Religious Expression in American Public Life:
A Joint Statement of Current Law

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.




January 2010

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Religious Expression in American Public Life: *A Joint Statement of Current Law*

The place of religion in American public life is a subject of widespread interest and intense debate. Part of that debate concerns the law that applies to these issues.

The drafters of this document often disagree about how the law *should* address issues regarding the intersection of religion and government. For example, some of us are actively urging the Supreme Court of the United States to reverse certain decisions in this area, while others of us are vigorously opposing such efforts.

Nevertheless, we have come together to provide a summary of how the law currently answers some basic questions regarding religious expression and practice in public life. However much we differ about what the law *should* be, we agree in many cases on what the law *is* today.

[W]e have come together to provide a summary of how the law currently answers some basic questions regarding religious expression and practice in public life. However much we differ about what the law should *be, we agree in many cases on what the law* is *today.*

The starting point for our dialogue and agreement is our shared conviction that religious liberty, or freedom of conscience, is a fundamental, inalienable right for all people, religious and nonreligious. In the United States, that right is secured by Article VI of the U.S. Constitution,[1] the First Amendment and related constitutional and legal provisions.

The First Amendment of the U.S. Constitution, the typical starting point for analysis of the law on religion and the state, provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech… ."[2] Under Supreme Court precedent, the prohibition against governmental establishment of religion prevents the state from promoting or endorsing religion. It also prohibits the government from denigrating or disapproving of religion. The prohibition against governmental interference with free exercise, together with supporting constitutional and legal provisions,[3] requires the state to respect Americans' rights to live their lives according to the dictates of their consciences. Describing current law's application to religion requires attention to both religion clauses as well as to the Free Speech Clause of the First Amendment.

Many of the questions concerning religious expression in public life could be better addressed if Americans kept in mind the First Amendment's crucial distinction between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[4] Of course, this reference to "private speech" is not limited to speech occurring "in private," but describes religious expression attributable to nongovernmental organizations and individuals rather than

to the state. This means that individuals and groups have the right to practice and promote their faith, not only within their homes and houses of worship, but also publicly in places such as parks, street corners, the airwaves, open meetings and many other places subject to the same time, place and manner limits that apply to other nongovernmental speech.[5] This statement is a brief summary of some of the ways in which the law applies to various forms of religious speech, expression and practice.[6]

Our description of current law should not be taken as a collective endorsement of all of the activities the law allows. Some of us would take that position; others would not. This document describes what is legally permissible, not necessarily what is desirable.

Our purpose in crafting this statement is to provide an accurate understanding of current law.

Our purpose in crafting this statement is to provide an accurate understanding of current law. We also hope our efforts to find consensus will spur others to engage one another in similar efforts and find common ground.

1. How is the term "public" used in the body of this statement?

We recognize that the word "public" can have a range of meanings. For example, the term "public" often is used as a synonym for government, as in "public school" or "public office." In other contexts the word "public" does not refer to the government but simply to an activity or place that is visible or accessible to a wide variety of people. For example, a religious leader might make a public statement, which would imply that the statement is being released to the media or others outside his or her particular religious community.

This document focuses on religious expression and activity that occurs in places and spheres that are visible and accessible to people generally rather than on religious expression and activity that occurs behind the closed doors of homes or houses of worship. Some of this expression and activity occurs on government property or involves government officials acting in their official capacities; some of it does not.

Rather than use the ambiguous term "public" in the body of this statement, whenever possible we try to use more specific terms to describe these activities, spheres, places and people. We use the term "government" or "state" to refer to government property, entities and employees acting in their official capacities as well as events and programs that are sponsored or funded by the state.[7] (In cases where the context is clear, however, such as "public schools" or "public policy," we will nevertheless use the commonly accepted word.) Conversely, we use the term "nongovernmental" (rather than the ambiguous word "private") to refer to people who are not employed by the state and property, programs, events and entities that are not funded, owned or sponsored by government.

2. Is the First Amendment the only constitutional or legal provision that affects these issues?

No. As noted above, the most prominent constitutional or legal provisions affecting these issues are the First Amendment's religion clauses, which bar the government from establishing religion or prohibiting its free exercise, and the First Amendment's Free Speech Clause.

But a variety of other constitutional and legal provisions also affect the role that religion plays in many different situations in contemporary American life. In addition to Article VI of the Constitution, which prohibits the federal government from requiring people to pass a religious test in order to hold government office, these provisions include state constitutional provisions on religious freedom.[8] These state constitutional provisions often are similar to those found in the First Amendment, although they may differ from the federal constitutional provisions in significant ways. For example, because the federal Constitution provides a floor rather than a ceiling for constitutional rights, some of these state constitutional provisions are more protective of religious exercise and expression.[9] State constitutional provisions may also differ from the First Amendment in that some of them contain stricter prohibitions against state sponsorship of or funding for religious activities and institutions.[10] State law may differ from federal law in these ways so long as these differences do not cause a conflict with federal law. If state law conflicts with federal law, federal law prevails.

Federal and state statutes are also sometimes relevant to these issues. For example, certain statutes provide heightened protection for the right to practice one's faith free from governmental interference, such as the federal Religious Freedom Restoration Act (RFRA) and associated state laws, as well as the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).[11] Federal, state and local civil rights laws, regulations and other provisions are also applicable to some of these matters. Some civil rights laws prohibit religion-based discrimination by governmental and many nongovernmental entities in areas like employment, housing and public accommodations, although many of these laws include exemptions for some religious organizations.[12]

Further, while other laws do not expressly refer to religious activities or organizations as such, they sometimes affect them. For example, certain laws apply to religious entities because they happen to be tax-exempt organizations or landowners. These laws may affect religious expression and practice, but only in ways that are consistent with the constitutional and other rights of the religious entity.

3. May religious groups and people participate in the debate of public issues?

Yes. Religious individuals and groups, like nonreligious individuals and groups, have a right to participate in the debate on all issues that are important to political and civic life. As the Supreme Court said in 1970: "Adherents of particular faiths and individual churches frequently take strong positions on public issues … Of course, churches as much as secular bodies and private citizens have that right."[13] For example, religious leaders and organizations frequently take positions on legislative bills, and they sometimes boycott certain corporations or launch media campaigns about their congregations or about public issues. This kind of activity usually is protected by the First Amendment.[14] Note that, if an entity wishes to qualify for and maintain status as a 501(c)(3) tax-exempt organization, then it will need to comply with certain restrictions on its political activities that apply to all 501(c)(3) organizations (whether religious or not), including the activities described in questions and answers 9 through 11 of this statement.

4. May religious beliefs inform public policy?

Government officials' religious beliefs may inform their policy decisions so long as advancing religion is not the predominant purpose or primary effect of governmental action. In other words, the predominant purpose and primary effect of governmental action must be nonreligious (secular) in nature. When the Supreme Court considers whether a governmental action has a permissible purpose, it says that

the government's "stated reasons [for its actions] will generally get deference, [but] the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[15]

In cases where the Supreme Court has found an impermissible purpose for government action, it says it has done so because "openly available data supported a commonsense conclusion that a religious objective permeated the government's action."[16] For an example of a governmental action that had an impermissible purpose, see the discussion of the *McCreary County v. ACLU* case in question and answer 20 of this statement.

The mere fact that a law coincides with religious tenets does not mean it violates the religion clauses of the Constitution.[17] For example, just because various religious teachings oppose stealing does not mean that the government may not enact laws prohibiting larceny.[18] And the Supreme Court has found that a federal statute that denied government funding for certain medically necessary abortions did not violate the Constitution.[19] The Court said that, although the law "coincide[d] with" certain religious tenets, it had a secular purpose, neither advanced nor inhibited religion and did not foster excessive government entanglement with religion.[20]

5. May the government require individuals to pass a religious test in order to hold government office?

No. Article VI of the Constitution requires certain government officials to take an oath or affirm that they will support the Constitution, but it specifies that "no religious [t]est shall ever be required as a [q]ualification to any [o]ffice or public [t]rust under the United States."[21] Thus, the federal government may require a person to swear or affirm that he or she will support the Constitution in order to serve as a government official. But it may not require a person to promise allegiance to or against a god, any particular faith or any purely religious precept in order to serve in government.

The Supreme Court has specifically held that neither the state nor federal government may require someone to say that he or she believes in God in order to hold government office. … It has also held that a state may not bar ministers from holding government office.

The Supreme Court has specifically held that neither the state nor federal government may require someone to say that he or she believes in God in order to hold government office.[22] In that decision, the Court said that a governmental body's "religious test for public office unconstitutionally invades [a person's] freedom of belief and religion and therefore cannot be enforced against him."[23]

It has also held that a state may not bar ministers from holding government office.[24] In the case that resolved this particular issue, Justice William Brennan said: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."[25]

6. Are persons elected or nominated to serve as government officials required to place their hands on the Bible when making oaths or affirmations?

No. Those who make an affirmation or take an oath promising to fulfill certain duties toward the government may choose to do so while placing a hand on a text that is sacred to him or her (whether the text is the Bible or something else), but this is not in any way required by the Constitution.

If an elected official chooses to place his or her hand on a book while taking an oath or making an affirmation, the official may select a religious or nonreligious book. If the official wishes to use a religious book, the official may select whatever scripture is sacred to him or her, whether that scripture is the Bible, the Torah, the Quran, the Bhagavad-Gita or something else.

An officeholder may choose to add the words "so help me God" at the end of this oath or affirmation. Adding these words to the oath or affirmation, however, is not and could not be required by government.

