RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

*Newsletter* / JUNE 2026

# FROM *the* EDITOR

Welcome to the June 2026 issue of the *Religious Liberty Law Section Newsletter*.

On September 21, 1649, the colony of Maryland adopted *An Act Concerning Religion*, often referred to as the Maryland Toleration Act. The Maryland Toleration Act is considered the first law in North America requiring religious toleration for the various sects of Christians. Like many laws at the time, it proscribed and punished blasphemy and certain sorts of religious speech. However, at the same time, the Act plowed new ground in religious liberty law by prohibiting religious persecution due to one's religious beliefs, at least for Christians. Further, the Maryland Toleration Act is important because the language of the First Amendment's Free Exercise clause was clearly modeled on the Act's provisions which provide against persecution of anyone "in respect of his or her religion **or the free exercise thereof**." Given the importance of the Maryland Toleration Act in the history of religious liberty in America and its influence on the American founding and in American law – particularly the First Amendment's Free Exercise clause – I have chosen for this issue's Great Moments in Religious Liberty History, an excerpt from the Maryland Toleration Act.

I want to extend a personal note of thanks to Lauren Hackett for authoring this issue's Feature Article – *Religion-Free Housing Communities and Their Threat to Religious Liberty* – in which she discusses the legal issues raised when housing communities attempt to restrict the religious exercise of their residents.

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

***"The Laws of Nature are the Laws of God, whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to Him from whose punishment they cannot protect us. All human constitutions which contradict His laws, we are in conscience bound to disobey."***

**— George Mason**

## IN *this* ISSUE





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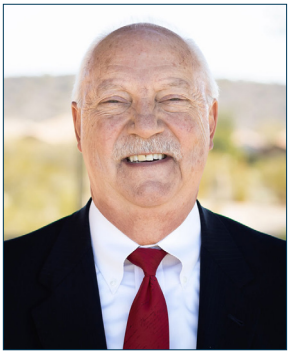
# FROM *the* CHAIR



**STEVEN KEIST** has an undergraduate degree in business and a law degree, which was obtained in 1977. Steve has been in private practice since 1977. He began his law career in Nebraska and practiced there for several years before moving to Arizona. Steve has practiced in Arizona since 1987, with his practice being primarily litigation, which means he spent a lot of time in Court, but is now practicing in estate planning and probate law.

Mass emigration from predominantly Muslim countries to those that are not has created tension between governments and the religious liberty of their citizens. This has been recently most acute in Europe but is increasingly an issue in some parts of the United States.

The religious freedom guarantees in the United States Constitution, primarily found in the First Amendment, are designed to create a neutral legal framework that applies equally to all religions, rather than favoring or adapting to any specific one. The key clauses are the Establishment Clause (the government cannot establish an official religion or favor one religion over another) and the Free Exercise Clause (individuals are free to practice their religion as they wish, within certain limits). This framework shapes how diverse religious traditions operate in the U.S.

The interaction between the Constitution and various religious traditions is guided by a few key principles:

**Neutrality** – The government must remain neutral among religions and between religion and non-religion;

**General Applicability** – Laws that apply to everyone (e.g., health and safety) can limit religious practices if they are not targeting a specific religion; and

**Accommodation** – In some cases, laws or policies make room for religious practices, especially when it does not harm others.

Tensions arise when religious practices conflict with secular laws. The Constitutional goal is to maintain both religious liberty and equal protection under the law for everyone. That goal is possibly soon to be tested by those who wish to be governed under Sharia Law.

Sharia Law, in its classical or traditional interpretations, is not just a personal moral code but a comprehensive legal system derived from Islamic sources (such as the Qur'an and Hadith). In jurisdictions where it is fully implemented, it can govern public and private life, including family law, criminal law, and sometimes religious observance.

Sharia Law may conflict with religious freedom guarantees in the U.S. Constitution in the following ways:

***State Neutrality vs. religious legal authority*** – A legal system based on Sharia, if adopted as state law, would privilege one religion's doctrines over others, which would contradict the Establishment Clause.

***Individual choice vs. prescribed religious norms*** – Some interpretations of Sharia include penalties for apostasy (leaving Islam) or restrictions on proselytizing, which would conflict with the constitutional protection of religious choice and expression.

***Equality under law vs. religious distinctions*** – Certain traditional applications of Sharia distinguish between Muslims and non-Muslims or between men and women in legal matters, which would conflict with constitutional guarantees of equal protection and treatment under the law.

***Civil law supremacy vs. religious courts*** – The U.S. legal system maintains that civil courts are the ultimate authority. A system that gives binding legal authority to religious courts in ways that override civil law would conflict with this principle.

Of course, individuals are free to follow religious practices, including aspects of Sharia voluntarily, if those practices do not violate civil law. Similarly, Christians, Buddhists, Hindus etc. can follow their own dietary laws, arbitration systems, or moral codes within the broader constitutional framework.

