

RELIGIOUS NONPROFITS

FIRST  LIBERTY

RELIGIOUS LIBERTY PROTECTION KIT

Guard Your Religious
Nonprofit Organization
from Legal Attack



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DEAR FRIEND OF RELIGIOUS FREEDOM,

Thank you for your desire to protect **religious nonprofits** against increasingly hostile legal threats to your freedom to believe and to act upon your beliefs. I hope you find this **Religious Liberty Protection Kit** a simple but high-quality tool for helping you guard the most precious freedom you or anyone in our society has: religious liberty, our first liberty in the Bill of Rights.

Please let us know any further way we can help you.

A handwritten signature in white ink that reads "Kelly Shackelford".

Kelly Shackelford, Esq.

President, CEO & Chief Counsel

FIRST LIBERTY INSTITUTE® RELIGIOUS LIBERTY PROTECTION KIT FOR RELIGIOUS NONPROFITS

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INTRODUCTION

How can my religious nonprofit ministry proactively protect its legal right to operate according to its religious beliefs? What steps can we take today?

First Liberty Institute has advised hundreds of organizations that ask these questions. Our guidance has helped religious nonprofits, charities, and other ministries implement policies and procedures designed to maximize their rights under the law, and shield them from unforeseen legal threats and challenges. First Liberty Institute is a nationwide, nonprofit law firm dedicated to protecting religious freedom for all Americans, at no cost to our clients. Our President and CEO, Kelly Shackelford, has over 30 years of experience defending the constitutional rights of organizations like yours.

We have carefully summarized our recommendations over the years to develop this Religious Liberty Protection Kit for Religious Nonprofits. In it, you will find guidance to help your ministry review and revise its governing documents to maximize its freedom to operate according to its beliefs. Because we most often receive questions from Christian ministries, many of the examples in this Protection Kit will be most relevant for those groups. Nevertheless, our mission is to protect religious liberty for *all* Americans, and the legal principles given in this guide are applicable to religious communities of all faiths.

Thank you for the important work you do for your community and for your interest in protecting your nonprofit's religious liberty – our First Amendment's First Liberty.

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Mission Statement

Mission Statement

What is the purpose or mission of your nonprofit organization?

In order to invoke religious liberty protections under state or federal law, your organization should make clear that it is, in fact, a religious nonprofit with a religious mission or purpose. The mere fact that your organization has a religious sounding name or was founded as a faith-based ministry may not be enough. If it is not clear that your organization is religious, then it may not be able to avail itself of all available legal protections.

The U.S. Constitution, as well as local, state, and federal laws, provide protections that generally enable religious organizations, including religious schools, to operate according to their sincerely held religious beliefs. [2] The analysis will vary based on the specific context, but the U.S. Supreme Court has found faith-based mission statements to be relevant. [3]

Organizations sometimes ask us whether they should become more secular or more religious. It may seem obvious, but organizations can run into legal issues if they do not clearly choose an identity. It is the best practice for a religious nonprofit organization to embrace its religious identity, leaving no doubt that it is entitled to invoke available religious liberty protections.

Consequently, we encourage your organization to adopt a mission or purpose statement that clearly explains your religious goals. This idea can be expressed in multiple ways. We list one example below, but there is no need to adopt this precise language. The idea is to simply and accurately convey your organization's religious mission and that this mission permeates all the organization does.

Example Mission Statement for Christian Charities

Citations:

2. Such as the First Amendment to the U.S. Constitution, the federal Religious Freedom Restoration Act, and some states' Religious Freedom and Restoration Acts.

3. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701 (2014).

[Organization] is a 501(c)(3) religious, nonprofit organization. Our mission is to show the love of God by serving our community and meeting the physical and spiritual needs of our neighbors. All of [Organization's] activities are designed to further this mission and ultimately to glorify God.

Statement of Beliefs

The First Amendment and other federal laws generally protect the right of religious nonprofit organizations to operate in communities that share a set of religious beliefs. For this reason, religious nonprofits should formally adopt a Statement of Beliefs to clearly state their core religious beliefs. This is sometimes called a Statement of Faith or a Doctrinal Statement.

How to Implement Your Statement of Beliefs

Bylaws promulgate the organization's governance rules. We generally recommend that your Statement of Beliefs should be set out in full in the Bylaws, not incorporated by reference or as a stand-alone policy.

