RESTORING FAITH IN AMERICA

FIRST LIBERTY

RELIGIOUS LIBERTY PROTECTION KIT

Your Guide to Restoring Faith in America

FirstLiberty.org

DEAR FRIEND OF RELIGIOUS FREEDOM,

Thank you for your desire to **restore faith in America** 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.

Kelly Shackelford, Esq.
President, CEO & Chief Counsel

FIRST LIBERTY INSTITUTE® RELIGIOUS LIBERTY PROTECTION KIT FOR RESTORING FAITH IN AMERICA

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INTRODUCTION

For several decades, public displays of religion have been inhibited and prohibited. This was due to various convoluted and incorrect Supreme Court opinions. However, in the last two years, the Supreme Court restored the proper constitutional framework for public displays of religion.

In fact, the door has been thrown wide open and we are experiencing a golden hour of freedom for religious liberty. First Liberty's work in the 2022 case of *Kennedy v. Bremerton School District* set the stage for this renaissance and rebirth of religious liberty. Coach Kennedy was granted the right to kneel at midfield after a football game to praise God. The *Kennedy* decision allows school employees and officials greater leeway in expressing their faith while on the job. It also threw out a 1970s case that inhibited public displays of religion and restored the ability of people throughout America to acknowledge religion in public spaces.

First Liberty won another monumental victory for religious liberty in the 2023 case of *Groff v. DeJoy.* This unanimous decision by the Supreme Court reinforced an employee's right to practice his or her faith while at work. What *Kennedy* did for school officials, employees, and public displays of religion, *Groff* did for employees in every other sector of employment. These groundbreaking cases have opened an opportunity for all Americans.

Now YOU can restore faith in America. This *Restoring Faith in America Protection Kit* will educate you on what your rights are and how to assert them. The following pages will guide you on how to restore faith in America through the public arena, education, houses of worship, the marketplace, the military, and the federal workplace.

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

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FirstLiberty.org/kits

Restoring Religious Freedom in the Public Arena

Restoring Religious Freedom in the Public Arena

Legislative Prayer

Government entities may restore faith in America by freely acknowledging the role of religion in public life. *Kennedy* removed unconstitutional, court mandated barriers for some traditional government activities that acknowledged religion and further bolstered the lawfulness of others. Local, state, and federal governments and their agencies now are freer than ever to pursue those things that accord with the nation's religious heritage and traditions.

Nowhere is this clearer than with invocations before government meetings, such as meetings of county boards and city councils, and school boards. This practice is known as legislative prayer. As the U.S. Supreme Court has observed, the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."

The Supreme Court upheld the constitutionality of legislative prayer both times the issue has been before it, first in *Marsh v. Chambers* in 1983 and more recently in *Town of Greece v. Galloway* in 2014. In both cases, the lawfulness of invocations to open meetings of deliberative public bodies was based on the nation's history and tradition.

Regardless, some governments have been hesitant to incorporate invocations into their meetings for fear of an Establishment Clause challenge. *Kennedy* unequivocally established history and tradition as the standard for lawful government activity under the Establishment Clause, which assures governments at all levels that legislative prayer is in keeping with the First Amendment. As an example, under the *Kennedy* standard – in another First Liberty win – a federal appeals court upheld invocations given by chaplains at the opening of a court of law of a Texas justice of the peace.

In short, the Establishment Clause is no barrier to including prayer at the opening portion of a city council meeting or county board meeting or a meeting of another similar public body.

School board prayer is a category of legislative prayer and

requires additional attention. After the Supreme Court clarified the law for legislative prayer in *Town of Greece*, two federal courts of appeals ruled on school board prayer. In 2017 the U.S. Court of Appeals for the Fifth Circuit (with jurisdiction over Texas, Louisiana, and Mississippi) found school board prayer is lawful under the Establishment Clause. The next year, however, the U.S. Court of Appeals for the Ninth Circuit (with jurisdiction over California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, Hawaii) found that school board prayer violated the Establishment Clause. The difference in outcome was due in part to the courts' differing views of whether a school board meeting is a legislative activity or an extension of the public school experience.