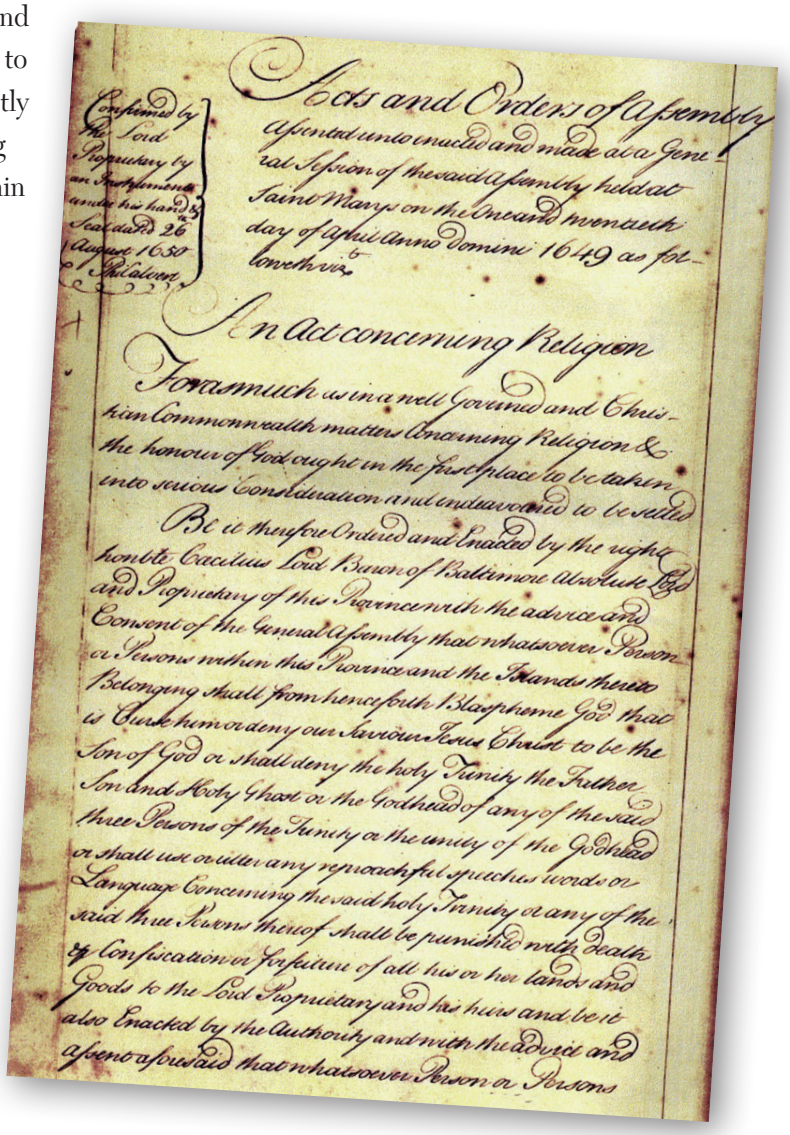
Steve Keist

Steve Keist, Chair

# GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

## *An Act Concerning Religion (September 21, 1649)**

And whereas the inforceing of the conscience in matters of Religion hath frequently fallen out to be of dangerous Consequences in those commonwealthes where it hath been practiced. And for the more quiet and peaceable government of this Province, and the better to preserve mutuall Love and amity amongst the inhabitants thereof. Be it Therefore also by the Lord Proprietary with the advise and consent of this Assembly Ordeyned and enacted (except as in this present Act is before Declared and sett forth) that noe person or persons whatsoever within this Province, or the Islands, Ports, Harbors, Creekes, or havens thereunto belonging professing to believe in Jesus Christ, shall be henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province or the Islands thereunto belonging nor any way compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governement established or to bee established in this Province under him or his heires. And that all and every person and persons that shall presume Contrary to this Act and the true intent and meaning thereof directly or indirectly either in person or estate willfully t wrong disturbe trouble or molest any person whatsoever within this Province professing to believe in Jesus Christ for or in respect of his or her religion or the free exercise thereof within this Province other than is provided for in this Act that such person or persons soe offending, shalbe compelled to pay trebble damages to the party soe wronged or molested, and for every such offence shall also forfeit 20s sterling in money or the value thereof, half thereof for the use of the Lord Proprietary, and his heires Lords and Proprietaries of this Province, and the other half for the use of the party soe wronged or molested as aforesaid. Or if the partie so offending as aforesaid shall refuse or bee unable to recompense the party soe wronged, or to satisfy such fyne or forfeiture, then such Offender shalbe severely punished by publick whipping and imprisonment during the pleasure of the Lord Proprietary, or his Lieutenant or cheife Governor of this Province for the thyme being without baile or maineprise.**


Laws and Orders of Assembly
Confirmed by the Lord Proprietary by an Instrument under his hand & Seal dated 28 August 1650 Recorded
A Act concerning Religion
Forasmuch as in a well Governed and Christian Commonwealth matters Concerning Religion & the honour of God ought in the first place to be taken into serious Consideration and endeavoured to be settled
Be it therefore Ordered and Enacted by the right honble Cæcilius Lord Baron of Baltimore Absolute Lord and Proprietary of this Province with the advice and Consent of the General Assembly that whatsoever Person or Persons within this Province and the Islands thereto Belonging shall from henceforth Blaspheme God that is Curse him or deny our Saviour Jesus Christ to be the Son of God or shall deny the holy Trinity the Father Son and Holy Ghost or the Godhead of any of the said three Persons of the Trinity or the unity of the Godhead or shall use or utter any reproachful speeches words or Language Concerning the said holy Trinity or any of the said true Powers thereof shall be punished with death & Confiscation or Forfeiture of all his or her lands and Goods to the Lord Proprietary and his heirs and be it also Enacted by the Authority and with the advice and Consent aforesaid that whatsoever Person or Persons

*The full text of the Act can be found at the Yale Law School Lillian Goldman Law Library online.

**Original spelling has been preserved throughout.

# SELECTED U.S. CASE LAW *Updates*

**CASE 1** ***Nathan v. Alamo Heights Independent School District***

173 F.4th 576 (5th Cir. 2026)

**A TEXAS STATUTE REQUIRING THE CONSPICUOUS DISPLAY OF THE TEN COMMANDMENTS IN EVERY PUBLIC ELEMENTARY AND SECONDARY SCHOOL CLASSROOM DID NOT VIOLATE EITHER THE ESTABLISHMENT CLAUSE OR THE FREE EXERCISE CLAUSE OF THE U.S. CONSTITUTION.**

At issue in this case was the constitutionality of a Texas statute that requires the Ten Commandments to be conspicuously displayed in every public elementary and secondary school classroom. Certain parents of public school students sued, challenging the law, alleging that the law violated the Establishment and Free Exercise Clauses of the First Amendment.

The court first addressed the Establishment Clause claim.

In doing so, the court, as a preliminary matter, addressed the lower courts' reliance on the secular-purpose test from *Lemon v. Kurtzman* and a Texas case opinion The court held that such reliance was in error because, in *Kennedy v. Bremerton School District*, the U.S. Supreme Court had clearly abandoned the *Lemon* test. "This means", the court said, "that, when analyzing Establishment Clause claims, courts do not consider any of the three *Lemon* prongs – whether a law has a secular purpose, whether it advances or inhibits religion, and whether it excessively entangles government and religion." And, the court pointed out, "the Court did not merely overrule *Lemon*, but also its 'progeny' and its 'offshoot[s]' such as the reasonable-observer test" and "that a strikingly different historical approach would govern all Establishment Clause cases going forward." The court concluded that *Kennedy* "was the last nail in *Lemon*'s coffin" and that "we cannot continue applying *Lemon*."