7. May elected officials reference religious ideas and discuss their personal religious beliefs while operating in their official capacities?

Elected officials must protect and defend the Constitution, including the constitutional obligation of the government to refrain from establishing religion. At the same time, elected officials are generally given substantial leeway to refer to religious ideas and communities and to talk about their personal beliefs, including their personal religious beliefs, while functioning in their official capacities. The constitutional line in this area is not always clear, but following are a few examples of speech that would fall on either side of that line.

Elected officials must protect and defend the Constitution, including the constitutional obligation of the government to refrain from establishing religion. At the same time, elected officials are generally given substantial leeway to refer to religious ideas and communities and to talk about their personal beliefs, including their personal religious beliefs, while functioning in their official capacities.

If a governor's office conducted a speaking tour to give the governor the opportunity to urge individuals across the state to accept Jesus Christ as their personal savior, that would be understood as prohibited government expression promoting religion rather than protected personal expression. And, if a mayor were invited to give a speech at a public high school graduation, he or she could not preach a religious sermon to attendees.[26]

It is common, and constitutional, however, for a candidate for high public office to make a speech that references his or her personal religious beliefs and how those beliefs inform his or her worldview. Further, presidents have long made religious references during their inaugural addresses without constitutional challenge.[27] As Supreme Court Justice John Paul Stevens has noted, "when

[government] officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity."[28]

The rules regarding the religious expression of government employees who are not elected officials are significantly different. For a brief discussion of some of these issues, see questions and answers 30 through 32 of this document.

8. Does the First Amendment place restrictions on the political activities of religious organizations?

No. As described above, the First Amendment protects the rights of religious organizations to participate in political activities. If organizations, including religious organizations, wish to qualify for and maintain status as tax-exempt 501(c)(3) organizations, however, they must abide by certain restrictions on their political activities. The next three questions and answers briefly discuss those rules.

[T]he First Amendment protects the rights of religious organizations to participate in political activities.

9. Does the Internal Revenue Code place restrictions on the political activities of tax-exempt organizations, including tax-exempt religious organizations?

Yes. For example, if groups wish to qualify for and maintain status as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code, they must not become involved in campaign activity for or against candidates for elective political office and no substantial part of their activities may be spent attempting to influence legislation.[29] Section 501(c)(3) organizations, which include both religious and nonreligious groups, are exempt from federal income tax, and contributions made to such groups are also generally tax-deductible to the donor.[30]

In other words, these organizations' political activities are restricted only to the extent they wish to receive such tax benefits and even then the restrictions are the same for all similarly situated nonprofit organizations. Organizations that choose to forgo the benefits of this tax-exempt status do not have to abide by these restrictions.[31]

As further explained below, these Internal Revenue Code restrictions apply only to actions attributable to the 501(c)(3) organization, not to actions attributable to individuals.[32]

10. More specifically, what does the Internal Revenue Service (IRS) restriction on lobbying by 501(c)(3) organizations prohibit and allow?

The Internal Revenue Code prohibits 501(c)(3) organizations from engaging in a substantial amount of lobbying.[33] According to the IRS, lobbying means attempting to influence legislation, including attempts to influence legislation through direct communication with any governmental official or employee who may

participate in the formulation of legislation (often called "direct lobbying") and attempts to urge the public to contact legislators to take a position on legislation (often called "grassroots lobbying").[34]

The IRS says, "[a]n organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation."[35]

Among other things, lobbying does not include examining and discussing broad social, economic and similar problems.[36] Thus, for example, if a congregation holds a forum on racial inequality and the forum does not call on members of the congregation to contact their elected representatives to urge them to take specific legislative action, the congregation is not engaging in lobbying.

The Internal Revenue Code does not define the term "substantial" when it prohibits a substantial amount of lobbying by 501(c)(3) organizations. The IRS says it considers all the facts and circumstances of a particular case when making such a determination. Tax experts have said, however, that a "general rule of thumb" is that if an organization spends 5 percent or less of its total activities on lobbying, it has not run afoul of this restriction.[37] Tax experts have also said that "lobbying activities that exceed the roughly 16 to 20 percent range of total activities … are generally considered substantial."[38] An occasional attempt to influence legislation by encouraging members of an organization to support or oppose a particular bill is unlikely to constitute such a substantial amount of lobbying.

11. More specifically, what does the IRS ban on political campaign intervention by 501(c)(3) organizations prohibit and allow?

The prohibition against political campaign intervention bars 501(c)(3) organizations from endorsing or opposing particular candidates for elective office. Unlike the lobbying limits, which allow some lobbying by 501(c)(3) organizations, this restriction is a flat ban on electioneering activities.

The prohibition allows 501(c)(3) organizations to play unbiased, nonpartisan roles regarding elections. Like nonreligious 501(c)(3) organizations, houses of worship are free, for example, to educate voters on issues through public forums, including candidate debates, and voter guides that are not biased for or against particular candidates or political parties. Similarly, religious as well as nonreligious organizations may conduct nonpartisan voter registration and get-out-the-vote activities.

But the rules prohibit both explicit and implicit statements of endorsement or opposition to particular candidates for elective office. The IRS has said that even if a statement does not explicitly tell an audience to vote for or against a specific candidate, it still crosses the line "if there is any message favoring or opposing a candidate."[39] According to the IRS, "[a] statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography."[40]

The prohibition against implicit campaign intervention does not mean that 501(c)(3) organizations must avoid discussing issues of public importance during the election season. The IRS has noted that these organizations "may take positions on public policy issues, including issues that divide candidates in an election for public office."[41] At the same time, the IRS has said that these organizations "must avoid any issue advocacy that functions as political campaign intervention."[42] The IRS emphasizes that "[a]ll the facts and circumstances need to be considered to determine if the advocacy is political campaign

intervention."[43] It has set forth a list of "[k]ey factors in determining whether a communication results in political campaign intervention. … "[44] The following factors appear on that list:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.[45]

Although the IRS says it will consider all the facts and circumstances when drawing any conclusions in this area, it also says "[a] communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election."[46]

Again, these Internal Revenue Code restrictions apply only to actions attributable to the 501(c)(3) organization, not to actions attributable to individuals. The Internal Revenue Service has said that partisan comments by leaders of such organizations in official organization publications or at official functions are attributable to the organization and thus forbidden by the rules (e.g., messages delivered from the pulpit during worship services or in columns in congregational newsletters). But, outside that context, leaders may become involved in campaigns and endorse candidates when they "do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken or the statements made are those of the individuals and not of the organization."[47]

In a court case involving a church that placed an ad in national newspapers encouraging people to vote against one candidate in a presidential race, the court ruled that the revocation of the church's tax-exempt status did not violate its free exercise or free speech rights.[48]

For more information on other restrictions on the political activities of 501(c)(3) organizations, please see a **2007 IRS Revenue Ruling** and a publication released by the IRS in February 2006 titled **Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations**. Like this statement, these resources provide general information about the relevant rules. The advice of an attorney should be sought when attempting to apply this general guidance to specific cases.

12. May a city require individuals and groups to obtain a permit prior to engaging in door-to-door advocacy on issues, including religious issues?

No. A city may not require individuals and groups that are merely seeking to advocate a cause, including a religious cause, to get a permit before engaging in door-to-door advocacy.[49] The government may regulate, however, the time, place and manner of these expressive activities. For example, a city might prohibit all door-to-door advocacy after nine o'clock in the evening to ensure that people are not disturbed when they are sleeping. So long as these kinds of restrictions apply to all who would like to engage in such advocacy

in the same way, they are permissible. And a city may have a stronger interest in the regulation of door-to-door activities when those activities involve the solicitation of money. City officials do not have unfettered discretion, however, to decide who must seek a permit.[50]

13. Do individuals and groups have a right to publish their religious messages?

Yes. The First Amendment protects the rights of individuals and groups to publish their religious or anti-religious views in pamphlets, books, newspapers, magazines, Web sites and other materials that they produce. Individuals and groups do not typically have a legal right to require the government to provide the means of printing and distribution of these materials, however.

The First Amendment protects the rights of individuals and groups to publish their religious or anti-religious views.

14. What role may religious groups, individuals and ideas play in nongovernmental newspapers, broadcast news and other media?

Individuals and groups have the right to ask nongovernmental newspapers, magazines and publishing houses to publish writing that includes religious or anti-religious themes. They may also develop religious or anti-religious advertisements or programming and ask newspapers, radio or television networks to carry it. And, of course, religious leaders have the same right as other individuals to seek opportunities to appear on radio and television shows.

Nongovernmental media outlets basically have the right to decide what they will publish or broadcast. They generally are free to publish religious or anti-religious materials, but they are not obligated to do so. Similarly, these media organizations are essentially free to endorse or criticize any point of view, including religious or anti-religious points of view.[51] Reciprocally, like all other nongovernmental groups, religious groups are free to praise or criticize the media.

15. May religious organizations apply for licenses to operate radio and television stations?

Yes. Religious organizations have the same right as other nongovernmental organizations to apply for licenses to operate radio and television stations.

16. May congregations and people place religious symbols in their front yards and otherwise express their faith on their own property?