Both of these cases were decided before *Kennedy*. Under *Kennedy*, with its focus on history and tradition to determine what is lawful under the Establishment Clause, the scales are tipped decidedly in favor of the lawfulness of school board prayer, and it is likely that the Ninth Circuit's decision is an outlier that will not stand for long.

Government Chaplains

Similarly, after *Kennedy* government chaplaincies—such as police chaplaincies—are safer and more secure under the Establishment Clause than they have been in 50 years. Even prior to *Kennedy*, courts consistently upheld government chaplaincies as constitutional. These included military chaplains, legislative chaplains, prison chaplains, and public hospital chaplains.

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The Supreme Court already recognized that American legislative chaplaincies pre-date the First Amendment. The Court explained that the First Congress, in fact, "made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." As the Court observed, "[c]learly the men who wrote the First Amendment Religion Clause did not view . . . legislative chaplains . . . as a violation of that Amendment." American military chaplaincies – the precursor to law enforcement chaplaincies – extend back even further to the time of the Continental Army under the Continental Congress and General George Washington.

Government chaplaincies plainly "accord with history and faithfully reflect the understanding of the Founding Fathers" and so fall well within government practices "permissible" under the First Amendment. With *Kennedy* in place, the Establishment Clause should be no obstacle for local governments that want a chaplain.

Government Displays of Religion

Before *Kennedy*, some government displays of the Ten Commandments were found lawful, some were found unlawful. It was the same with cross displays as memorials to the fallen. Whether a display would survive an Establishment Clause challenge was unpredictable, and courts handed down inconsistent results. Perhaps the most telling example occurred in 2005 when the U.S. Supreme Court – on the same day – upheld a six foot, multi-ton granite Ten Commandments monument that sat on the state Capitol grounds in Austin, Texas, but struck down a paper copy of the Ten Commandments that hung on a wall in an eastern Kentucky courthouse.

Under *Kennedy*, bolstered by *The American Legion v. American Humanist Association* (another First Liberty win at the Supreme Court), government displays of the Ten Commandments and of crosses as memorials that are in keeping with the nation's history and tradition are protected under law. None should be removed.

Similarly, government display of the National Motto – In

God We Trust – can be seen on government buildings, other government property, license plates, and even the currency. The U.S. Supreme Court consistently has used display of the motto as an example of a lawful government use of religious language. Even so, before *Kennedy*, if a government wanted to display the motto on its property in any significant way it was likely to meet with threat of legal action. This was clearly seen a few years ago when law enforcement offices across the country began to display "In God We Trust" on their vehicles. Under *Kennedy*, however, there is no credible question that government display of the National Motto is lawful. Any government entity that wants to display the motto should do so.