Hence, the court went on to say, the Establishment Clause "'must [now] be interpreted by reference to historical practices and understandings,' using an interpretation that 'faithfully reflects the understanding of the Founding Fathers' and 'focuses on original meaning and history.'" In other words, the court said, the court must determine whether the plaintiffs have "'prov[en] a set of facts that would have historically been understood as an establishment of religion.'"

In answering this question, the court conducted an historical inquiry to determine what would have been recognized as an establishment of religion in the founding era, concluding from that study that there were certain hallmarks of founding-era religious establishments, including "(1) government control over religious doctrine, governance, and church personnel; (2)

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compulsory church attendance; (3) compelled financial support, especially in the form of land grants and religious taxes; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for civil functions; and (6) restriction of political participation to members of the established church." The court concluded that the Texas Ten Commandments law under review "plainly lacks the features of founding-era establishments".

In coming to that conclusion, the court noted that, whereas founding-era establishments "commonly punished dissenters through fines, taxes, and legal disabilities," the Texas Ten Commandments law "does none of those things." "Nor" the court said, does the law "regulate what any religious institution teaches, how it worships, or whom it employs" or "compel financial support for religious institutions." Further, the court rejected the argument that "merely displaying [a] religious text in a classroom coerces students in the way that founding-era establishments coerced dissenters." As the court said, the law "does not compel any student to engage in formal religious exercise. The law does not require students to 'recite the Ten Commandments as an act of worship,' or to affirm them at all… Nor does it mandate students pray, adopt any faith, or engage in any other 'unmistakably religious exercises.'" "While they contain religious text, the [Ten Commandments] displays do not pressure anyone to engage in religious exercise or observance." The court noted that, in the founding-era, there's no evidence that anyone ever claimed that displaying religious symbols constituted religious establishment. Indeed, the court said, "religious placenames dot the landscape and religious mottos, symbols, and flags adorn countless public buildings, and noted that the "Ten Commandments themselves feature in displays in the Supreme Court, the Capitol, the Jefferson Building, the National Archives, the Department of Justice, the Ronald Reagan Building, the House of Representatives, and the courthouse housing the D.C. Circuit and the District Court for the District of Columbia."

The court also rejected the argument that, by adopting a certain version of the Ten Commandments over which there was sectarian disagreement, the law constituted religious discrimination. The court stated that "[i]f the rule against 'denominational favoritism' applies in this area, all religious language and symbolism will have to be scoured from public life." The court also stated that "[i]f we were so foolish as to accept this invitation [to wade into this theological issue], our very decision would ironically violate the Establishment Clause by presuming to decide a religious question."

The court also rejected the argument that the Texas Ten Commandments law had to be struck down as unconstitutional because there was insufficient historical evidence of public schools displaying the Ten Commandments. The court stated that the correct analysis was "to ask whether a challenged law shares the 'hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment'", which does not lead to the proposition that a modern practice not supported by a founding-era tradition violates the Establishment Clause.

In conclusion, the court found that the Texas Ten Commandments law "bears none of the hallmarks of a founding-era establishment of religion and therefore does not facially violate the Establishment Clause."

The court then turned its attention to the Free Exercise Clause.

In analyzing the Free Exercise claim, the court concentrated its attention on whether the Texas Ten Commandments law placed a substantial burden on the students who would be exposed to the Ten Commandments, or on their parents. In applying this test, the court noted that "[t]he Texas law creates no religious curriculum designed to shape children's beliefs or subvert their parents' teaching. Teachers are not required or encouraged to offer religious reflections on the Ten Commandments. Nor are they told to proselytize students who ask about the displays or disagree with the Commandments. Nor are they given lesson plans instructing that certain students (say, atheist, nontheist, polytheist, or agnostic students) are to be told their beliefs are 'hurtful' or 'hateful' … This means the core of a free-exercise violation – a substantial burden on religious belief or practice – is missing."

The court specifically rejected the plaintiffs' claim that any religious or scriptural content in the display is, by definition, coercive for purposes of the Free Exercise Clause. The court wrote, "[t]hat is not the law." "The proper inquiry," the court said, "is whether the display religiously coerces a child or undermines parental rights to direct a child's religious upbringing … But no case suggests that the mere presence of religious language in a school display is *ipso facto* religious coercion." The court pointed out that "[i]f students are coerced merely by seeing scripture in a classroom poster, as Plaintiffs claim, what about witnessing their classmates daily recite, 'one Nation under God'"? … Plaintiff's view would plainly require abolishing the Pledge for everyone."

So, in conclusion, the court held that the "Plaintiffs have failed to show that [the Texas Ten Commandments law] … imposes a substantial burden on their free exercise rights."

There were also several concurring, concurring in part, and dissenting opinions.

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## CASE 2 *Union Gospel Mission of Yakima, Washington v. Brown, et al.*

162 F.4th 1190 (9th Cir. 2026)

**A STATE DOMESTIC VIOLENCE INTERVENTION PROGRAM THAT MANDATED THE PARTICIPATION OF DOMESTIC VIOLENCE OFFENDERS BUT EXCLUDED FAITH-BASED INTERVENTION PROGRAMS DID NOT VIOLATE THE FREE SPEECH OR FREE EXERCISE RIGHTS OF RELIGIOUS PROVIDERS.**

In this case, the Union Gospel Mission, a Christian organization whose mission is to "spread the Gospel of the Lord Jesus Christ", operates a homeless shelter, faith-based recovery programs, health clinics, and meal services. Because of its religious purpose, the Mission requires its approximately 150 employees to agree with and live out its Christian beliefs and practices, including "abstaining from any sexual conduct outside of biblical marriage between one man and one woman." The Washington Law Against Discrimination (WLAD), however, prohibits employers from discriminating against employees based upon, among other things, sexual orientation, which the statute defines as "heterosexuality, homosexuality, bisexuality, and gender expression or identity." Although the statute exempts non-profit religious organizations, the Washington Supreme Court has interpreted that exemption narrowly to apply only to a religious organization's "ministerial" employees.

The Mission brought a pre-enforcement action challenging the law's application to its "non-ministerial" employees.

The court analyzed the Mission's claims under the church autonomy doctrine, stating that "the Religion Clauses [of the U.S. Constitution] establish the church autonomy doctrine", under which "religious institutions have 'the right … to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine … That's because the Free Exercise Clause guarantees religious groups the right 'to shape [their] own faith and mission' … and the Establishment Clause 'prohibits government involvement in … ecclesiastical decisions.'" And the court noted that "[t]he church autonomy doctrine has deep roots in our Nation's historical tradition."