Nongovernmental groups and individuals have the right to express their faith on property they own. So, for example, a congregation generally may place religious symbols or displays on its property anytime, and homeowners may do the same on their property. Certain land use or zoning limits may apply to religious and nonreligious displays alike in this context, but when those limits affect religious exercise, they must meet constitutional and statutory standards protecting religious freedom and free speech, the latter of which may also protect nonreligious displays.[52]

17. Are individuals and groups permitted to use government property for religious activities and events?

Individuals and groups are permitted to use government property for religious activities and events in many, but not all, cases subject to reasonable time, place and manner restrictions. The rules that apply depend on the type of government forum involved.

There are three basic types of governmental forums: traditional public forums, designated public forums, and nonpublic forums. The rules regarding each of these forums will be considered in turn.[53]

Some governmental property such as sidewalks, streets and government-owned and operated parks is often called a **"traditional public forum"** because it has historically been open to all individuals for their use.[54] With respect to this kind of property, there is a presumption of access for speakers, including nongovernmental speakers. The government cannot exclude types of speech from these forums unless it is able to show that the exclusion is necessary to serve a compelling state interest and that the exclusion is narrowly drawn to that end.

Individuals and groups are permitted to use government property for religious activities and events in many, but not all, cases subject to reasonable time, place and manner restrictions.

Thus, individuals and groups that wish to engage in religious expression generally have the same right of access to such property as other individuals or groups. In other words, in this context, the constitutional prohibition against governmental establishment of religion normally does not justify the exclusion of religious expression because it is understood that the speech is attributable to nongovernmental rather than governmental speakers.

Likewise, when the state allows nongovernmental organizations to erect unattended symbols or display messages in these forums, it generally must allow groups to display their religious symbols on the same basis, so long as it is clear that the religious displays are not sponsored, financed or endorsed by the government. So, for example, when a city allows temporary displays by nongovernmental organizations including a fundraising campaign thermometer, booths and exhibits associated with an art festival, it must also allow a group to erect a Christian cross temporarily, at least when there is a sign disclaiming any government sponsorship or endorsement of the cross.[55] (As discussed in questions and answers 19 through 22 of this statement, however, when the government itself creates monuments, signs or displays with religious symbols and sayings, the legal analysis is different.)

The second type of forum is called a **"designated public forum."** It also is government property, but it is not the type that is automatically open for all forms of nongovernmental expression. Examples of this kind of government property include courthouses, military bases and capitol buildings. This type of government property may become a designated public forum whenever the state chooses to open it up for expressive activities on a wide range of topics.[56] While the government is not obligated to open up this type of property for unrestricted individual or group expression, once it does, it cannot exclude types of nongovernmental speech from these forums based on its content unless the government is able to show that the exclusion is necessary to serve a compelling state interest and that the exclusion is narrowly drawn to that end.[57]

For example, the Supreme Court has ruled that when a state university makes its facilities generally available for the activities of a variety of student groups, it may not exclude a student group that wishes to use such facilities "to engage in religious worship and discussion."[58] In this case, the Supreme Court rejected the argument that the religious student group must be excluded in order for the school to comply with the constitutional ban on government promotion or sponsorship of religion. It noted that this kind of forum in a state university did not "confer any imprimatur of state approval on religious sects or practices" any more than it committed the university to approval of any other student group.[59] It also noted that the forum was available to "a broad class of nonreligious as well as religious speakers," and that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[60]

The third type of governmental forum is a **"nonpublic forum."**[61] It is government property that has not by tradition or designation been open for wide-ranging expression by nongovernmental individuals and groups.[62] The government has a much freer hand in terms of excluding speech from these forums. The Supreme Court has said that the government is free to reserve these forums for their intended purposes so long as the regulation on speech is reasonable and not an effort to suppress expression simply because government officials disagree with speakers' points of view.

The Supreme Court has applied the rules regarding nonpublic forums in several cases. One case involved a public school that had opened its property for after-hours use by community groups for educational, social, civic, recreational and entertainment purposes. A church group wished to show films on family values from a religious perspective on school property, but the school refused to allow the group to do so.[63] In this case, the Court assumed, without deciding, that the forum at issue was a nonpublic forum rather than a designated public forum.[64] The Court required the school to permit the religious group the same kind of access the school gave to nonreligious groups to discuss the same subject matter from a nonreligious standpoint.[65] In another case, a public school provided after-hours access to community groups, but it denied access to a religious community club for children that offered activities including storytelling, singing religious songs, study of scripture, and prayer after school.[66] Here again, the Court assumed, without deciding, that the forum was a nonpublic forum.[67] In this case, the Supreme Court held that the school's denial of access to the religious community club constituted discrimination based on the viewpoint of the religious speaker, and thus ruled that the school must allow the religious group equal access to the school property. In this case, parental permission slips for club participation were required.[68]

Lower courts have disagreed as to whether government property that is open to a variety of social and community activities must be available to congregations for worship services. Some courts have found that such uses of government property must be permitted in these cases.[69] Other courts have disagreed, holding that religious worship services may be excluded because worship is a distinct subject matter rather than simply a community activity undertaken from a religious viewpoint.[70]

In cases involving the use of government property by religious organizations, the Supreme Court has sometimes considered the fact that religious groups did not dominate the forum as a factor suggesting that the "primary effect" of affording those groups equal access was not the advancement of religion. For example, in the case mentioned above involving a student religious club at a state university, the Court noted that the forum was open to "a broad class of nonreligious as well as religious speakers" and there was no "empirical evidence that religious groups [would] dominate" the forum.[71] The Court has also stated, however, that when the government opens up its property for use by groups of any viewpoint, "[the Court]

would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time."[72]

When nongovernmental organizations and individuals express themselves on government property, it is not always clear which situations, if any, require the government to disclaim such speech. Nevertheless, it is clear that the government is free to disclaim all speech by nongovernmental groups and individuals in these situations as a way of helping ensure that the speech is not understood as government-endorsed or state-sponsored.[73] At the same time, it must be recognized that a governmental disclaimer does not necessarily guarantee that the speech will be deemed purely nongovernmental rather than government-endorsed.[74]

Regardless of whether the forum is a traditional, designated or nonpublic one, the government may reasonably regulate the time, place and manner of the expressive activities according to constitutional standards. For example, a city may set limits on the size of symbols that may be erected in a public park, and it may enforce time limits for rallies and other events. When the state regulates in this way, it must do so without regard to the content or viewpoint of the expression. For example, the state cannot create more lenient time, place and manner guidelines for speech about a subject it likes or commentary from a point of view that it prefers.

In the same vein, if a governmental body charges community groups a fee for the use of its property, it must charge the same fee to religious and nonreligious groups.[75]

18. May individual gravestones or markers in government cemeteries display religious symbols chosen by the deceased or their families?

Yes. For example, many of the graves of service members in Arlington National Cemetery are marked with religious or nonreligious symbols that were chosen by the service members or their families from a list of emblems that have been approved for placement on these graves by the federal government.[76] The federal government adds new symbols to this list from time to time.[77] The government must refrain from any preference for some faiths over others in this approval process.[78] As discussed in questions and answers 19 through 21 of this statement, when the government itself chooses to place particular religious symbols and sayings on monuments or showcase them in displays, the legal analysis is different.

19. May the government erect temporary holiday displays that contain some religious elements such as a crèche or a menorah?

Governmental bodies may erect seasonal holiday displays that contain some religious elements when the context taken as a whole does not promote a religious message. For example, the Supreme Court has found that a city does not violate the Constitution when it displays a crèche with "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'"[79]

Governmental bodies may erect seasonal holiday displays that contain some religious elements when the context taken as a whole does not promote a religious message.

The Supreme Court has also upheld a governmental display near a county building that included a menorah, a Christmas tree and a sign saying, "Salute to Liberty."[80] It held that the overall setting indicated that the governmental display did not have the effect of endorsing religion.

However, a city may not permit a religious symbol to stand on government property in a way that communicates governmental endorsement of religion. For example, the Supreme Court held that a county violated the Constitution when it allowed a crèche to stand by itself on the "Grand Staircase" of a court house, even though the crèche was sponsored by a religious group and it bore a sign saying so.[81] The Court noted that "[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time. …"[82] Indeed, it held that, "[e]ven if the Grand Staircase occasionally was used for displays other than the crèche … it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government."[83]

20. Outside the holiday context, may the government post passages from sacred scripture or religious images, and may it erect monuments that feature such scripture or imagery?

The law permits some governmental displays and monuments that contain religious elements. To determine whether a governmental display or monument that includes religious elements is constitutionally permissible, courts examine its purpose and primary effect.[84] Courts also sometimes ask whether the display or monument would cause the reasonable observer to believe that the government was endorsing or disparaging religion.[85] When courts ask these questions, they focus on factors such as the overall context of the display or monument and the facts that gave rise to its creation.