The decision for how to implement your Statement of Beliefs is unique to each organization and largely depends upon your goals. Ministries differ widely with respect to who is held accountable to faith-based standards, what those standards are, and how they are implemented. For instance, some outreach-oriented nonprofits may wish to hold only their employees to their standards of faith. Conversely, other nonprofits may seek to foster a close-knit community in which everyone personally adheres to the same set of beliefs as a condition of membership.

The most important point is clarity and consistency. If you intend to hold members of community accountable for abiding by certain beliefs, be clear and upfront about what those beliefs are, what your expectations are with respect to standards regarding those beliefs, and apply those standards in a fair and consistent way.



Statement of Beliefs

What to Include in Your Statement of Beliefs

It is essential to include the core religious beliefs of your religious nonprofit in your Statement of Beliefs.

We highly recommend that your Statement of Beliefs also clarify your beliefs with respect to the most contested and controversial issues of today, if your organization takes a position on these issues. Religious beliefs related to the sanctity of life, marriage, gender, and sexual conduct are most likely to come into conflict with prevailing cultural norms and therefore are most susceptible to threats of litigation. Some example language on these topics is included below to illustrate one way in which these ideas can be expressed.

If your organization is denominationally affiliated, you could adopt the pre-existing doctrinal or theological statements of your denomination. If you take this approach, it is preferable to repeat such statements in full, rather than simply adopting them by reference, for clarity. By contrast, non-denominational, multi-denominational, or ecumenical organizations often will be best served by promulgating their own Statement of Beliefs to avoid ambiguity about their core beliefs.

We also recommend that your Statement of Beliefs also include three key clauses: a residual clause, a final-authority clause, and a voluntary-termination clause.

Residual Clause

Because your Statement of Beliefs may not be able to anticipate all potential religious issues that may arise, we recommend including a residual clause providing for unexpressed, material religious beliefs of your organization.

Example Language for Christian Ministries: This Statement of Beliefs does not exhaust the extent of our religious beliefs. The Bible, as the inspired and infallible Word of God, speaks with final authority concerning truth, morality, and the proper conduct of human affairs.

Statement of Final Authority

We recommend that your Bylaws identify the final human authority who will promulgate, interpret, and enforce religious policies for your religious nonprofit. Often, a Board of Directors will act as this authority. Having a final authority specified will help resolve issues should any ambiguity arise regarding your Statement of Beliefs or Faith-based Code of Conduct.

Example Language for Christian Ministries: For purposes of the organization's faith, doctrine, practice, discipline, and policy, the Board of Directors is the organization's final interpretive authority on the Bible's meaning and application.

Contractual Voluntary-Termination Clause

If you require employees to affirm that they personally adhere to your Statement of Beliefs, including a voluntary-termination clause provides an agreed-upon procedure in the event an employee's beliefs change.

Example Language for Christian Ministries: I sincerely adopt this Statement of Beliefs as containing the system of doctrine taught in the Bible and agree that if at any time I find myself out of accord with this Statement of Beliefs, that I will, on my own initiative, make known to the organization's executive leadership the change that has taken place in my views since my last written affirmation of this statement of faith and, if requested, quietly and voluntarily remove myself from employment of the organization. I understand and affirm that this requirement is a material term and a condition precedent to my continued employment with the organization. [5]

Example Christian Statement of Beliefs on the Sanctity of Life

We believe that all matters of faith and conduct must be evaluated on the basis of Holy Scripture, which is our inspired, infallible, and inerrant guide. (2 Timothy 3:16-17)

Because Holy Scripture speaks to creation and human life, it is imperative that we correctly understand, articulate, and abide by what Holy Scripture teaches on this matter.

We believe that every human life is sacred because God has created mankind in His image and that human life begins at fertilization. We believe every human life must be recognized, respected, and protected as having the rights of a person and the inviolable right to life.

God creates each person's inmost being, knitting each person together in his mother's womb. (*Psalms* 139:13) As God's individualized and personal creation, each person is fearfully and wonderfully made. (*Psalms* 139:14) God has ordained all the days of each person's life before they came to be. (*Psalms* 139:16)

We are strongly committed to the preservation and defense of unborn human life, which compels our religious, moral, and ethical duty to defend unborn human life.

Example Christian Statement of Beliefs on Marriage, Gender, and Sexuality

We believe that all matters of faith and conduct must be evaluated on the basis of Holy Scripture, which is our infallible guide. (*2 Timothy* 3:16-17) Since the Holy Bible does speak to the nature of human beings and their sexuality, it is imperative that we correctly understand, articulate, and abide by what the Bible teaches on these matters.