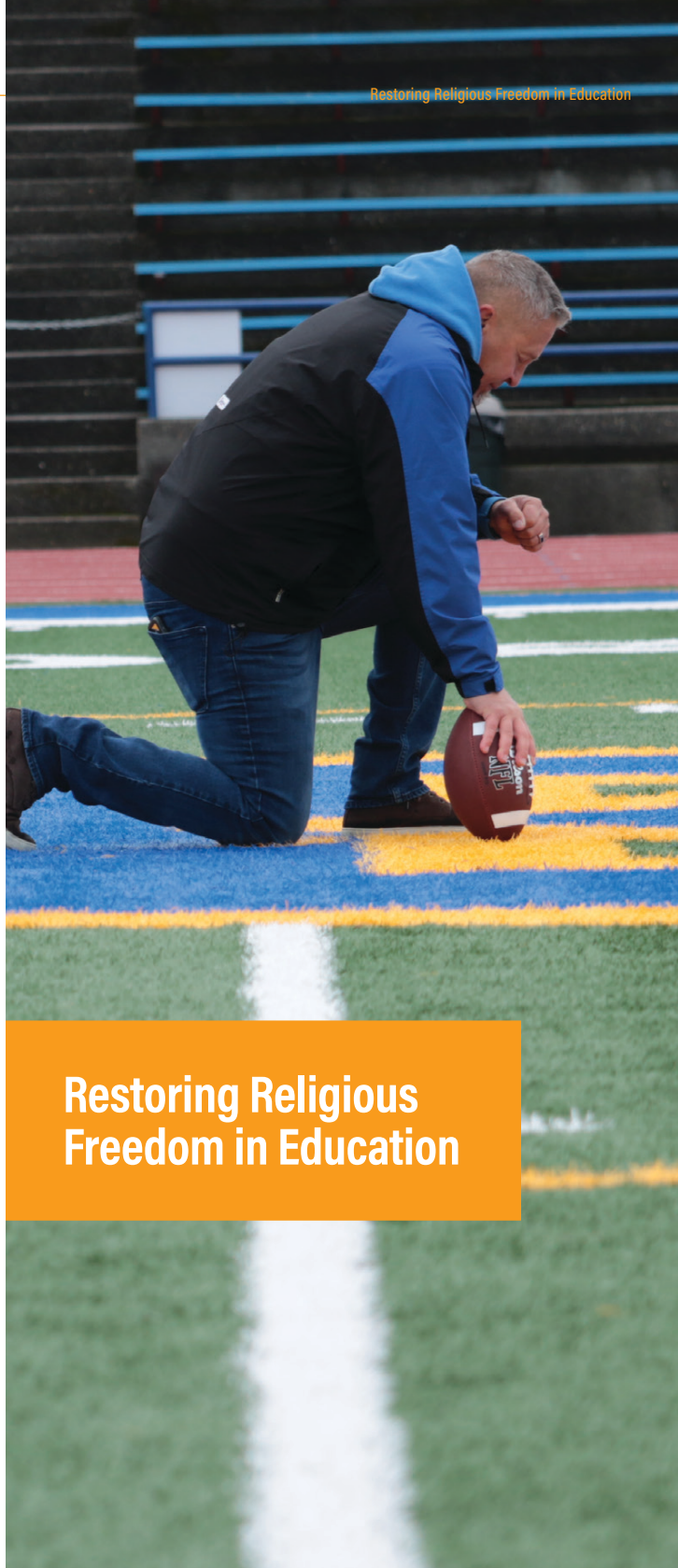
Restoring Religious Freedom in Education

Kennedy and Groff Reinforce the Religious Rights of Public-School Employees

Teachers and administrators engaging in non-disruptive religious expression unrelated to the scope of their official duties and professional capacity, and generally not coercive to students, are protected by the First Amendment. For example, a school cannot create a sweeping policy to prohibit all written or oral religious advocacy among its employees, or retaliate against a teacher for writing a religious-based letter to the local newspaper, or prohibit employees from wearing religious attire or jewelry. Additionally, under *Kennedy*, schools cannot retaliate against or prohibit teachers from engaging in brief, private religious observances, such as prayer, at times during which other private, secular activities are allowed.

Federal employment discrimination law, Title VII of the Civil Rights Act of 1964, prohibits employers with 15 or more employees from discriminating on the basis of religion. The law also provides that employers may not create a hostile work environment on the basis of religion, which means that employers cannot tolerate severe or pervasive harassment on the basis of religion. Some states also provide similar protections applicable to employers with fewer than 15 employees. If you believe that you have experienced religious discrimination or harassment, we recommend that you reach out to an attorney to discuss filing a complaint with the Equal Employment Opportunity Commission or the appropriate state agency.