If the predominant purpose or effect of a governmental display or monument is to advance religion, it will be found unconstitutional. For example, in the 2005 case of *McCreary County v. ACLU*, the Supreme Court struck down a governmental display of the Ten Commandments that had recently been posted on the wall of a Kentucky courthouse.[86]

The Kentucky display had a complicated history, with two other displays predating the display the Supreme Court struck down. The first display featured the Ten Commandments by themselves. After a lawsuit was filed challenging this display, the county created a second, expanded display featuring the Ten Commandments in a large frame and religiously themed excerpts from eight other documents in smaller frames surrounding it, including the Declaration of Independence, the National Motto and the Mayflower Compact. The legislative resolutions supporting this display referenced, among other things, a 1993 statement of the Kentucky House of Representatives that the Ten Commandments should be posted "in remembrance and honor of Jesus Christ, the Prince of Ethics."[87]

When a court preliminarily halted this second display, the county posted a third display consisting of nine framed documents of equal size, with one of them featuring the Ten Commandments. In this case, the Supreme Court found that the government had acted "with the ostensible and predominant purpose of advancing religion"[88] and held the display unconstitutional. The Court observed that "[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."[89]

The Court has recognized that some governmental displays and monuments that contain religious elements are constitutionally permissible. For example, on the same day the Supreme Court decided the

McCreary County case, the Court also handed down its ruling in the *Van Orden v. Perry* case, holding that a 40-year-old monument inscribed with the Ten Commandments that was one of 17 monuments and 21 historical markers appearing on the grounds of a state capitol did not violate the Constitution.[90] As Justice Breyer noted in his important opinion concurring in the judgment in the *Van Orden* case, the monument was donated to the state by a nongovernmental organization as part of its campaign to combat juvenile delinquency.[91] This monument passed constitutional muster in part because it had "a mixed but primarily nonreligious purpose"[92] and primary effect, and because it appeared to have been relatively noncontroversial—there had been no legal challenge for 40 years.[93]

The Court has also noted that on the walls of the Supreme Court itself is a frieze including "the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments [] in the company of 17 other lawgivers, most of them secular figures… . "[94] The Court has said of this frieze: "[T]here is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion."[95]

In addition to cases involving government-sponsored displays in public parks and courthouses, the Supreme Court has addressed a related issue within the public school context. In 1980, the Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments, purchased with contributions made by nongovernmental sources, on the wall of each public school classroom in the state.[96] The Court concluded that the law had no secular purpose and therefore found it unconstitutional. The Court said that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[97] But it also noted that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[98] (See question and answer 34 of this statement for further discussion of academic teaching about religion in public schools.)

21. May government-funded or supported galleries include paintings that depict religious figures or stories or other artwork that contains religious imagery?

Art galleries supported by state funds may display religious artwork so long as the predominant purpose for doing so is historic or artistic rather than religious. For example, the Supreme Court has noted that the National Gallery in Washington, D.C., which is supported by government funds, "regularly exhibits more than 200 … religious paintings."[99] At the same time, government officials are not permitted to censor artwork that meets secular criteria for display solely because the artwork would offend their religious views or those of their constituents.[100]

Art galleries supported by state funds may display religious artwork so long as the predominant purpose for doing so is historic or artistic rather than religious.

22. Is the motto "In God We Trust" found on our money unconstitutional?

While this motto is sometimes subject to litigation, several Supreme Court opinions discuss the motto approvingly. For example, in 1963, Justice Brennan wrote: "The truth is that we have simply interwoven

the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement [of government with religion] which the First Amendment prohibits."[101] Further, all lower federal courts that have considered challenges to the motto have upheld its constitutionality.[102] This does not mean, however, that any and all official uses of "In God We Trust" would be constitutional. For example, the use of the motto in a public school classroom would be subject to a different analysis.[103]

23. Ministers often offer prayers at presidential inaugural events. Is that practice constitutional?

The practice of offering prayers at inaugural events is common, although it is sometimes subject to litigation. In 2005, a lower court noted that the practice of offering prayers at presidential inaugurals "can be traced to the founding of this country."[104] Thus, the court held that this distinctive history "pull[ed] th[e] case closer to those where a ceremonial prayer or other religious act has been permitted" by the law.[105] It also noted that the inaugural prayer in the case had not been financially subsidized by the government.[106] Further, the court said it was not convinced that the prayer had been used to affiliate the government with religion or to proselytize.[107]

24. May legislative bodies hire chaplains and open legislative sessions with official prayers?

Legislative bodies may employ chaplains to provide prayers at the opening of legislative sessions.[108] Alternatively, legislators may choose to offer such prayers themselves or they may invite a variety of religious leaders to lead these official prayers. As the Supreme Court explained in *Marsh v. Chambers*, its reasoning for upholding the constitutionality of such prayers relies heavily on the following point:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[109]

The Court concluded: "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."[110]

The prayers in this case were characterized as "nonsectarian" by the legislative chaplain who gave them.[111] In the *Marsh* case, the Court said: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[112]

In a subsequent case, the Court said: "[N]ot even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief."[113] It noted that "[t]he legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain [in that case] had 'removed all references to Christ.'"[114]

There has been, and continues to be, litigation in the lower courts over the issue of when official prayers become impermissible governmental attempts "to proselytize or advance any one, or to disparage any

other, faith or belief."[115] In any case, legislators may meet in their offices for prayer in their specific faith traditions just as they may engage in other personal, nonreligious speech in their offices. Legislators also may reserve rooms in government buildings for non-official prayer in their specific faith traditions when such rooms are made available for other non-official, non-legislative business. Government employees may not be coerced into attending any prayer sessions.[116]

25. May military and prison authorities hire chaplains?

The Supreme Court has not ruled on the constitutionality of the military chaplaincy, but lower courts have upheld it.[117] Indeed, given the isolation some service members experience, the Free Exercise Clause of the First Amendment may affirmatively require the state to provide chaplains in certain circumstances.[118]

Military chaplains perform a variety of duties. For example, they conduct worship services, lead devotional studies, provide counseling and administer rites for those who seek such services.

A federal statute provides that when chaplains conduct worship services for service members who choose to attend such services, the chaplain may preach and pray "according to the manner and forms of the church of which he is a member."[119] Sometimes military chaplains are also invited to offer prayers and remarks at certain nonreligious military ceremonies, where attendance is mandatory for some service members. There is ongoing debate both within and outside the military branches about whether, in those settings, chaplains may use terms that are exclusive to one faith in their prayers and remarks—or even whether they may offer prayers or religious remarks at all in these contexts.[120]

The Supreme Court has not ruled on the constitutionality of the prison chaplaincy, but lower courts have held that the government may also hire chaplains to serve in this context.[121] Here too, the law may require the state to make chaplains available to prisoners in some cases. If special provisions like these were not made, many prisoners might be unable to engage in certain forms of worship or other religious practices.[122]

Even in these contexts, however, the predominant purpose or primary effect of the government's actions may not be the promotion of one religious view over others, and it may not coerce adherence to any particular set of beliefs.

26. May nongovernmental businesses include religious symbols or images in their holiday marketing efforts?

Nongovernmental organizations, including stores and businesses, may include religious themes or symbols in their marketing activities so long as they are consistent with applicable civil rights laws. By the same token, nongovernmental organizations may decide against including religious themes or symbols in their marketing activities. In other words, this is basically a business decision, not a legal one.

Civil rights laws do provide some boundaries here, however.[123] For example, while a restaurant owner could put up Christmas decorations in her restaurant, she may not give special deals to customers who celebrate Christmas, because the law prohibits such religious discrimination. And, as described below, nongovernmental businesses must ensure that neither employees nor customers are discriminated against or harassed based on their faith or lack thereof.

Unlike civil rights laws, the First Amendment's prohibition against establishing religion rarely applies to nongovernmental entities such as stores and businesses.[124]

27. Must secular nongovernmental employers accommodate employees' religious practices?

Employers have an obligation to reasonably accommodate the religious practices of their employees unless doing so would create undue hardship for the employer.[125] For example, the Equal Employment Opportunity Commission (EEOC) has said, "some reasonable accommodations that employers may be required to provide workers include leave for religious observances, time and/or place to pray, and ability to wear religious garb."[126]

If an accommodation would require the imposition of more than minimal costs, or would actually disrupt the work environment, the employer need not make the accommodation because these things are considered to create undue hardships for the employer.[127] Further, the courts have assumed that undue hardship for the employer includes undue hardship on a religious worker's fellow employees.[128]

The accommodation requirements also do not obligate the employer to offer the accommodation that is the least burdensome for the employee.[129] Instead, the employer must simply offer a "reasonable" accommodation,[130] and an accommodation may be deemed to be "reasonable" even if it does not substantially remove the conflict with the employee's religious practice.[131]

At the same time, however, when claiming more than minimal costs, the employer must demonstrate that those costs are real, not speculative.[132] Further, the EEOC "will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a [minimal] cost."[133] Finally, employer accommodations of nonreligious needs cannot be favored over religious needs.[134]

28. May employees express and exercise their faith within secular nongovernmental workplaces?

As discussed above, an employer is required to accommodate the religious practices of its employees unless such accommodation would cause the employer undue hardship. An employer, therefore, sometimes must accommodate religious practice even if the employer does not have to accommodate similar nonreligious practice. For example, if an employer prohibits the wearing of hats in the workplace, it still might be required to accommodate an employee's need to wear a head covering at work for religious reasons.

[A]n employer is required to accommodate the religious practices of its employees unless such accommodation would cause the employer undue hardship.

Also, if a nongovernmental secular employer permits employees to engage in nonreligious types of personal expression at work, it usually must permit employees to engage in personal religious expression as well.[135] As the Equal Employment Opportunity Commission (EEOC) has said: "Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency."[136] For example, as a general matter, employees who wish to keep a devotional book at their desks must be permitted to do so if other employees are permitted to keep novels, self-help books or other non-work-related books at their desks.

And a secular nongovernmental employer usually must treat employees' personal expression about religious beliefs at the water cooler the same as it treats employees' personal expression about any other non-work-related matter at the water cooler. Further, if such an employer gives some employees access to a workplace conference room for non-work-related employee groups that meet during lunch break, then the employer generally must give employees who wish to form a Bible study group the same kind of access to that room.[137]

Religious expression may be curtailed, however, if it would cause the employer an undue hardship. The previous question and answer briefly addresses this undue-hardship standard. Religious expression also may be curtailed if it would violate other employees' rights, including if such expression would appear to constitute discrimination on the basis of religion by the employer, or if it would appear to constitute religious harassment.[138] The next question and answer briefly discusses these matters.