We believe that God created mankind in His image: male and female, sexually different but with equal personal dignity. We believe that individuals should affirm their biological sex and refrain from any attempts to physically change, alter, or disagree with their biological sex. (*Genesis* 1:26-28; *Romans* 1:26-32; *1 Corinthians* 6:9-11)

We are committed to the home and family as set forth in Holy Scripture. We believe God has ordained and created marriage to exist between one man and one woman, with

absolute marital fidelity. Consequently, we believe that individuals should refrain from any sexual conduct or acts outside of this marital relationship. (*Genesis* 1:27; *Genesis* 2:24; *Matthew* 19:4-6; *Mark* 10:5-9; *Romans* 1:26-27; *1 Corinthians* 6:9-11; *Ephesians* 5:25-27; *Revelation* 19:7-9; *Revelation* 21:2)

It is our firm conviction that we uphold the dignity of each individual as we embrace the unchanging and longstanding principles of scriptural truth.

Citations:

4. See, e.g., *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices”).

5. See Office of the Stated Clerk, General Assembly of the Presbyterian Church in America, *The Book of Church Order of the Presbyterian Church in America*, 24-6 (2019).



Employment Policies

Employment Policies

The majority of lawsuits challenging a religious nonprofit organization's right to operate in accordance with its religious beliefs occur in the employment context. Consequently, it is of the utmost importance to review and revise your employment policies, found in employee contracts, handbooks, job descriptions, and codes of conduct.

Many religious organizations seek to operate in communities that share a common faith. Consequently, many ministries hold their employees to standards of conduct based upon their sincere religious beliefs. For these organizations, we recommend that the Statement of Beliefs and Faith-based Code of Conduct should be set out in full in employee contracts. They should be on or near the first page of the employee handbook. Employees should be required to sign agreement with the Statement of Beliefs before filling out applications for employment.

We will first briefly summarize the current legal landscape with respect to federal employment non-discrimination law, and then we will provide our top employment law recommendations for religious organizations.

Summary of the Legal Landscape

Title VII of the Civil Rights Act of 1964, as amended, is a federal law that prohibits employment discrimination on the basis of sex, race, color, national origin, and religion. By a congressional amendment, the prohibition on sex discrimination also forbids pregnancy discrimination. [6] In an opinion issued on June 15, 2020, the United States Supreme Court held that the prohibition on sex discrimination also includes a prohibition on sexual orientation and transgender status discrimination. [7] Title VII presumptively applies to organizations that employ 15 or more employees. [8]

There are three main protections available specifically for religious employers: (1) the ministerial exception derived

from the First Amendment to the U.S. Constitution; (2) the statutory religious employer exemption given in the text of Title VII itself; and (3) the Religious Freedom Restoration Act. [9] There may be other available protections, such as religious organizations' general right to autonomy, their right to be free from excessive government entanglement in their affairs, and the bona fide occupational qualification statutory exception. We focus here on the three main lines of defense and how a religious nonprofit may amend its documents, policies, or procedures to be shielded by existing protections.

The first defense is a constitutional defense called the "ministerial exception." It is available to churches, religious schools, and other religious nonprofit organizations. Courts have held that it is applicable to "religiously affiliated entit[ies]" whose "mission is marked by clear or obvious religious characteristics," such as Christian college campus ministries and Jewish nursing homes. [10] When it applies, the ministerial exception should provide a complete defense to federal employment discrimination law suits involving a religious organization's "ministers." [11] In 2012, the U.S. Supreme Court unanimously held that the First Amendment's ministerial exception protects the right of religious organizations to choose their "ministers." [12] The term "minister" includes more than just the head pastor of a church. It includes any position that performs "vital religious duties," [13] such as worship leaders and Sunday school teachers. Job descriptions at your organization should accurately explain the ministerial nature of all positions that perform vital religious duties.

The second defense is a statutory defense based in Title VII itself, available to most religious nonprofits. The first question a court will ask is whether your organization is eligible to assert the defense. The leading case from the Ninth Circuit, *Spencer v. World Vision, Inc.*, states that an entity is eligible for the religious exemption under Title VII if "it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially

in the exchange of goods or services for money beyond nominal amounts." [14] At least one federal appellate court takes a different approach, instead considering a variety of factors in a balancing test. [15] The precise analysis may depend on the details of your ministry and the applicable law in your location.