In particular, the court stated that "Today, the church autonomy doctrine is most often invoked in the employment context. It is widely recognized that religious institutions may appoint their spiritual leaders and clergy without any government interference … [s]o religious institutions may select or terminate their ministers regardless of any federal or state employment laws… [and o]nce an employment dispute involves 'an employee [who] qualifies as a minister,' the First Amendment commands courts to abstain."

However, the court went on to declare that "the church autonomy doctrine is broader than the ministerial exception.", stating that "[w]hile the ministerial exception protects a religious organization's narrow right to select its ministers, the church autonomy doctrine more generally prohibits 'government interference with an *internal church decision* that affects the faith and mission of the church itself' … Thus, the First Amendment forbids government intrusion into the 'internal management decisions that are essential to the institution's central mission'."

Hence, the court concluded, "these 'internal management decisions' may include a religious organization's policy of hiring co-religionists for non-ministerial roles."

However, the court noted that not all non-ministerial employees of a religious organization are exempt from employment laws. "The church autonomy doctrine only protects religious institutions' non-ministerial hiring policy on a showing that the employment decision was 'rooted in religious belief' that was 'sincerely held'". Unlike ministerial employees, religious organizations cannot discriminate against non-ministerial employees on non-religious grounds, and the stated religious grounds for the discrimination cannot be a pretext for discrimination on non-religious grounds. But the court clarified that 'this doesn't mean that courts may question the veracity of sincerely held religious views."

The court also clarified that only religious ministries like the Mission, "which plainly qualify for protection under the church autonomy doctrine", are protected. The court stated that it was not considering whether other types of entities, such as commercial businesses or hospitals, operating under the umbrella of a religious organization, would qualify for church autonomy protection of its non-ministerial employment decisions.

Summing up its analysis of the church autonomy doctrine, the court stated that "the church autonomy doctrine encompasses more than just the ministerial exception… [s]o in cases involving the hiring of non-ministerial employees, a religious institution may enjoy its protection when a challenged hiring decision is rooted in a sincerely held religious belief. That is, under the church autonomy doctrine, religious organizations may decide to hire co-religionists to further their religious missions."

Finally, in applying the church autonomy doctrine to the Union Gospel Mission in particular, the court found that (1) the Mission was a religious organization entitled to the doctrine's application, (2) the Mission accomplishes its religious mission through its employees and expects its employee to participate in the Mission's evangelistic efforts and to be an example to others of what the Mission believes it means to be a Christion, (3) the Mission has a sincerely held religious belief that only co-religionists can advance its religious mission because only by fostering a community of likeminded believers can the Mission ensure that the Mission presents a united,

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correct, and consistent Christian message to the people it serves and to the world, and (5) employing staff whose actions or beliefs go against the Mission's teaching would hamper the Mission's ability to achieve its religious goals.

For all these reasons, the court found, unanimously, that the Mission had shown that it was likely to prevail on the merits and was therefore entitled to a preliminary injunction

## CASE 3 *Barber v. Rounds*

169 F.4th 577 (5th Cir. 2026)

**THE FIRST AMENDMENT PROHIBITS THE PRINCIPAL OF A PUBLIC SCHOOL FROM PROHIBITING SCHOOL EMPLOYEES FROM PRAYING IN THE PRESENCE OF STUDENTS.**

In this case, a public high school teacher invited other staff to join her in prayer by the school flagpole, before students were to gather at the flagpole for prayer under the school's Fellowship of Christian Athletes club's plan to host a nationwide "See You at the Pole" event at which students gather to pray together. Although the staff's prayer activity was to end before the student group was to arrive, the school Principal sent a staff-wide email message prohibiting school employees from "praying with or in the presence of students", and in a separate email to the plaintiff stated that "employees CANNOT pray with or in the presence of students." In addition, when the plaintiff and some of her colleagues proceeded to pray near the flagpole on the morning of the See You at the Pole event, the Principal stopped them, stating that "teachers may not pray where students 'might see' or 'be influenced by' their conduct – even if such conduct occurred 'when the teachers were not on school time.'"

The plaintiff sued the Principal, alleging that he violated her free speech and free exercise rights under the First Amendment of the U.S. Constitution. The Principal claimed qualified immunity.

In analyzing the qualified immunity claim, the court began by noting that, in order for a defendant to be entitled to qualified immunity, (1) the alleged facts must show that the government official's conduct violated a constitutional right and (2) that the constitutional right was clearly established, meaning that existing precedent has placed the constitutional question beyond debate.

In addressing whether the Principal violated a constitutional right of the plaintiff, the court described the Principal's act as "a 'categorica[l]' prohibition on teacher prayer extending beyond the S[ee] Y[ou] A[t] T[he] P[ole] event to *any* setting in which students might observe teachers." The court found that this issue was "squarely" decided by *Kennedy v. Bremerton School District* in which the Supreme Court held that, where a school district pressured a high-school football coach to abandon his practice of saying his own quiet, on-field postgame prayers and suspended him when he failed to do so, the school district violated the coach's First Amendment free speech and free exercise rights, even when students may have been present on the field or nearby.

In applying this principle to this case, the court found that "As in *Kennedy*, a schoolteacher sought to engage in personal prayer outside instructional time, and the school district imposed categorical restrictions on her religious expression based solely on the possibility that students might be 'in the vicinity.'" Therefore, the court concluded, that the plaintiff's "complaint plausibly describes conduct that, if proven, would violate her First Amendment rights."

Turning to the issue of whether the constitutional right was clearly established, the court again relied on the *Kennedy* decision. In so doing, the court noted that the Supreme Court, in *Kennedy*, "expressly rejected the proposition that religious expression by a public-school employee may be restricted merely because students might observe it." Therefore, the court stated, if the Principal "imposed a categorical ban on teacher prayer wherever students might see it, [], he violated clearly established law."

Therefore, the court concluded that, taking the plaintiff's allegations as true, in prohibiting the plaintiff from praying anywhere students might observe her, the Principal violated the plaintiff's clearly established constitutional free speech and free exercise rights and, therefore, was not entitled to qualified immunity.

