Letter to Congress Supporting Johnson Amendment, Aug. 23, 2017, *available at* http://www.nonprofitlawblog.com/assets/NASCO-Letter-to-Congressional-Leaders-re-Johnson-Amendment-8.23.2017.pdf. NASCO is an association of state offices charged with oversight of charitable organizations and charitable solicitations in the United States and includes state attorneys general, secretaries of state and other state offices. For more information, *see* https://www.nasconet.org/.
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11. Joint Committee on Taxation chief of staff Thomas Barthold, testimony before House Ways & Means Committee, Nov. 6, 2017, *available at* https://www.c-span.org/video/?436788-1/house-ways-means-committee-resumes-tax-reform-bill-markup (00:51:37 – 00:54:10).
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13. Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 Cas. W. Res. L. Rev. 685, 692 (2012) (internal citation omitted), *available at* http://scholarlycommons.law.case.edu/caselrev/vol62/iss3/12.
14. *Id*.
15. *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930).
16. Colinvaux, *supra* note 13, at 693 citing H.R. REP. NO. 73–1385, at 3–4 (1934) (Conf. Rep.) ("showing the House and Senate agreeing to more limited language: 'no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation'"). The Senate had sought to include a limitation on partisan campaign activities as well. The proposed 1934 language was found in Sen. Johnson's files with handwritten notes, presumably by one of his staff members.
17. *Id*. at 695.
18. *Id*.
19. *Id*. at 697.
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21. Free Speech Fairness Act, H.R.949, 116th Congress (2019), *available at* https://www.congress.gov/bill/116th-congress/house-bill/949/text?q=%7B%22search%22%3A%5B%22free+speech+fairness+act%22%5D%7D&r=1&s=1. *See also* the Senate companion bill S.330.
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ARTICLE *of* NOTE

Christopher C. Lund, *Religion is Special Enough*, 103 Va. L. Rev. 481 (2017)

AUTHORS' ABSTRACT:

"In ways almost beyond counting, our legal system treats religion differently, subjecting it both to certain protections and certain disabilities. Developing the specifics of those protections and disabilities, along with more general theories tying the specifics together and justifying them collectively, has long been the usual stuff of debate among courts and commentators.

Those debates still continue. But in recent years, increasingly people have asked a slightly different question – whether religion should be singled out for special treatment at all, in any context, for any purpose. Across the board, but especially in the context of religious exemptions from generally applicable laws, many have come to doubt religion's distinctiveness. And traditional defenses of religion's distinctiveness have been rejected as unpersuasive or religiously partisan.

This Article offers a defense of our legal tradition and its special treatment of religion. Religious freedom can be justified on religion-neutral grounds; it serves the same kinds of values as other rights (like freedom of speech). And while religion as a category may not perfectly correspond to the underlying values that religious freedom serves, that kind of mismatch happens commonly with other rights and is probably inevitable. Ultimately, religious liberty makes sense as one important liberty within the pantheon of human freedoms. Religion may not be uniquely special, but it is special enough."

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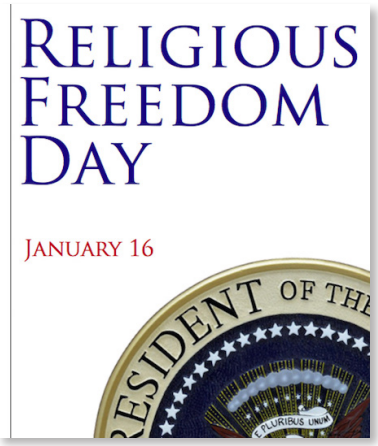

President of the United States – Religious Freedom Day

On January 15, 2020, Donald J. Trump, President of the United States, issued a Proclamation proclaiming January 16, 2020 as Religious Freedom Day, calling on all Americans "to commemorate this day with events and activities that remind us of our shared heritage of religious liberty and that teach us how to secure this blessing both at home and around the world."

https://www.whitehouse.gov/presidential-actions/proclamation-relgious-freedom-day-2020/

President of the United States – Executive Order Advancing International Religious Freedom

On June 2, 2020, Donald J. Trump, President of the United States, signed an Executive Order Advancing International Religious Freedom, which prioritizes international religious freedom concerns for United States foreign policy. It requires the U.S. Department of State and the U.S. Agency for International Development to create long term strategic plans for advancing religious freedom internationally, provides $50 million per year for religious freedom programs, and requires U.S. foreign service members to receive training on religious freedom.

https://www.whitehouse.gov/presidential-actions/executive-order-advancing-international-religious-freedom/

RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act –
Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

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Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

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Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

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Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Gallagher & Kennedy PA)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

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