When it applies, the statutory religious employer exemption in Title VII provides that religious organizations may consider religion while making employment decisions in order to make sure that they employ only people who can carry out their religious missions. [16] It is widely recognized that this provision provides a complete bar to any lawsuits claiming discrimination on the basis of religion for any position in the organization - whether or not the position is considered ministerial. [17] That means that Christian nonprofit organizations generally are free to hire only Christians, or to prefer Christians in hiring, and these organizations cannot be sued for religious discrimination.

There is debate over whether this statutory provision also provides a defense to claims of sex discrimination where the religious organization's employment decision is based on the employee's failure to live up to the organization's Statement of Beliefs or Faith-based Code of Conduct on issues of sexual morality. In 2017, the U.S. Department of Justice [18] took the position that because Title VII defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief," [19] religious organizations may choose to "employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." [20] Thus, the statutory exemption may provide a defense to some claims of sex discrimination. Because this is a potential line of defense, if your organization maintains a Faith-based Code of Conduct, it should include clear standards regarding moral transgressions that could lead to adverse employment actions, applying them consistently and equally.

Finally, the Religious Freedom Restoration Act ("RFRA") may provide some protections for religious organizations.

RFRA prohibits the federal government from imposing a substantial burden on religious exercise unless it can demonstrate a compelling reason for its action that is narrowly tailored to be the least restrictive means of achieving its goals. [21]

In addition to federal law, it is important to also consider any applicable state and local employment discrimination laws, as these may be more restrictive.

Recommended Employment Non-Discrimination Policy Statement

When choosing an employment non-discrimination statement to include in your employee application forms, handbooks, and job descriptions, most generic examples you will find have not been formatted for religious employers. Although you should not be able to waive your First Amendment rights, it is preferable to state your employment non-discrimination policy in a way that does not purport to waive any religious liberty rights. The employment non-discrimination statement should be consistent wherever it appears.

Some example language is below. This language may need to be adjusted depending upon any applicable state or local employment non-discrimination laws.

All employment decisions of [Organization] are made to further [Organization's] mission to [Mission Statement]. [Organization] is an equal opportunity employer and does not discriminate on any basis covered by applicable law. As a nonprofit faith-based employer, [Organization] reserves the right to carefully and fully explore the religious values, faith, personal conduct, and convictions of applicants and employees in order to employ only those individuals who support, advance, and live in a manner consistent with our Statement of Beliefs and Faith-based Code of Conduct.

Recommended Ministerial Job Descriptions

The First Amendment protects the right of religious

organizations to make employment decisions with respect to who leads the ministry and who conveys the faith.

Constitutional religious liberty protections are at their strongest with respect to “ministerial” positions. Essentially, because “ministers” are responsible for conveying the tenets of the faith, religious organizations are free to choose whoever they want to be a minister and that decision cannot be scrutinized by courts. Therefore, the First Amendment protects the employment relationship between a church and its minister from government intrusion and bars many employment related lawsuits.

The protection applies to more than just a minister or pastor at a church. Courts have held that it can also apply to teachers at Christian schools [22], the music director at a church, [23] an organist at a church, [24] a chaplain at a faith-based hospital, [25] and a spiritual director at an Intersarsity campus ministry. [26] Other leaders at nonprofit religious organizations who perform vital religious duties also should be considered ministers. The leading ministerial exemption cases are *Hosanna-Tabor* and *Our Lady of Guadalupe*. [27] To decide who qualifies as a “minister,” courts may consider several factors, such as an employee’s title, religious training, and credentials, but the most important factor is “what an employee does” — whether they are responsible for performing “vital religious duties.” [28]

Your organization should carefully review your job descriptions and employment criteria to ensure that ministerial positions accurately and sincerely reflect as many ministerial factors as possible. When a position has religious duties or responsibilities, those should be included and explained in the job description. The more specificity with respect to religious duties, training, credentials, and other religious job requirements (including faith-based character requirements), the stronger the argument that the position is ministerial.

One final note of caution. It is unlikely that courts would

consider all employees of a religious organization to be ministers. If an organization claims that every position is ministerial, including janitorial positions, such claims could undermine its credibility.

Recommended Faith-based Code of Conduct for Employees

Religious organizations differ in how to approach moral issues. If an organization intends to hold its employees to a Faith-based Code of Conduct, it is recommended that these requirements are clearly specified in advance.