**ABOUT THE AUTHOR**

**LAUREN HACKETT** is an attorney at Evans, Garvey, Lackey & Ochs, where she practices civil litigation and nonprofit governance. Lauren also has experience in constitutional law and religious liberty, particularly in emerging cultural issues that relate to parental rights, freedom of speech, and freedom of conscience. Lauren graduated from Gettysburg College with a double major in Political Science and English Literature, and received her J.D. from Delaware Law School, Widener University, where she served on the Executive Editorial Board of the *Law Review*.



**FEATURE ARTICLE**

# Religion-Free Housing Communities and Their Threat to Religious Liberty

**By Lauren L. Hackett**

America began as a nation of immigrants, who brought with them diverse religious convictions from across the world that led to the Free Exercise Clause that we cherish today. A national identity emerged from our unique ability to accommodate religious differences that has historically defined America and served for centuries as our greatest strength.[i] Over time, pluralism in America has not changed, but our reverence for religious liberty has drifted away from its origins as hostility toward religion intensifies under the façade of tolerance and respect.

Today, the widespread implementation of diversity and inclusion policies have increasingly become a threat to religious liberty. There has been an emerging trend in senior living facilities throughout our country, including private apartment complexes and Homeowner's Associations (HOAs), where policies have been implemented to create religion-free communities that claim to promote inclusion and diversity. These policies include the elimination of all signage, decorations, crosses or Bible verses on doorways of private residences, patios, or porches, as well as activities in common areas such as prayer gatherings, Bible studies, or even worship services. Instead of recognizing our heritage of religious diversity by accommodating our differences, these policies work against their stated goal of fostering inclusion by eradicating religion from the public sphere entirely. It is ironic that sterilizing these living facilities of religion that might otherwise underscore our diversity undermines the very purpose of inclusion that these initiatives claim to achieve.

Of particular concern are policies that target senior citizens. Senior citizens and individuals with disabilities are often victims of discrimination, many of whom live in government subsidized units without many alternatives for housing. It is extremely important to residents at

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apartment complexes like these to form Bible studies and prayer groups where they can meet in common areas, especially since many residents are disabled, homebound, and physically unable to attend church.

## The Fair Housing Act Protects Religious Expression

There is no legal authority to support policies that ban religious activities or expression in any housing facility. Consistent with our nation's robust protection of religious liberty, the Fair Housing Act (FHA) protects, rather than prohibits, the use and display of religious expression in both public and private housing complexes. The FHA makes it unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, … because of … religion[.]"[ii] Additionally, regulations issued by the Department of Housing and Urban Development (HUD) and supporting guidance issued by the Department of Justice (DOJ), all explicitly prohibit these bans on the expression of religious identity in the sale, use, and enjoyment of property.


States have their own statutes protecting against discrimination in housing, often incorporated into their public accommodation laws, which serve as an additional protection against policies that target religious expression.[iii] Arizona has even supplemented this protection with the Free Exercise of Religion Act (FERA), which mirrors the Religious Freedom and Restoration Act (RFRA) by prohibiting the government from substantially burdening a person's free exercise of religion unless the burden is the least restrictive means of furthering a compelling governmental interest.[iv]

Like the FHA provisions, HUD regulations prohibit religious discrimination that impose "different terms, conditions, or privileges relating to the sale or rental of a dwelling."[v] Moreover, HUD makes it clear that "limiting the use of privileges, services, or facilities, associated with a dwelling" because of the owner's or tenant's religion is prohibited as well.[vi] This means that the FHA, HUD regulations, and analogous state laws not only permit Bible studies, prayer or worship gatherings, and religious décor in common areas of housing facilities, but also preclude the use of policies that attempt to eliminate these valuable expressions of faith.

Housing facilities are furthermore prohibited by the FHA from interpreting facially neutral policies in a way that singles out a particular religious group or form of expression. The Seventh Circuit upheld the homeowner's claim of discriminatory intent against the association, because the association's selective interpretation and enforcement of the rule could infer discriminatory intent, as well as strong evidence of anti-Semitic motives and animus toward the Plaintiff.[vii] In contrast, the United States District Court of the Southern District of Florida held in favor of the housing facility where there was no evidence of one particular religion being singled out and the court believed the rule was imposed equally among all religions.[viii]

There is also powerful authority outside the courts to govern this movement. The current guidance from the Civil Rights Division of the DOJ, which enforces the Fair Housing Act, interprets the FHA to require equal access for both religious and non-religious symbols and uses in common areas:

> *No one may be discriminated against in the sale, rental or enjoyment of housing because of their religious beliefs. This includes equal access to all the benefits of housing: someone could not, for example, be excluded from using a common room for a prayer meeting when the room may be reserved for various comparable secular uses.*[ix]

The DOJ incorporated the concept of equal access where the Supreme Court has interpreted this protection for religion in the context of government property when a limited public forum has been created. If a government actor opens up an area for communication or activities of a secular, or non-religious nature, they need to open that same area up to religious expression as well, otherwise they are engaged in viewpoint

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discrimination.[x] The same is true for any housing unit subject to the FHA: if the establishment has opened up the area to secular uses of a non-religious nature, then they must also permit religious activity.

There is no need for these housing units to create religion-free communities to promote inclusion, because inclusion is already accomplished through the principles of equal access and neutrality. The Establishment Clause does not "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious."[xi] In fact, the United States Supreme Court recently and unanimously rejected a city's attempt to censor religious speech, as it was impermissible viewpoint discrimination that violated the Free Speech Clause of the First Amendment.[xii] All that is required is neutrality: that "the state [] be [] neutral in its relations with … religious believers and non-believers; [the Establishment Clause] does not require the state to be their adversary."[xiii]

It is wrong and in violation of the law for any apartment complex to deny religious groups' access to an apartment's community room or prohibit religious decorations in common areas to become more "inclusive." When common areas are open to other groups for secular purposes and uses, those areas must be equally open to host religious groups as well. Contrary to the purported basis for implementing these policies, it is discriminatory and unconstitutional to deny religious groups and religious displays equal access to common areas.

## Private Housing Facilities and First Amendment Protection

There are additional considerations when residents want to claim the protections of the Constitution but live in a private facility or HOA. The First and Fourteenth Amendments work together to constrain government actors, but not private actors. Residents of private housing facilities claiming religious discrimination cannot get the protections of the First or Fouteenth Amendments unless they can demonstrate sufficient state action.