Under Title VII, religious teachers and employees in the school environment also may request religious workplace



Restoring Religious Freedom in Education

accommodations when there is a conflict between a job requirement and their religious beliefs. Title VII requires that employers grant reasonable religious accommodation requests unless doing so would cause an undue hardship on the business. Under *Groff*, undue hardship is defined as substantial increased costs in relation to the conduct of the particular business. You have the right to ask for a religious accommodation when you may be called to do something on the job that violates your sincerely-held religious beliefs, including teaching curriculum or promoting topics that violate your faith.

Carson Protects Religious Schools Right to Receive Access to Government Funding

Some States create programs for tuition relief, scholarships, financial aid, or grants for schools in general. In *Trinity Lutheran Church of Colombia, Inc. v. Comer, Espinoza v. Montana Department of Revenue*, and *Carson ex rel. O. C. v. Makin*, the Supreme Court established that private religious schools can participate in these State programs to help students with tuition, update facilities, or any other purpose the program is designed to aid. In the cases above, the States involved attempted to prevent the use and application of these programs to religious schools because these institutions were religious. However, the Supreme Court stated that the State cannot provide aid for private education in a manner that disqualifies faith-based schools solely because of their religious status, and that such action would be to punish "[the school] for the free exercise of its constitutional liberty." Moreover, the Supreme Court determined in *Carson* that public funds that go to religious organizations by the decision of the benefit-recipient for religious instruction do not offend the Establishment Clause of the First Amendment. There is one exception a State can deny an individual from using a State-funded scholarship program to assist with the training of clergy through the use of taxpayer funds.

Restoring Religious Freedom in Houses of Worship and Faith-Based Organizations

Kennedy ends with words that should comfort religious organizations throughout the country: "Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head."

Chiefly, *Kennedy* removed one of the primary obstacles to religious institutions intersecting with the public square:

Restoring Religious Freedom in Houses of Worship and Faith-Based Organizations

"the *Lemon* Test." Until *Kennedy*, whenever a religious institutions would seek to participate in the public square, government officials were wary. Indeed, government officials became adept at wielding the Establishment Clause of the First Amendment to the U.S. Constitution to ward off a religious institution's involvement in any public benefit.

To that end, the Supreme Court reminded government officials that the First Amendment is not in conflict with itself. The Establishment Clause may not trump the rights guaranteed under the Free Exercise Clause. Or, as Justice Neil Gorsuch wrote, "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." What is good for the individual is likewise guaranteed to the organizations they form to express their religious convictions.

Government officials need no longer fear running afoul of the Constitution when partnering with religious institutions. This opens opportunities for local governments to partner with religious institutions to the benefit of the public good. Municipalities, for instance, may partner—through cooperative agreements, grants, or other public benefits—with churches, synagogues, or religious charities to provide for the homeless, feed the hungry, find homes for the orphan, and provide other essential services to the betterment of their community.

Further, government entities need not fear the speech and expression of religious institutions in government-operated forums, whether in a city's amphitheater, assembly building, or local park. *Kennedy* alleviated concerns of a religious institution's unconstitutional entanglement with the government, moving religious institutions from the sidelines and welcoming their public participation on equal footing with the rest of the community. As the Supreme Court explained in *Kennedy*, "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."

Finally, religious institutions benefit from the weight of our nation's historic respect for their religious expression and activity. It is clear after *Kennedy* that the U.S. Supreme Court will measure any questioned behavior by the nation's religious institutions against the historical record. Since America has long welcomed the religious and charitable

missions of its religious institutions, our houses of worship and faith-based organizations have much to build upon. Government officials intolerant of a religious institution's contribution to our pluralistic society will be viewed as hostile to religion.

After *Kennedy*, Americans, and the religious institutions they form, live under a level of freedom unseen for nearly half a century. But this freedom cannot be merely academic. Rather, this hard-fought freedom is to be confidently enjoyed by every American, perhaps especially within the nation's religious institutions.

Restoring Religious Freedom in the Marketplace

Strengthened First Amendment Rights of Government Employees

Employees of faith have a level of legal protection greater than we have seen in over four decades.