Requiring employees to agree to abide by a Faith-based Code of Conduct each year has several advantages:

- Fair and clear expectations up front
- Deters ill-suited applicants from applying
- Helps ensure that a consistent procedure is followed in case of violations
- Provides proof of the faith-based tenets of the organization

Because federal law often allows faith-based organizations to make employment decisions consistent with their religious tenets, having these standards clearly stated and consistently applied provides a strong defense. Moral standards, such as a prohibition on non-marital sexual conduct, should be applied equally to male and female employees. The Faith-based Code of Conduct should be enforced consistently to avoid even the appearance of a double standard.

Your Faith-based Code of Conduct should be grounded in your Statement of Beliefs and should establish parameters for acceptable behavior. Such a code should include a preamble addressing the religious motivation for behavior addressed in the code using supporting scriptures, doctrines, and statements of faith.

Alternative Dispute Resolution

Employment agreements should set forth a procedure for resolving disputes, such as requiring alternative dispute resolution (ADR) in the form of mediation and binding arbitration rather than litigating in civil courts. Christian forums for this kind of dispute resolution include the Institute for Christian Conciliation, Peacemaker Ministries, and Christian Legal Society Christian Conciliation.

Example ADR Language

The Parties must resolve any dispute, controversy, or claim arising out of or relating to this Agreement (the "Dispute") under the procedures and provisions set out in this Agreement. Those procedures and provisions are the exclusive mechanism for resolving any Dispute between the Parties.

Notice. A party must send written notice of any Dispute to the other party. The Parties must then consult and negotiate in good faith in an attempt to resolve the Dispute set out in the Dispute Notice. If the Dispute is not resolved promptly, the Parties must then consult and negotiate in good faith in an attempt to resolve the Dispute set out in the Dispute Notice at an in-person meeting at a mutually agreeable place and time.

Mediation and Arbitration. If the Parties do not resolve the Dispute within 7 business days after the in-person meeting, the Parties must proceed to mediation and, if necessary, to legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation (complete text of the Rules is available at www.iccpeace.com). Judgment upon an arbitration decision may be entered in any court of competent jurisdiction.

Waiver and Attorney's Fees. The Parties waive their right to a jury trial and to file a lawsuit in any civil court against each another for any Dispute, except to enforce an arbitration decision. If a party files a civil lawsuit except

to enforce an arbitration decision, and the other party successfully compels arbitration regarding the Dispute, the compelling party is entitled to recover its reasonable and necessary attorney's fees and court costs for having had to compel arbitration.

Survival. The obligations of this section survive the expiration or termination of this Agreement.

Recommendations for Non-Employee Volunteers

Your religious organization should strongly consider requiring volunteers to sign an agreement to adhere to your written conduct policies and Statements of Beliefs.

Citations:

6. 42 U.S.C. § 2000e(k).
7. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020) (holding “employers are prohibited from firing employees on the basis of homosexuality or transgender status”).
8. 42 U.S.C. § 2000e(b).
9. *Bostock*, 140 S. Ct. at 1754 (listing these three religious liberty protections).
10. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)).
11. However, there are ongoing lawsuits seeking to chip away at these protections in particular contexts.
12. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).
13. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).
14. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011).
15. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (considering “whether [the organization] is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue . . . whether the entity holds itself out to the public as secular or sectarian . . . whether the entity regularly includes prayer or other forms of worship in its activities.”).
16. 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 2000e-2(e)(2).
17. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987).
18. For a helpful elaboration on this argument by the Department of Justice, please see the DOJ’s Religious Liberty Memorandum, available at <https://www.justice.gov/opa/press-release/file/1001891/download>.
19. 42 U.S.C. § 2000e(j).
20. *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); see also *Killinger v. Samford Univ.*, 113 F.3d 196, 198-200 (11th Cir. 1997).
21. 42 U.S.C. § 2000bb-1.
22. *Hosanna-Tabor*, 565 U.S. at 190-191.
23. *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 170 (5th Cir. 2012).
24. *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019).
25. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 418 (2d Cir. 2018).
26. *Conlon*, 777 F.3d at 834-35.
27. *Hosanna-Tabor*, 565 U.S. at 193; *Our Lady of Guadalupe*, 140 S. Ct. at 2066.
28. *Our Lady of Guadalupe*, 140 S. Ct. at 2064, 2066.