The state action doctrine is a body of law developed by the Supreme Court over the last century that expands the reach of the Fourteenth Amendment so that a private entity can still be considered a government actor when certain conditions are met. The concept first came about in the 1883 Civil Rights case *United States v. Stanley*, which articulated the basic principle of state action.[xiv] The body of law began to develop more by the 1940's, but expanded most during the civil rights movement of the 1960's when the Supreme Court began crafting exceptions to this rule. Those exceptions have evolved into a doctrine where a private entity can be viewed as a government actor if one of the following tests are met:


1. Public function test where private actor takes on an exclusively government function;
2. Compulsion or coercion test where government requires by law or coerces the action;
3. Close nexus test where government and private entity are joint actors and whose operations are intertwined;
4. A government and private entity act together "under the color of state law" where there are joint actors, but a separate claim is filed under 42 U.S.C. §1983 to extend the cause of action to a private actor.

If state action is shown, residents of private housing units and HOAs can still plead claims arising out of the Constitution in addition to the protections provided under the FHA. Some of these claims could be viewpoint discrimination arising out of the Free Speech Clause, a Free Exercise argument, or a violation of the Equal Protection Clause. It is important to note that this is a highly confusing and complex doctrine that is often inconsistently applied.[xv] Drawing the line between a public and private actor is not always clear, but several cases set forth basic principles that provide a general overview of the doctrine to aid in such an analysis.

The public function exception exists when the private entity performs a traditional, exclusive, public function. In *Marsh v. Alabama*, a Jehovah's Witness began distributing literature on a sidewalk which would have normally been permitted in a public town.[xvi] This town, however, was privately owned by a company, and the private owner did not want any literature distributed.[xvii] A public function existed here because the private entity assumed all the functions of a traditional municipality

*– continued*

by opening up the town to be freely used and accessible by the public.[xviii] *Marsh* calls for a balancing test that examines the degree to which a private actor engages with the public sphere.

*Marsh* extended the public function exception to parks and then later to shopping malls.[xix] In the 70's, however, the Court went in the opposite direction, overruled *Logan Valley*, and placed strict limitations on the reach of *Marsh* and this exception.[xx] Nevertheless, the public function exception is still an important doctrine to consider today – especially with the growth of HOA's, their highly-regulated environment, and the potential these communities have to supplant the surrounding municipality.

The compulsion exception was developed in the in the 1960's when laws imposing segregation were common. State segregation laws required private actors to engage in racial discrimination, and those laws were challenged as being in violation of the Equal Protection Clause. In *Peterson v. Greenville*, a city ordinance required segregation in restaurants in Greenville, South Carolina, in the 1960's.[xxi] African American children came into a privately owned store to eat at a lunch table, sat down, and refused to leave.[xxii] They were arrested, challenged the statute as violating the Equal Protection Clause and First Amendment, and won.[xxiii] The Supreme Court determined that there was state action because the City of Greenville, an agency of the State, provided by its ordinance that the decision as to whether a restaurant facility was to be segregated or not was reserved to the state, and not the private actor.[xxiv] The state commanded a particular result and removed that decision from the sphere of private choice.

A private entity can still be acting under the direction and authority of the state even without a statute mandating the action, when there is coercion – or "strong encouragement" – by the state to engage in the action. In *Lombard v. Louisiana*,[xxv] the facts were similar to *Peterson v. Greenville*: African-American customers sat in the back of the store and requested to be served, but service was refused.[xxvi] No state law existed that required segregation, but high-ranking police officers including a captain and a major abused their authority by ordering a group of African-American customers to leave the store.[xxvii] These individuals were then charged with criminal mischief, sentenced to some jail time and a fine.[xxviii] The Supreme Court treated the conduct of the city officials the same as if there had been an ordinance prohibiting such conduct, because it contained the same coercive effect from the state.

State action can also be found where the government and private entity are joint actors whose operations are intertwined. The close nexus test, also called the excessive entanglement test, requires that "there must be a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter [private entity] may be fairly treated as that of the State itself."[xxix] Actions between the private and government entities are jointly linked together in a relationship of interdependence to such an extent that it is indistinguishable which entity is engaged in the act.

A pivotal case demonstrating this exception is *Burton v. Wilmington Parking Auth.*, where a private restaurant leased space from a parking garage owned by the City of Wilmington, Delaware, and developed such a symbiotic relationship with the public entity that it became an integral part of the public building.[xxx] The restaurant refused to serve the appellant solely because he was African-American. The Court found state action where the public and private functions were intertwined: public funds paid for the upkeep and repairs of the leased space and the restaurant benefited from parking garage's tax-exempt status for building improvements.[xxxi] With this relationship, there was sufficient state participation and involvement to constitute a violation of the Equal Protection Clause.[xxxii]


These early examples of state action all established a violation of the Fourteenth Amendment where the private entity was never sued. It was not until several years later that the state action doctrine was applied to a private entity in *Adickes v. S.H. Kress & Co.*, using a civil rights cause of action arising out of 42 U.S.C. §1983. [xxxiii] In *Adickes*, a restaurant refused to serve a white school teacher who brought African American students with her to a restaurant in Mississippi.[xxxiv] The school teacher was charged with vagrancy because she was "a Caucasian under the company of Negros."[xxxv] Although the school teacher was not acting in violation of a statute, she was accused of violating a "custom of the community to separate the races in public eating places."[xxxvi] She filed a lawsuit against the private establishment with two counts arising out of 42 U.S.C. §1983 – each for a violation of the Equal Protection Clause of Fourteenth Amendment since the private establishment was acting under the color of state law to facilitate this act of discrimination.[xxxvii] In finding that the discriminatory action was a violation of the Fourteenth Amendment against a private actor through the use of 42 U.S.C. §1983, the Court extended the reach of the state action doctrine as seen in cases like *Peterson*, *Lombard*, and *Burton* to private entities, in large part because the public and private actor were part of a joint conspiracy to discriminate.[xxxviii]

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The United States Supreme Court more clearly articulated the relationship between state action and a right to recover under 42 U.S.C. §1983 in *Lugar v. Edmondson Oil Co.*[xxxix] In *Lugar*, the Court confirmed that the "statutory requirements of action 'under the color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical," and this does not change when these concepts are applied to private entities.[xl] The *Lugar* Court relied upon *Adickes*, where the "private party's joint participation with a state official in a conspiracy to discriminate would constitute both 'state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights' and action '"under color" of law for purposes of the statute.'"[xli] In other words, the circumstances giving rise to state action and a 42 U.S.C. §1983 civil rights action are the same; the only difference is that 42 U.S.C. §1983 empowers a victim of discrimination to sue a private entity if the elements of state action are met.[xlii]

The relationship between state action and a color of state law claim as enunciated in *Lugar* is still recognized by the Supreme Court today.[xliii] Yet, despite the Court's attempt at clarifying this doctrine through the years, it is difficult at times to discern how much government involvement makes the action fairly attributable to the State. It is clear, however, that to hold a private actor responsible for the violation of one's constitutional liberties, the type of action filed would be a 42 U.S.C. §1983 civil action for the deprivation of constitutional rights under the color of state law when the state action doctrine applies.