29. What kinds of activities are prohibited by the ban on religious discrimination as applied to the secular nongovernmental workplace?

As noted above, secular nongovernmental employers may not discriminate against any employee or potential employee because of his or her faith or lack thereof.[139] This means, among other things, that employers must not treat employees more or less favorably because of their religious beliefs and practices. Employers also are responsible for ensuring that employees are not subject to harassment in the workplace based on their religious affiliation and beliefs or lack thereof.[140]

Employees who hold supervisory positions have special responsibilities in the workplace because they have at least some power to hire, fire, promote and otherwise control the employees they supervise. Thus, supervisors must realize that employees may understand their religious or anti-religious expression as coercive, even if it is not intended to be. Supervisors must take special care, therefore, to ensure that employees do not feel coerced along religious lines by their statements or conduct.[141]

30. Do these same civil rights rules regarding religious accommodation, discrimination and harassment also apply to the governmental workplace? And are there special rules regarding religion that apply only to governmental workplaces?

The same civil rights laws that apply to the nongovernmental workplace also typically apply to the governmental workplace, but government employers also must comply with federal and state constitutional rules and other laws that apply only to governmental bodies.[142] In some cases, these constitutional rules will modify the application of the relevant civil rights laws to the government workplace. And, in every case, these constitutional rules add another layer of law to consider.[143]

The Supreme Court has held that government employees do not enjoy free speech rights regarding expression that is part of their job duties.[144] Thus, the government may restrict personal speech, including religious or anti-religious speech, which is understood to be part of an employee's work responsibilities.

For example, a court has held that an elementary school teacher could be fired for offering her personal opinion on a political issue in the classroom against the wishes of the school.[145] The court said: "[T]he [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."[146]

At the same time, however, "[t]he Court has made clear that [governmental] employees do not surrender all their First Amendment rights by reason of their employment."[147] If a person speaks as a citizen, rather than pursuant to official governmental duties, and the speech addresses a matter of "public concern," then such expression may be constitutionally protected.[148]

For example, a court has held that a city employee who criticized the city council for failing to comply with open-meetings laws could not be terminated for his statements.[149] This was the case even though the employee attended the city council meeting at which he made his controversial statements in order to present an unrelated report as part of his job duties.[150] The court found that, when the employee spoke about the open-meetings laws, the employee spoke as a citizen, not as a city employee, and on a matter of public concern.[151]

31. What are some of the ways in which constitutional prohibitions on governmental establishments of religion apply to the governmental workplace?

When considering the rules that apply to religious expression in the governmental workplace, it is important to note that the Establishment Clause and associated laws sometimes affirmatively require the government to restrict an employee's religious or anti-religious speech.[152] For example, in a governmental workplace, some employees effectively represent the government to the public. Consistent with the First Amendment, government employers must ensure that government speech neither endorses nor disparages religion. Thus, if employee speech that endorses or opposes religion would appear to a reasonable observer to be government speech, it must be prohibited. For example, a worker at a city tollbooth cannot hand out religious or anti-religious tracts to cars as they come through the booth because that would appear to be government speech endorsing or disparaging religion.

At a lunch break, however, this same employee could try to convince a fellow tollbooth worker that religion is good or evil, so long as such overtures ceased if they were rejected. Indeed, when one non-supervisor employee is simply talking to another about matters that are not part of work duties, the government generally must treat employees' personal religious speech the same as other comparable forms of personal expression by employees. Employees' personal speech may be curtailed, however, in order to ensure that government services are delivered efficiently or to protect the rights of other employees. And the state may regulate the time, place and manner of personal speech by employees according to constitutional standards.

It also should be noted that non-establishment norms prohibit the government from preferring one religion over another, whether the case involves religious speech or actions motivated by faith.[153] For example, a governmental employer could not create or implement a policy that says that workers are allowed to take a day off to attend Christian services but workers are not allowed to take a day off work to attend any other religion's services.

As in the nongovernmental workplace, somewhat different rules apply to governmental employees who hold positions as supervisors because they have at least some power to hire, fire, promote and otherwise control other employees. In some circumstances, employees may reasonably perceive the religious or anti-religious expression of their supervisors as coercive, even if it is not intended to be. Thus, supervisors must take special care to ensure that employees do not feel coerced along religious lines by their statements or conduct.[154]

32. Are governmental employers subject to the legal requirements described above regarding accommodation of religious practices? Also, how do the Free Exercise Clause of the First Amendment and related laws apply in these situations?

Like nongovernmental employers, governmental employers have an obligation to reasonably accommodate the religious practices of their employees unless doing so would create an undue hardship.[155] Of course, governmental employers must accommodate religious practices in ways that do not violate the constitutional prohibition against governmental establishments of religion.[156]

Governmental employers also are bound by the Free Exercise Clause of the First Amendment. That clause prohibits the government from targeting religious practice by selectively imposing burdens only on conduct motivated by religious belief, unless the government demonstrates a compelling justification for doing so.[157] So, for example, a governmental employer may not allow employees to take time off work for personal reasons but not for personal religious reasons because this restriction would rarely, if ever, be narrowly tailored to achieve a compelling interest.

Governmental employers also may be subject to certain federal and state statutes and some state constitutional provisions that provide a higher level of protection for free exercise interests than does the federal Free Exercise Clause. With regard to federal and certain state and local employers, the law prohibits the government from substantially burdening religious exercise unless the government's actions are narrowly tailored to serve a compelling governmental interest.[158] These laws and/or the accommodation requirements described above might require an employer, for example, to grant a Jewish employee time off for certain religious holidays or to grant breaks during the day to a Muslim employee so that he or she could pray.[159]

[G]overnmental employers must accommodate religious practices in ways that do not violate the constitutional prohibition against governmental establishments of religion.

When a federal employee's religious beliefs require that he or she be absent from work at certain times, the employee has the right to do overtime work for the time lost because of those religious obligations. In these cases, employees will be paid regular wages for such overtime work.[160]

33. What are some ways in which students may express their faith in public elementary and secondary schools?

Public schools may not promote or endorse religious expression, but students are free to pray alone or in groups, read their scriptures and discuss their faith so long as they are not disruptive, do not infringe upon the rights of others and comply with the same time, place and manner restrictions applicable to other non-school-related student expression. In public secondary schools, students have the right to form religious clubs that meet on school property during non-instructional time if other extracurricular student clubs are permitted to do so.[161]

In some instances, courts have upheld a school's decision to prohibit a student's distribution of religious items in the context of school-sponsored activities, concluding that the school's actions were reasonable and directed toward preserving educational goals.[162] However, outside the context of school-sponsored activities, such as in hallways and other areas where students are normally permitted to share items with other students, courts generally have held that students' distribution of religious literature must be allowed, subject only to the same time, place and manner restrictions that are imposed on distributions of nonreligious literature.[163]

For more information on these and related issues, please see **Religion in the Public Schools: A Joint Statement of Current Law**;[164] **Religious Liberty, Public Education, and the Future of American Democracy**;[165] **A Teacher's Guide to Religion in Public Schools**;[166] and **The Bible and Public Schools: A First Amendment Guide**.[167]

34. May public schools teach about religion?

School officials may teach about religion if they are neutral in their treatment of faith, neither promoting nor denigrating religion.[168] Public schools may teach about religion (as opposed to engaging in religious indoctrination) where appropriate, as part of a complete education. Like other areas of instruction, such teaching should be fair, objective and based on sound scholarship. For more information on these and related issues, please see the consensus documents referred to in question and answer 33 of this statement.

School officials may teach about religion if they are neutral in their treatment of faith, neither promoting nor denigrating religion.

35. May public schools lead students in a voluntary recitation of the Pledge of Allegiance with the words "under God" at the beginning of the school day?

In 2004, the Supreme Court heard a challenge to the constitutionality of a public elementary school's policy requiring each class to recite the Pledge of Allegiance with the words "one nation under God."[169] (Consistent with Supreme Court precedent, this school district recognized that any student who objected to saying the pledge could abstain from reciting it.[170]) In this case, the Supreme Court found that the person who brought the lawsuit did not have the necessary stake in the outcome, so it declined to decide the issue of whether the pledge policy was constitutional. Several justices commented in separate opinions that they believed the use of the Pledge in public school is, in fact, constitutional. Litigation continues over these issues in the lower courts.[171]

Conclusion

As noted in the introduction of this document, our purpose in providing this statement is to increase understanding of current law regarding religious expression in American public life. Too often, legal rights and responsibilities in this area are poorly understood. We hope this document helps clarify some of these matters.

We also hope this statement will improve our national dialogue on these issues. While there is disagreement among us about the merits of some of the court decisions and laws mentioned in this document, we agree that current law protects the rights of people to express their religious convictions and practice their faiths on government property and in public life as described here. Thus, we hope this document will help settle the debate about whether current law provides any protection for the right of religious expression and practice in these settings (it clearly does) and focus our attention on the merits of specific laws and court decisions in this area. Finally, when engaging in these more focused discussions, we hope this document will help Americans describe current law as accurately as possible. That certainly will not end our debates, but it will help make them more productive.