Facilities Use Policies

It is recommended that your facilities use policy to explain that everything that your organization does, including the use of its facilities, is a part of its broader religious mission and must be in accordance with your religious purpose.

In some jurisdictions, when private religious organizations open their facilities to use for the general public, such as for use as a polling place or renting out facilities during the weekend, that activity may be considered a public accommodation. The analysis will vary widely by state. If your organization rents its facilities for a fee, it may be advisable to rent at cost or at below market rates. This is because, in some jurisdictions, the more a rental is seen as a profit-seeking enterprise rather than a faith-based endeavor, the more likely a court may consider the activity to be subject to regulation. [29]

In light of these possibilities, we recommend that religious organizations consider adopting facility use policies that limit the use of their facilities only to uses that accord with the organization's religious tenets. A religious organization may specify that its facilities are not open to the general public and that its facilities may not be used in ways that conflict with its religious or moral teachings. We recommend including a signature block in facility use rental agreements acknowledging receipt, review, and assent to all policies, including the Statements of Beliefs.

Alternatively or additionally, a religious organization may wish to limit its facilities to particular specified uses. For instance, a religious organization may implement a policy that only enables members to rent its facilities.

Citations:

29. See *Doe v. Cal. Lutheran High Sch. Ass'n.*, 88 Cal. Rptr. 3d 475, 482-83 (Cal. Ct. App. 2009) (concluding that faith-based school was not a place of public accommodation, but some nonprofit organizations could be subject to the state's law).



Facilities Use Policies



Government Funding

Government Funding

Religious charities and nonprofit organizations often question whether they should seek government grants or contracts in pursuit of their community service goals. Faith-based organizations are often well-positioned to provide valuable services for people in need of all backgrounds, and this funding could multiply their efforts to assist the vulnerable.

However, religious charities should be aware that government funding often comes with additional conditions and restrictions that are not applicable to organizations that do not receive government funding. At the federal level, restrictions on faith-based organizations often change with changes between presidential administrations. State and local governments may impose different restrictions on organizations they fund. These restrictions should be carefully considered before accepting government funding.

Federal Government Grants

Religious non-profits seeking grants may be able to invoke the Free Exercise Clause of the U.S. Constitution to avoid being excluded from grant programs to which they would otherwise be eligible. The Free Exercise Clause prohibits the government from discriminating against or disfavoring religious organizations on the basis of religion. Consequently, the government may not deny “a generally available benefit solely on account of religious identity [imposes a penalty on the free exercise of religion]” unless the government can prove that doing so is necessary to further a compelling interest of the highest order. [30] For example, in the *Trinity Lutheran Church* case, the U.S. Supreme Court held that excluding a church from a government grant program that would fix children’s playgrounds based on the church’s religious identity was unconstitutional religious discrimination.

That said, government grants generally cannot directly fund religious activities under the Establishment Clause. To

be eligible for grant programs, religious organizations will likely be required to separate their “inherently religious activities,” [32] such as religious worship, prayer, or studying of religious texts, from government funded activities. The specific requirements may change and we highly recommend you speak to an attorney about your specific situation.

Federal Government Contracts

Contracting with the federal government is subject to different requirements than receiving federal grant funds.

All federal contractors are required to abide by the federal government’s employment non-discrimination requirements. Executive Order 11246, as amended, prohibits federal contractors from discriminating against employees on the basis of “race, color, religion, sex, sexual orientation, gender identity, or national origin.” [33] Executive Orders are issued by the President and enforced by regulations issued by the President’s administration. Thus, the interpretation of this Executive Order could change with different administrations.

Importantly, Executive Order 11246 contains an exception for religious organizations. [34] This religious exception mirrors the language of the religious exception in Title VII of the Civil Rights Act of 1964, which is the federal non-discrimination law applicable to most employers in the country. The language of Executive Order 11246 should be interpreted similarly.

Under both Executive Order 11246 and Title VII of the Civil Rights Act of 1964, it is widely accepted that religious organizations can make employment decisions on the basis of religion. For example, Jewish nonprofit organizations are free to hire only Jewish employees without being disqualified as a federal contractor. However, like in Title VII, there is ambiguity over whether religious federal contractors may make employment decisions based upon their religious beliefs about issues of sexual morality. We anticipate additional regulations and litigation

on this question. Because this is an evolving area of law, we again highly recommend speaking with a religious liberty attorney to discuss your particular situation.