There are occasions when government conduct does not rise to the level of state action. Mere acquiescence by the state as seen in other sit-in cases is not state action.[xliv] The state must take an active role, rather than passive role, in the complained-of conduct and decision-making process. Similarly, a government subsidy or even substantial regulation by the government does not constitute state action.[xlv] There must be interdependence between the public and private actor such as in a financial relationship or mutual use of the property.

Finally, judicial enforcement of legal claims between private parties generally does not constitute state action. It happened once several decades ago in *Shelly v. Kraemer*,[xlvi] where the Court enforced racially-restrictive covenants on property. The Court held that the judicial enforcement of this particular form of private contractual agreement would still be treated as a form of state action, but no such decision has occurred since.

When these concepts are considered in light of policies that implement a discriminatory ban of religious décor and activity in private apartment complexes, many factors necessary to create state action and a 42 U.S.C. §1983 color of state law claim are still unknown. For example, no one knows where the direction to use these policies is coming from – is it coming from a government department, an agency, or a particular government official? There is a systematic and organized movement throughout the country showing a unified theme, so determining where the action is originating would shed light on its relationship to the State.

In many cases, private facilities are actually leveraging the FHA to justify these discriminatory policies by perverting its meaning and purpose. A rapid trend of private actors misusing the FHA could create a joint action between the government and private entity in a conspiracy to discriminate if it is discovered that the government is actively facilitating – or creating a "procedural scheme"[xlvii] – for the FHA's misuse. Additionally, many senior living facilities receive government subsidies, so while that alone is not enough to constitute state action, more evidence could reveal financial interdependence between the apartment facility and government funding to blur the line between public and private action.

Like private apartment complexes, residents of HOAs could also claim protection from the Constitution if they can find state action. But an additional argument for residents living in an HOA would be to challenge the validity of the servitude on the deed that restricts religious expression. These servitudes are unique to HOAs and would not exist with a private apartment complex. The powers of an HOA are derived from declarations made in covenants, which are contracts between private parties where normally the protections of the First Amendment would not extend.[xlviii] Those covenants create a servitude where one private party owns the property, but the other party – the HOA – tells the owner how they can use the property. Those specified uses are usually set forth in the HOA agreement in a regime of "covenants, conditions, and restrictions" (CCRs) and act as servitudes on the property.[xlix] These restrictions come in the way of banning religious symbols, decorations, and religious uses of the property in publicly visible areas – such as on the front of homes, balconies, walls, or patios. It also can include bans on religious services in common areas.[l]

Although servitudes come with a presumption of validity, they can be declared invalid if "it is illegal or unconstitutional or violates public policy."[li] The Restatement further provides that "a servitude that unreasonably burdens a fundamental constitutional right" violates public policy.[lii] The public policy analysis is based on a balancing of the interests, and a servitude will be held in violation of public policy if the "risks of societal harm … outweigh the benefits of validating the servitude."[liii] The flexibility offered with a balancing test gives lawyers the freedom to be creative by drawing upon many sources to make arguments that may persuade a court to invalidate the servitude for reasons arising out of the Constitution.

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## Conclusion

It should come as no surprise that even with the many safeguards in our legal system to protect religious liberty, there are still assaults on that protection even today. Every generation must be reminded that the robust protection of religious liberty is indispensable to a free society. People today have forgotten that religious tolerance can still be achieved when we liberally allow for all religions to be represented in the public sphere. Not only can our nation benefit from our diversity, but religious expression in the public sphere must also be recognized as central to this diversity.

## ENDNOTES

**[i]** See Michael W. McConnell, The Origins and Historical Understanding of the Free Exercise of Religion, 103 HARV. L. REV. 1409, 1466-74 (May 1990).

**[ii]** 42 U.S.C. §3604(b); see www.justice.gov/crt/fair-housing-act-1.

**[iii]** See e.g. A.R.S. §41-1491.14 (Arizona's Fair Housing Act which mirrors the FHA).

**[iv]** Free Exercise of Religion Act, A.R.S. §41-1493.01; see also *State v. Hardesty*, 214 P.3d 1004 (Ariz. 2009).

**[v]** 24 C.F.R. 100.65(a).

**[vi]** 24 C.F.R. 100.65(b)(4).

**[vii]** *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009).

**[viii]** *Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005).

**[ix]** U.S. DOJ, Know Your Rights: Federal Laws Protecting Religious Freedoms, www.justice.gov/sites/default/files/crt/legacy/2010/12/15/know_your_rights.pdf (last visited March 8, 2026) (emphasis added).

**[x]** See *Good News Club, et al. v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990).

**[xi]** *Van Orden v. Perry*, 545 U.S. 677, 699 (2005).

**[xii]** *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

**[xiii]** *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); see also *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 248 (1990) (explaining that a policy of equal access conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

**[xiv]** 109 U.S. 3 (1883).

**[xv]** See Christopher W. Schmidt, On Doctrinal Confusion: The Case of the State Action Doctrine, 2016 B.Y.U.L. REV. 575 (2016).

**[xvi]** 326 U.S. 501, 502-03 (1946).

**[xvii]** *Id.* at 502.

**[xiii]** *Id.* at 509-10.

**[xix]** See *Evans v. Newton*, 382 U.S. 296 (1966); *Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308, 318 (1968).