Endnotes

1. The final clause of Article VI of the Constitution reads:

   The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
2. This provision applies to the executive and judicial as well as the legislative branches of government. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (executive); North Carolina Civil Liberties Union v. Constangy, 947 F.2d 1145 (4th Cir. 1991)(judicial). By virtue of the due process clause of the Fourteenth Amendment, it applies to state and local government as well as to the federal government. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Bd. of Educ., 330 U.S. 1 (1947) and Gitlow v. New York, 268 U.S. 652 (1925).
3. *See, e.g.*, Religious Freedom Restoration Act ("RFRA") 42 U.S.C. Section 2000bb *et seq.* (2010); Religious Land Use and Institutionalized Persons Act ("RLUIPA") 42 U.S.C. 2000cc *et seq.* (2010).
4. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).
5. The government may disclaim speech by nongovernmental groups and individuals in an effort to avoid mistaken attribution to the state. *See* **question and answer 17** of this document for further discussion of this topic.
6. This document does not address a number of relevant matters due to space limits or a lack of consensus about the status of current law. Where there is a lack of consensus about the status of current law, it is usually due to the fact that the Supreme Court has yet to speak to a matter. For further information on issues not addressed in this statement, we invite you to contact the members of the drafting committee.
7. In rare instances, courts have found that certain nongovernmental entities should be treated as "state actors" because of the particularly close relationship they have with the state. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In such cases, these entities must abide by the constitutional restraints that bind the state.
8. Also, as described in more detail in **question and answer five** of this document, the U.S. Supreme Court has specifically held that neither the state nor federal government may require someone to say that he or she believes in God in order to hold government office. Torcaso v. Watkins, 367 U.S. 488 (1961).
9. *See, e.g.*, Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (relying on a state constitution rather than the federal Constitution to find that the Amish had free exercise right not to display fluorescent emblems on their horse-drawn buggies).
10. *See* Locke v. Davey, 540 U.S. 712 (2004).
11. *See supra* n.3.
12. These civil rights laws vary greatly in terms of the entities and forms of discrimination they cover, so interested parties should consult the specific federal, state and local laws that apply in their particular cases.
13. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).
14. A court has held, however, that the First Amendment does not provide a defense where a religious group's threatened boycott was designed to achieve an objective prohibited by state law. Jews for Jesus v. Jewish Community Relations Council, 968 F.2d 286 (2d Cir. 1992).
15. McCreary County v. ACLU, 545 U.S. 844, 864 (2005).
16. *Id.* at 863.
17. Harris v. McRae, 448 U.S. 297, 320 (1980).
18. *Id.* at 319.
19. *Id.*
20. *Id.*
21. U.S. Const. art VI.
22. Torcaso v. Watkins, 367 U.S. 488 (1961).
23. *Id.* at 496.
24. McDaniel v. Paty, 435 U.S. 618 (1978).
25. *Id.* at 641 (Brennan, J., concurring in the judgment).
26. *See* Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
27. *See, e.g.*, **Abraham Lincoln's Second Inaugural Address** (1865).
28. Van Orden v. Perry, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting).
29. *See* 26 U.S.C. Section 501(c)(3) (2010). Congregations that meet the 501(c)(3) requirements "are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS." See Internal Revenue Service, **Tax Guide for Churches and Religious Organizations**. However, congregations must abide by the same rules as other 501(c)(3) organizations in order to maintain that tax-exempt status.

30. 26 U.S.C. Section 501(c)(3) (2010). The exempt purposes set forth in Section 501(c)(3) include "charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals." Internal Revenue Service, Exempt Purposes—**Internal Revenue Service Code Section 501(c)(3)**. There also are other types of tax-exempt entities, but we do not address them in this document. For more information, see www.irs.gov.
31. The political activities of nongovernmental organizations may also be subject to various state and federal campaign finance restrictions. We do not attempt to address those restrictions in this document.
32. The following is a bit of guidance on this point from the *IRS Tax Guide for Churches and Religious Organizations*:

    The political campaign activity prohibition is not intended to restrict free expression on political matters by leaders of churches or religious organizations speaking for themselves, as *individuals*. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organizations to remain tax exempt under IRC section 501(c)(3), religious leaders cannot make partisan comments in official organization publications or at official church functions. To avoid potential attribution of their comments outside of church functions and publications, religious leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the organization.

    Internal Revenue Service, **IRS Tax Guide for Churches and Religious Organizations**. For more information on these issues, you may consult a guide titled *Politics and the Pulpit: A Guide to the Internal Revenue Restrictions on the Political Activity of Religious Organizations*. Deirdre Dessingue, **Politics and the Pulpit 2008: A Guide to the Internal Revenue Restrictions on the Political Activity of Religious Organizations** (Pew Forum on Religion and Public Life).
33. *See* 26 U.S.C. Section 501(c)(3) (2010).
34. *See* Internal Revenue Service, **Section 501(c)(3) Organizations**. Because the term "legislation" does not include "actions by executive, judicial or administrative bodies," this IRS limit does not apply when a 501(c)(3) organization litigates a court case or urges an administrative agency to create or revise a regulation, for example. But the IRS lobbying limits would apply if a 501(c)(3) organization urged the president of the United States or a governor to sign or veto a particular piece of legislation. *See* Internal Revenue Service, **Lobbying**.
35. *See id.*
36. *Id.*
37. Judith E. Kindell and John Francis Reilly, **Lobbying Issues** (1997 Exempt Organizations CPE Text) at 280. This publication states:

    Under *Seasongood* [v. *Commissioner*, 227 F.2d 907 (6th Cir. 1955)], a five percent safe harbor has been frequently applied as a general rule of thumb regarding what is [a] substantial [amount of lobbying]. Similarly, lobbying activities that exceed the roughly 16 to 20 percent range of total activities found in *Haswell* [v. *United States*, 500 F.2d 1133 (Ct. Cl. 1974)] are generally considered substantial.

38. *Id.* Certain 501(c)(3) organizations may choose to be subject to a specific lobbying expenditure limit rather than the general "substantial part of activities" test. This limit places caps on the percentage of funds an organization may normally spend on its lobbying efforts. *Id.* at 284-85. Congregations and congregation-related entities may not elect to be subject to this specific expenditure limit; instead, they are subject to the general "substantial activities" test. *Id.*; *see also* Internal Revenue Service, **Section 501(c)(3) Organizations** ("These elective provisions for lobbying activities by public charities do not apply to a church, an integrated auxiliary of a church or of a convention or association of churches, or a member of an affiliated group of organizations that includes a church.") As the IRS has noted, "[c]hurches, along with church-related organizations, were precluded from making [such an election] at their own request." Judith E. Kindell and John Francis Reilly, **Lobbying Issues** (1997 Exempt Organizations CPE Text) at 286.
39. **Revenue Ruling 2007-41, 2007-25 I.R.B. (June 18, 2007)**.
40. *Id.*
41. *Id.*; *see also* Fact Sheet 2006-17, **Election Year Activities and the Prohibition on Political Campaign Intervention for 501(c)(3) Organizations (February 2006)**.
42. **Revenue Ruling 2007-41, 2007-25 I.R.B. (June 18, 2007)**.
43. *Id.*
44. *Id.*
45. *Id.*

46. *Id.*
47. Judith E. Kindell and John Francis Reilly, **Election Year Issues** (2002 Exempt Organizations CPE Text) at 364.
48. Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).
49. Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002).
50. *Id.*
51. This document does not address any rules promulgated by the Federal Communications Commission that may be applicable to these or related activities.
52. These standards would include the federal constitutional guarantees of free exercise and free speech and the federal statutory provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. Sections 2000cc *et seq.* (2010). For the text of RLUIPA and a database of cases interpreting the statute that is maintained by a group advocating a broad reading of RLUIPA, *see* **http://www.rluipa.com/**.
53. These cases raise two types of questions: who can insist on access to the forum; and, if access is granted, what regulation is permissible? The answers depend on the extent to which governments regulate without regard to the content of the speech (e.g., time, place and manner restrictions) or regulate based on the content or viewpoint of the speech. The former types of regulation are far more likely to be upheld than the latter.
54. Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939).
55. *See* Capitol Square Rev. Bd. v. Pinette, 515 U.S. 753 (1995).
56. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
57. Some courts hold that when first designating a forum, a government may limit the forum on reasonable content-based lines. For example, when the government holds a public meeting, it may limit the forum to the discussion of items relevant to the meeting. *See id.* at n.7 ("A public forum may be created for a limited purpose such as use by certain groups, e.g., *Widmar v. Vincent* [, 454 U.S. 263 (1981)] (student groups), or for the discussion of certain subjects, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*[, 429 U.S. 167 (1976)] (school board business)."). There is great uncertainty about the existence of, and limits on, this authority, especially in distinguishing between restrictions based on the content of the speech and restrictions based on the viewpoint from which such speech is expressed.
58. Widmar, 454 U.S. at 269. In this case the Court did not specifically refer to the forum at issue as a "designated public forum." Instead, it used more general terms to refer to the forum, such as a "public forum" or an "open forum." *Id.* at 270, 274. The Court also noted that the trial court in this case concluded that the forum was a "limited public forum." *Id.* at 272. As recognized elsewhere in this statement, the terms "limited public forum" and "designated public forum" are sometimes used interchangeably. *See infra* n.61. Further, in a subsequent case, the Court referred to the forum at issue in the *Widmar* case as a "designated public forum." *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998).
59. Widmar, 454 U.S. at 273-74.
60. *Id.* at 274.
61. As the Seventh Circuit Court of Appeals has noted, "[t]he forum nomenclature is not without confusion." Christian Legal Society v. Walker, 453 F.3d 853, n.2 (7th Cir. 2006). Here's how the Seventh Circuit explained the confusion:

    > [In addition to the traditional, designated and nonpublic fora,] Court decisions also speak of "limited public" fora; most recently this phrase has been used interchangeably with "nonpublic" fora, which means both are subject to a lower level of scrutiny. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (identifying limited public fora as subject to the same test as nonpublic fora described in, for example, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993)). But "limited public forum" has also been used to describe a subcategory of "designated public forum," meaning that it would be subject to the strict scrutiny test. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (Stevens, J. concurring); *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 796 (1985) (noting that appellate court did not decide whether forum in question was a limited public forum or nonpublic forum); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001).
    >
    > Christian Legal Society, 453 F.3d at n.2 (parallel citations omitted).
62. *See* Perry Educ. Ass'n, 460 U.S. at 46.

63. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
64. *Id.* at 391-92.
65. *See generally id.*
66. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). The Supreme Court did not decide whether the outcome would be different if the meetings were held in an elementary school classroom or if the instructors were teachers in the school. *Id.* at 115-18.
67. *Id.* at 106; *see also supra* n.61 for explanation of the fact that the *Good News Club* Court used the term "limited public forum" to refer to what this document calls a "nonpublic forum." (The *Good News Club* Court also used the term "limited public forum" to refer to the forum in the *Lamb's Chapel* case discussed above. *See* 533 U.S. at 109.)
68. *Id.* at 115. The Supreme Court has also held that airport terminals are nonpublic forums. *See* International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). In this case, the Court upheld a general ban on soliciting funds inside these terminals because it found that the ban was reasonable.
69. *See, e.g.*, Bronx Household of Faith v. Board of Educ., 400 F. Supp. 2d 581 (S.D.N.Y. 2005) (striking down a school district policy that opened school property to a range of community uses but prohibited rental of the property for the purpose of religious worship). The Second Circuit Court of Appeals later vacated and remanded this decision, but there was no rationale regarding the merits with which a majority of the court agreed. 492 F.3d 89 (2d Cir. 2007) (per curiam). In this 2007 decision, two judges believed the case was ripe for adjudication but split on the merits, while a third judge believed that the case was not ripe. *Id.*
70. *See, e.g.*, Faith Center Church Evangelical Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006).
71. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274-75 (1981); *see also* Board of Educ. v. Mergens, 496 U.S. 226, 252 (1990) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995)(O'Connor, J., concurring in part and concurring in the judgment)("At some point, for example, a [nongovernmental] religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.").
72. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 n.9 (2001).
73. There is another category of government property that is not considered a forum of any kind. *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).
74. County of Allegheny v. ACLU, 492 U.S. 573 (1989). *See* **question and answer 19** for a discussion of the *County of Allegheny* case.
75. Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir. 1994).
76. *See* U.S. Department of Veterans Affairs, **Available Emblems of Belief for Placement on Government Headstones and Markers**.
77. Alan Cooperman, "**Administration Yields on Wiccan Symbol**," The *Washington Post* (April 24, 2007).
78. Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").
79. Lynch v. Donnelly, 465 U.S. 668, 671 (1984).
80. County of Allegheny v. ACLU, 492 U.S. 573 (1989).
81. *Id.*
82. *Id.* at n.50.
83. *Id.*
84. *See, e.g.*, Lynch, 465 U.S. 668.
85. *See, e.g.*, County of Allegheny, 492 U.S. 573.
86. McCreary County v. ACLU, 545 U.S. 844 (2005).
87. *Id.* at 870.
88. *Id.* at 860.
89. *Id.* at n.14. A display identical to the one struck down in McCreary County was upheld in a subsequent lower court case on the basis that it lacked any predominant religious purpose or effect. ACLU of Kentucky v. Mercer County, 432 F.3d 624 (6th Cir. 2005).
90. Van Orden v. Perry, 545 U.S. 677 (2005).
91. *Id.* at 701 (Breyer, J., concurring in the judgment).
92. *Id.* at 703.
93. *Id.* at 702.
94. McCreary County v. ACLU, 545 U.S. 844, 874 (2005).
95. *Id.*
96. Stone v. Graham, 449 U.S. 39 (1980).
97. *Id.* at 41.
98. *Id.* at 42.
99. Lynch v. Donnelly, 465 U.S. at 676 n.4.
100. *See, e.g.*, Brooklyn Institute of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y 1999).
101. Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

102. A federal district court described these rulings and the relevant Supreme Court dicta (the term "dicta" refers to remarks in a judicial opinion that do not directly address the legal point at issue) in the following way:

> [S]everal federal appellate courts have considered the phrase "In God We Trust" and held that neither its use as the national motto nor its appearance on currency violates the Establishment Clause. *See* Gaylor [v. United States], 74 F.3d [214,] 216 [(10th Cir. 1996)] (holding that "In God We Trust" as the national motto and printed on currency satisfies both the Lemon and the endorsement tests because "the motto's primary effect is not to advance religion … through historical usage and ubiquity [it] cannot be reasonably understood to convey government approval of religious belief"); Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) (concluding that "'In God We Trust' has nothing whatsoever to do with the establishment of religion" and noting that "its use [as a motto and on currency] is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise… . It is excluded from First Amendment significance because [it] has no theological or ritualistic impact."); *see also* O'Hair v. Blumenthal, 462 F. Supp. 19, 20 (W.D. Tex. 1978) ("It is equally clear that the use of the motto on the currency or otherwise does not have a primary effect of advancing religion." (first emphasis added)), aff'd per curiam sub nom. O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979). Other appellate courts, though not directly presented with the question, have similarly acknowledged that the motto does not violate the Establishment Clause. *See, e.g.*, Glassroth v. Moore, 335 F.3d 1282, 1301 (11th Cir.), cert. denied, 157 L. Ed. 2d 404, 124 S. Ct. 497 (2003); Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d 247, 264 (3rd Cir. 2003); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 780 (7th Cir. 2001); ACLU of Ohio, 243 F.3d [289,] 301 [(6th Cir. 2001)].
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> [A number of justices] of the Supreme Court have also clearly stated that "In God We Trust" and similarly brief ceremonial references to a deity are not unconstitutional. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 322-23 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) (noting that the Establishment Clause does not prohibit singing the national anthem with its concluding verse "And this be our motto: 'In God is our trust'" at public school functions); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 602-03 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."); *id.* at 630-31, (O'Connor, J., concurring in part and concurring in judgment, joined by Brennan and Stevens, JJ.) (concluding that the "history and ubiquity" of longstanding government practices, "such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,'" would "not convey a message of endorsement" to a reasonable observer "despite [the practices'] religious roots"); id. at 657 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."). Although these pronouncements are properly categorized as dicta, they are of "considerable persuasive value" to lower courts. United States v. Fareed, 296 F.3d 243, 247 (4th Cir. 2002) (citing Gaylor, 74 F.3d at 217 (stating that federal appellate courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements")).
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> Lambeth v. Bd. of Comm'rs, 321 F. Supp. 2d 688, 700-01 (M.D.N.C. 2004) (parallel citations omitted).

103. The Supreme Court has recognized that children are especially impressionable and that their school attendance is involuntary. Thus, it interprets the Establishment Clause's restrictions with particular care in this setting. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).
104. Newdow v. Bush, 355 F. Supp. 2d 265, 286 (D.D.C. 2005) (denying preliminary injunction to plaintiff who challenged the inclusion of prayers by invited clergy in presidential inauguration). Further, in 2009, a trial court judge found that plaintiffs who challenged prayers at a presidential inauguration and the inclusion of the words "so help me God" in the presidential oath had identified no concrete and particularized injury, and thus lacked standing. *See* Newdow v. Roberts, Civil Action No. 08-2248 (RBW)(D.D.C. March 12, 2009). The court also said that, "even if the plaintiffs could establish such an injury, they have failed to demonstrate how the harm they allege is redressable by the relief they seek, or that the [c]ourt has any legal authority to award the relief requested." *Id.*