Citations:

30. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

31. *Id.* at 2024-25.

32. Department of Justice, *DOJ Faith-based and Community Initiatives FAQ*,

<https://www.justice.gov/archive/fbci/faq.html#:~:text=Answer%3A,other%20similar%20non%2Dgovernmental%20organizations> (last accessed May 24, 2021).

33. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(i), as amended (July 21, 2014).

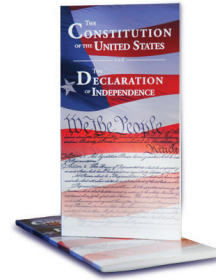
34. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 204(c), as amended (Dec. 16 2002), reads “Section 202 . . . shall not apply to a Government contractor or subcontractor that is a religious corporation,

association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

Conclusion

We hope this guide is a helpful resource for your religious nonprofit organization. If you have any questions about this guide or other religious liberty issues, please seek legal assistance. First Liberty attorneys are standing by at firstliberty.org to help protect your ministry’s religious freedom.

Additional FREE Resources



Back to the Constitution: Learn it, Love it, Live it.

Today, there are many who like to blame the Constitution for our nation's problems. But the truth is, our Constitution is not the problem—it's the solution. Make America's Founders proud and take the source of your first freedom with you wherever you go!

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FirstLiberty.org/Constitution



Freedom Starts Here

Perfect for those new to First Liberty, this resource will help you discover all the "must-know" essentials about us. Get an inside look at our mission, president and leadership team, clients, the key cases we've won at the U.S. Supreme Court, our unique national volunteer attorney network, and the many ways you can become a force multiplier for religious freedom.

Visit:
FirstLiberty.org/Faith-And-Freedom



OurCalling

OurCalling is a faith-based outreach ministry that provides essential services to people experiencing homelessness, including remaining open 24-hours during emergencies if homeless individuals have nowhere else to go. After the Dallas city council adopted a policy that threatened OurCalling’s critical work in its community, First Liberty stepped in to protect the ministry’s ability to fulfill its mission.



Point of Connection

Located in the remote village of Joseph, Oregon, Point of Connection is a faith-based nonprofit that serves its community by providing shelter, assistance, and training to men seeking to become more productive citizens. After county officials prevented the ministry from operating by denying a permit application, First Liberty’s intervention helped this ministry secure the permit it needed to fulfill its religious mission.



Christians Engaged

First Liberty appealed an IRS decision that denied tax-exempt status to Christians Engaged, a Texas nonprofit organization that educates and empowers people of faith to pray for our nation and elected officials, vote, and be civically engaged. After our legal team took action, the IRS reversed course and granted Christians Engaged tax-exempt status.



FORGE

Forge Youth Mentoring

Forge Youth Mentoring is a faith-based program that partners with local government to provide youth mentoring services to children in need. First Liberty successfully stopped an attack from an external, anti-religious organization, clarifying to the local government that religious charities have the right to participate in government programs to provide services on equal terms as all other organizations.



Insight for Living Ministries

Under the Affordable Care Act, Insight for Living Ministries and several other ministries would have been forced to provide insurance coverage for abortion-inducing drugs, in violation of their religious beliefs. After First Liberty litigated the case for three years, the U.S. Dept. of Justice brought it to a resolution by issuing a rule that rolled back the mandate. This helped ensure nonprofit organizations were not forced to choose between adhering to their religious beliefs or obeying the law.



Learn More on First Liberty's Website

Visit our website, where you'll find information on our cases, clients and breaking updates on religious liberty in America. Whether you want to learn more about our attorneys, leadership and staff, or if you need to request legal assistance, our website is a one-stop shop for everything you need to know about religious freedom.

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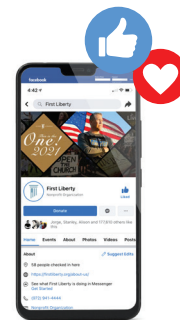
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 [FirstLiberty.org/Help](https://www.FirstLiberty.org/Help)
 (972) 941-4444



Stephanie Taub
Senior Counsel
First Liberty's Religious Nonprofits Expert

First Liberty is our nation's largest legal organization solely dedicated to protecting religious liberty for all Americans. We have won cases at all court levels, including the United States Supreme Court, federal and state courts, and administrative courts and agencies. Victories are won through a nucleus of top-ranked staff attorneys who coordinate a national network of top litigators from firms that include 24 of the largest 50 in the world.



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