First, *Kennedy* confirmed that government employees maintain their First Amendment rights to free speech and free exercise of religion. They do not give these rights up by accepting government employment. Nor do they have to hide their religious practices or religious identities from public view. Instead, government employers are required to treat their employees equally. They cannot single out and censor the private, personal religious expression of their employees.

This opinion marks a fundamental change in the law and will impact countless government employees of faith across the country. In 1971, the Supreme decided a case called *Lemon v. Kurtzman* which manufactured a legal standard for how governments are supposed to deal with religious issues. Unfortunately, this "*Lemon* test" stacked the deck against religious expression. Instead of requiring neutrality, fear of the *Lemon* test caused many government officials to instead become hostile toward personal religious expression – particularly for schoolteachers and school children at public schools.

In the *Kennedy* case, the Supreme Court explained that the Lemon test is no longer good law. Instead, the free speech, free exercise, and establishment clauses in the First Amendment all work together to protect individual rights. Moving forward, government employees should no longer be placed in a position where they are singled out for censorship or feel as though they must walk on eggshells to hide their religious identity.

Empowered Employees of Faith to Receive Religious Accommodations

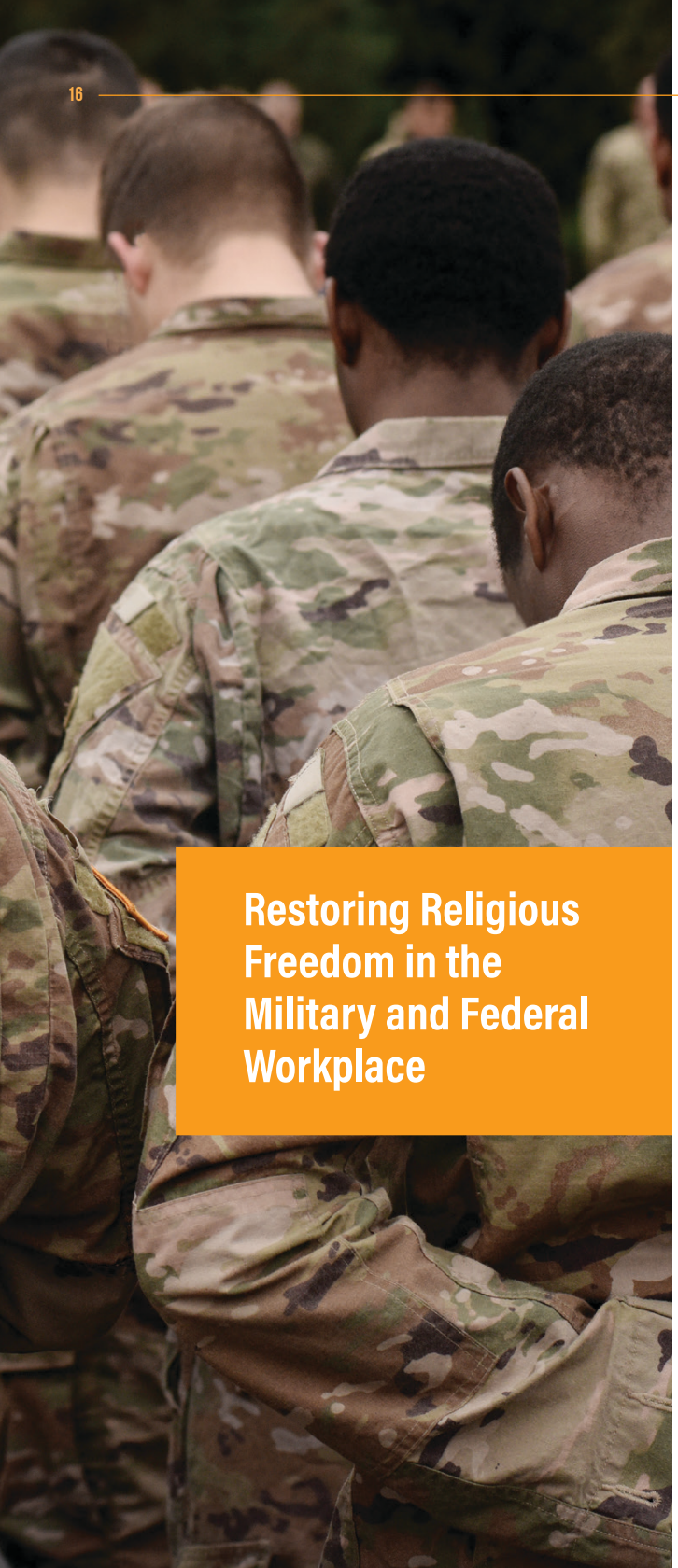
Next, *Groff* empowers employees across the country to receive religious accommodations that they need to be able to work without violating their religious beliefs. This decision protects both government employees and non-government employees. It applies to virtually all workplaces across the country where there are 15 or more employees. Because of this decision, fewer employees will be forced to choose between their jobs and their faith.