105. Newdow v. Bush, 355 F. Supp. 2d. at 287.
106. *Id.* at 290 n.31.
107. *Id.* at 288-89.
108. Marsh v. Chambers, 463 U.S. 783 (1983).
109. *Id.* at 792.
110. *Id.* at 791.
111. *Id.* at 793 n.14. The chaplain explained that some of his earlier prayers had contained explicit Christian references, but that he had "removed all references to Christ" from his prayers after he received a complaint from a Jewish legislator. *Id.*
112. *Id.* at 794-95. Thus, the Supreme Court explained, "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.
113. County of Allegheny v. ACLU, 492 U.S. at 603.
114. *Id.*
115. Compare Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004); Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005) *rev'd for lack of standing*, 506 F.3d 584 (7th Cir. 2007); Rubin v. City of Burbank, 101 Cal. App. 4th 1194 (2002) with Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008).
116. *See* the documents referred to in **questions and answers 30 through 32** of this document.
117. The leading case is *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), which recognizes that the government may hire chaplains to serve in military settings in which individuals would not otherwise have access to religious counsel and services. The U.S. Supreme Court cited the *Katcoff* case approvingly in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).
118. Abington Township v. Schempp, 374 U.S. 203, 297-98 (1963) (Brennan, J., concurring)("Since government has deprived [members of the Armed Forces and prisoners] of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.").
119. 10 U.S.C. Section 6031 (2010).
120. For more information about these and other disputed matters relating to religion and the military, please contact the members of the drafting committee.
121. *See, e.g.*, Rudd v. Ray, 248 N.W.2d 125 (Iowa 1976) (concluding that "there is no violation of the First Amendment to the United States Constitution by the action of the state in providing chaplains and religious facilities to prisoners.").
122. *See supra* n.118.
123. *See* **questions and answers 27 through 29** of this statement.
124. In rare instances, courts have held that nongovernmental entities are "state actors" and thus have all the constitutional obligations of the state in those cases. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
125. This federal obligation applies to employers with 15 or more employees. 42 U.S.C. Sections 2000e(b) and (j)(2010). This statement focuses on federal civil rights law, specifically Title VII of the 1964 Civil Rights Act. 42 U.S.C. Section 2000e *et seq*. It is important to note, however, that state and local civil rights laws may be applicable to questions involving religion and the secular workplace. Interested parties should consult state and local law for other applicable rules, and they should be aware that these laws may be triggered by thresholds different from the one that triggers Title VII.
126. *See* **Religious Discrimination**, a publication of the Equal Employment Opportunity Commission; *see also Equal Employment Opportunity Commission*, **Compliance Manual Section Regarding** Religious Discrimination (July 22, 2008). The accommodations listed in this document and on the Equal Employment Opportunity Commission's Web site are illustrative, not exhaustive.
127. *See, e.g.*, Wilson v. US West, 58 F.3d 1337 (8th Cir. 1995) (upholding nongovernmental employer's decision to forbid wearing of uncovered fetus pin by religious employee).
128. Kent Greenawalt, *Title VII and Religious Liberty*, 33 Loy. U. Chi. L.J. 1 (2001); *see also* TransWorld Airlines v. Hardison, 432 U.S. 63 (1977); **Religious Discrimination**, a publication of the Equal Employment Opportunity Commission.
129. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
130. *Id.*
131. *Id.*
132. The White House, **Guidelines on Religious Exercise and Religious Expression in the Federal Workplace** (August 14, 1997).
133. 29 C.F.R. Section 1605.2(e)(1).
134. Philbrook, 479 U.S. 60.
135. In cases involving purely religious speech (e.g., a quote posted on the walls of worker's cubicle), rather than religious conduct or a mix of religious speech and conduct (e.g., wearing a religious head covering), it is unclear whether the government may treat purely religious speech more favorably than nonreligious speech. *See* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?* 22 Harv. J. L. & Pub. Pol'y 959 (1999).
136. *See* **Religious Discrimination**, a publication of the Equal Employment Opportunity Commission.

137. Adverse treatment of religious speech by a nongovernmental employer also might be evidence of unlawful discriminatory treatment of religion. As explained below, nongovernmental employers are barred from discriminating against employees on the basis of their religion or lack thereof. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, national origin and religion. 42 U.S.C. Section 2000e *et seq*. As noted above, Title VII applies to employers with 15 or more employees.
138. *Id*.
139. Title VII exempts religious employers from this prohibition, allowing these organizations to make employment decisions on the basis of religion. *See* 42 U.S.C. Section 2000e-1(a) (2010)("This title shall not apply to an employer with respect to the employment of aliens outside any State, or to 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.").
140. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). There are two different types of workplace harassment. *See* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?* 22 Harv. J. L. & Pub. Pol'y 959 (1999). The first type of harassment is often called "quid pro quo harassment." *See* Burlington Industries v. Ellerth, 524 U.S. 742 (1998). In terms of religious harassment, it occurs when an employee proves that a tangible employment action resulted from the employee's refusal to submit to a religion-related demand made by a person in authority. The second type of harassment is often called "hostile work environment harassment." *See id*. It occurs when the workplace environment is abusive even though no threats have been made or fulfilled by a person in authority. *Id*. Determining whether such an environment exists, or whether such harassment has occurred, often depends on the frequency or repetitiveness of the offensive activity, as well as its severity. It also depends on whether co-workers engage in the offensive activity or whether a supervisor does so. *Id*.
141. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
142. *See, e.g.*, Religious Freedom Restoration Act (RFRA), 42 U.S.C. Section 2000bb *et seq*. (2010); *see also infra* n.159.
143. *See generally* The White House, **Guidelines on Religious Exercise and Religious Expression in the Federal Workplace** (August 14, 1997).
144. Garcetti v. Ceballos, 547 U.S. 410 (2006).
145. Mayer v. Monroe County Community Sch., 474 F.3d 477 (7th Cir. 2007).
146. *Id*. at 480. However, the Seventh Circuit also noted:

    > How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in [*Garcetti v. Ceballos*, 547 U.S. 410 (2006)] and [*Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006)] and need not be resolved today. Nor need we consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class. *See Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir. 2002).

    Mayer, 474 F.3d at 480.
147. Garcetti, 547 U.S. at 417; *see also* Pickering v. Board of Education, 391 U.S. 563 (1968).
148. Garcetti, 547 U.S. at 418.
149. Lindsey v. City of Orrick, 491 F.3d 892 (8th Cir. 2007).
150. *Id*.
151. *Id*
152. The term "associated laws" would include the various non-establishment provisions in state constitutions, although these state provisions must be viewed in light of federal constitutional and statutory law.
153. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1981) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").
154. *See* **question and answer 29** of this statement.
155. *See* **question and answer 27** of this statement for an explanation of those requirements.
156. *See* **question and answer 31** of this statement.
157. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Employment Division v. Smith, 494 U.S. 872 (1990).
158. The federal government is subject to this standard by the Religious Freedom Restoration Act (RFRA). *See supra* n.3. Some state and local governments may be subject to this or similar standards by virtue of certain state constitutional provisions or state statutes. For citations to those state statutes and court rulings, *see* Douglas Laycock, *Theology Scholarship*, the *Pledge of Allegiance*, *and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 211-12 nn.368-373 (2004). *But see infra* n.159.

159. Some courts have held that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, and thus employees may not bring lawsuits in this area under laws such as the Religious Freedom Restoration Act (RFRA). *See, e.g.*, Francis v. Mineta, 505 F.3d 266 (3rd Cir. 2007). The U.S. Supreme Court has not yet addressed this specific issue, but it has held that "the congressional intent [behind the 1972 amendments to the 1964 Civil Rights Act] was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Brown v. General Services Administration, 425 U.S. 820, 829 (1976).
160. *See* 5 U.S.C. Section 5550a (2010) and associated regulations; *see also* United States Department of Personnel Management's Policy on **Adjustment of Work Schedules for Religious Observances**.
161. 20 U.S.C. Section 4071 *et seq.* (2010)(the "Equal Access Act").
162. For example, a court has deferred to a school's judgment that it was inappropriate for an elementary school student to distribute candy canes with religious messages to classmates during an in-class winter holiday party. Walz v. Egg Harbor Township Bd. of Educ., 342 F.3d 271 (3d Cir. 2003).
163. For example, in a case involving high school students who were members of a student-organized Bible club, a court issued a preliminary injunction protecting the students' rights to distribute candy canes with religious messages on school property during non-instructional time. Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98 (D. Mass. 2003).
164. American Jewish Congress *et al.*, **Religion in the Public Schools: A Joint Statement of Current Law** (April 1995).
165. Freedom Forum First Amendment Center *et al.*, **Religious Liberty, Public Education, and the Future of American Democracy**.
166. Freedom Forum First Amendment Center *et al.*, **A Teacher's Guide to Religion in the Public Schools**.
167. Bible Literacy Project, Society for Biblical Literature, Freedom Forum First Amendment Center *et al.*, **The Bible and Public Schools: A First Amendment Guide**.
168. *See, e.g.*, Abington Township v. Schempp, 374 U.S. 203, 225 (1963); Edwards v. Aguillard, 482 U.S. 578 (1987).
169. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). The constitutionality of the statute that incorporates the words "under God" in the Pledge of Allegiance, 4 U.S.C. Section 4 (2010), has also been challenged. Although one lower court initially found the statute unconstitutional, it later issued an amended ruling that eliminated its prior discussion of this issue without expressing an opinion as to whether that earlier discussion was correct. *See* Newdow v. Bush, 328 F.3d 466 (9th Cir. 2002).
170. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).
171. One federal district judge has ruled that the 2003 decision of the Ninth Circuit Court of Appeals holding that Elk Grove School District's pledge policy was unconstitutional (Newdow v. Congress of the United States, 328 F.3d 466 (9th Cir. 2003)) continues to bind that circuit. Newdow v. Congress of the United States, 383 F. Supp. 2d 1229 (E.D. Cal. 2005). In *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992), however, a court upheld a school's policy of voluntary recitation of the Pledge.

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Melissa Rogers wishes to thank the members of the drafting committee for their work. She is grateful for their willingness to share their expertise, their painstaking efforts on this project and their commitment to the cause of religious freedom. Rogers also would like to thank E.J. Dionne, Jr., Darrell M. West, Emily Luken and Christine Jacobs of the Brookings Institution for their interest in and encouragement of this work. She wishes to thank the Wake Forest University Divinity School for its support of this project and express special appreciation for the assistance given by Bill J. Leonard, Jill Y. Crainshaw, L. Wade Stokes, Jr., Adam Woods, Jo Ann M. Trethaway, Janice Huesman, Susan C. Jague and Joey Robbins. Finally, Rogers would like to thank James M. Dunn, without whom this project would not have been possible.

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