**[xx]** See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

**[xxi]** 373 U.S. 244 (1963).

**[xxii]** *Id.* at 245-46.

**[xxiii]** *Id.* at 247.

**[xxiv]** *Id.* at 247-48.

**[xxv]** 373 U.S. 267 (1963).

**[xxvi]** *Id.* at 268.

**[xxviii]** *Id.* at 268-69.

**[xxiii]** *Id.* at 269.

**[xxix]** *Rendell-Baker v. Kohn*, 457 U.S. 830, 836 (1982).

**[xxx]** 365 U.S. 715, 725 (1961).

**[xxxi]** *Id.* at 722-24.

**[xxxiii]** *Id.* at 726.

**[xxxiii]** 398 U.S. 144, 150 (1970). 42 U.S.C. §1983 provides a remedy against private actors for the deprivation of constitutional rights when the deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State.

**[xxxiv]** *Id.* at 146.

**[xxxv]** *Id.* at 146-47.

**[xxxvi]** *Id.*

**[xxxvii]** *Id.* at 147-48.

**[xxxiii]** *Id.* at 170. The Court's decision was influenced by a criminal prosecution in *United States v. Price*, 383 U.S. 787 (1966), wherein the Court evaluated 42 U.S.C. §1983's criminal counterpart 18 U.S.C. §242 and recognized that "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under the color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Id.* at 794.

**[xxxix]** 457 U.S. 922 (1982).

**[xl]** *Id.* at 929.

**[xli]** 457 U.S. at 931 (citations omitted).

**[xlii]** *Lugar* created a two-part test for evaluating whether a private entity's action is fairly attributable to the state: 1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and 2) "the party charged with the deprivation must be fairly said to be a state actor … because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.'" *Id.* at 937.

**[xliii]** *Lindke v. Freed*, 601 U.S. 187, 195 (2024) ("[T]he statutory requirement of action 'under the color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.").

**[xliv]** See *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978).

**[xlv]** *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

**[xlvi]** 334 U.S. 1 (1948).

**[xlvii]** See 457 U.S. at 925.

**[xlviii]** See *Id.*

**[xlix]** Angela C. Carmella, Religion-Free Environments in Common Interest Communities, 38 PEPP. L. REV. 57, 65-66 (2010).

**[l]** See *Id.* at 65-73.

**[li]** RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §3.1 (2000).

**[lii]** *Id.* at §3.1(2).

**[liii]** *Id.* at §3.1 cmt. h.

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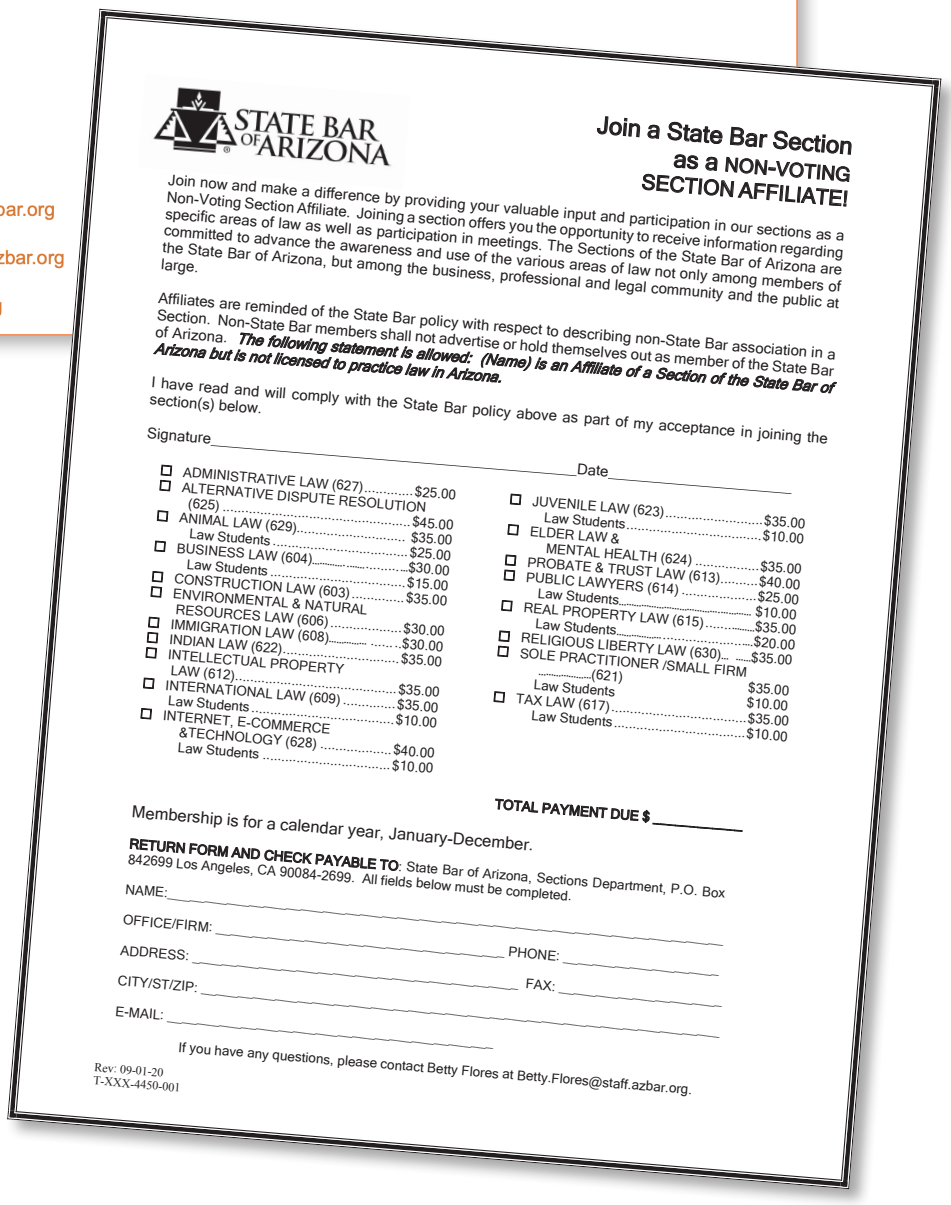

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### *Federal Statutes*

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

### *Executive Orders*

February 6, 2025, Executive Order: Eradicating Anti-Christian Bias.
www.whitehouse.gov/presidential-actions/2025/02/eradicating-anti-christian-bias

### *Office of the U.S. Attorney General*

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

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

July 30, 2018 Memorandum: Religious Liberty Task Force.
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.
www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance

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

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

### *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.
www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

### *U.S. Department of Health and Human Services*

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
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.
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