As stated previously, under federal employment discrimination law, Title VII of the Civil Rights Act, employees may request religious workplace accommodations when there is a conflict between a job requirement and their religious beliefs. These accommodations allow employees to observe holy days, attend worship services, follow the dress or modesty requirements of their faith, or otherwise not be forced to violate their religious beliefs on the job.

The law requires businesses to give their employees reasonable religious accommodations unless doing so would cause an undue hardship on the business. Previously, a Supreme Court case from 1977 called *TWA v. Hardison* defined "undue hardship" to mean anything more than a "de minimis cost." Under the prior standard, employers could deny religious accommodations simply by pointing to a minimal burden on the business.

Groff clarified that employers must provide reasonable religious accommodations unless they can prove that doing so would result in "substantial increased costs" on the conduct of the particular business.

When applying this legal standard, courts are supposed to consider many factors, including the nature, size, and operating cost of the employer. This means that larger employers will more often be required to grant religious accommodations to their employees. The Court also clarified that animosity or hostility toward an employee's religious beliefs cannot provide a defense to a religious accommodation claim.



Restoring Religious Freedom in the Military and Federal Workplace

Overall, *Groff* provides greater legal rights for religious employees than we have seen for decades. First Liberty will continue to fight for all employees of faith to be able to work with full and equal rights, in a manner consistent with their religious convictions.

Restoring Religious Freedom in the Military and Federal Workplace

Service Members and Federal Employees Can Now Celebrate Greater Religious Liberty Protections in the Workplace

Now, more than ever, our military and Executive Branch leaders are under significant pressure to quell the religious expression of service members and federal employees to advance a woke political agenda. But thankfully, *Kennedy* and *Groff* allowing the brave men and women who faithfully serve our nation and those who support the important missions of our government to finally celebrate having greater religious liberty protections despite the ever-increasing secularization of our society.

1. *The Federal Government Can No Longer Rely on Baseless Establishment Clause Claims to Chill Freedom of Religious Speech and Religious Expression*

While modern times may seem grim, the history and tradition of the American military and the very establishment of our federal government confirm that religious liberty is a fundamental component to a thriving nation.

In fact, religious liberty in the military was so important to John Adams, that Congress instructed its fledgling navy that "commanders of the ships of the Thirteen Colonies are to take care that Divine Service be performed twice a day on board, and a sermon be preached on Sundays."

Later, in 1942, Franklin D. Roosevelt expressed his favorable view of religion's importance in our military by vowing to "never fail to provide for the spiritual needs of our officers and men" and during WWII had Bibles printed and provided to troops in the field.

But recently, Diversity, Equity, and Inclusion policies, LGBTQ+ initiatives, and damaging politically motivated mandates are eroding our national security and forcing

religious service members and federal employees into a corner. Rather than sacrifice their careers, our nation's finest are violating their sincerely held religious beliefs on a daily basis just to put food on the table for their families.

Fortunately, through First Liberty's commitment to fighting for every American's U.S. Constitutional and statutory rights, the long-endured crisis of conscience is ending.

For military members, while obedience to orders, good order, and discipline are vital to a military force that is capable of fighting and winning wars, they are free to act and speak in accordance with their religious beliefs as long as there is no demonstrable negative effect on mission accomplishment. Department of Defense Instruction 1300.17, titled *Religious Liberty in the Military Services*, and other service-specific instructions place a high value on the rights of members of the military services to observe the tenets of their religion or to observe no religion at all. But oftentimes those rights are violated, and our most cherished national assets are discriminated against and punished for standing by their faith.

Thankfully, the Supreme Court recognized the damage prior precedential cases like *Lemon v. Kurtzman* were inflicting on the First Amendment rights of all citizens and decided to overturn those flawed decisions for good when it decided *Kennedy*.

The *Kennedy* case provides greater protections for religious service members and federal employees than ever before. In this unprecedented opinion, the Supreme Court unequivocally held that the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause of the First Amendment have complementary purposes, not warring ones where one Clause is always sure to prevail over others. This means that the federal government can no longer engage in viewpoint discrimination and defend its illegal actions with baseless Establishment Clause claims that often times trumped Free Exercise and Free Speech protections.

Today, the Supreme Court's stance on the First Amendment is clear—where the Free Exercise Clause protects religious exercise, whether spoken or not, the Free Speech Clause provides overlapping protection for expressive religious activities. Importantly, the Court harkened back to the history and tradition of our nation, recalling that the First Amendment is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent—concerns that resonate all too well with many Americans today. Indeed, the Court highlighted, learning how to tolerate speech or religious expression of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry."

Through First Liberty's determination, service members and federal employees who wish to live by their faith can now freely act and speak in accordance with their religious views. Military members, just like federal employees, are never excluded from the protection granted by the First Amendment, and *Kennedy v. Bremerton* reinforces the importance of religious speech and religious expression as it existed upon our nation's founding.

2. Religious Speech and Religious Expression Are Now Doubly Protected by Groff's More Stringent Religious Accommodation Standard

Under *Groff*, federal employees receive more religious liberty in the workplace. As discussed earlier in this guide, requests for religious accommodation pursuant to Title VII must now be approved unless granting the accommodation would place a real, and not perceived, "undue hardship" on the employer.

For years, the federal government successfully denied even minor requests for religious accommodation if granting the accommodation would cause the government to incur more than a "de minimis" cost. But, as the Supreme Court in *Groff* explained, the notion of the "de minimis" cost standard was erroneously derived from a case that was decided approximately 50 years ago—*Trans World Airlnes v. Hardison.*

Now, the burden is on the government to show that granting an accommodation would result in actual "undue hardship" in the context of its business. This means that if the government fails to provide an accommodation, it has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue."

With *Groff* at play, federal employees can finally live by their faith and meaningfully seek accommodations to

policies such as the U.S. Office of Personnel Management's May 2023 Guidance Regarding Gender Identity and Inclusion in the Federal Workplace.

Considering many religious employees have objections to such overly secularized employment requirements, they can take comfort in knowing that their requests for religious accommodation are now required to be reviewed under a more rigorous process due to First Liberty's success in *Groff*.

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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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.

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First Liberty Clients

Coach Joe Kennedy

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Gerald Groff

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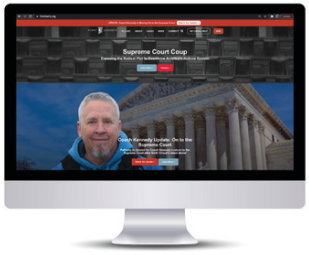
Resources Available

RFIA.org

Now YOU can restore faith in America in many different facets! Visit RFIA.org to learn what your rights are and how to assert them. The site will guide you on how to restore faith in America through the public arena, education, houses of worship, the marketplace, the military, and the federal workplace.



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