

Christian Legal Society National Conference, Washington, DC, October 31-November 3, 2024

Workshop Title: How to help ministries keep or recover their faith

Workshop Description: Suppose that, Sunday morning at coffee fellowship after worship, a Christian nonprofit's trustee or Christian school's principal asks you whether a government official really can demand some change, or whether it is legal to post a job notice requiring Christian conduct—or how to rewrite the trustee requirements so that nonbelievers won't be eligible in the future. How can you assist these ministries even though nonprofit law and religious freedom are not your areas of practice. The workshop will examine how Christian lawyers should reply to such questions in appropriate fashion, balancing their responsibilities to the Christian community and to legal ethics (including attorney-client relationship issues).

Module 1: State of Play; Situations Facing Christian Attorneys

1. State of Play
 - a. The faith-based organizations (FBOs) and the lawyers helping them should have institutional religious freedom confidence, though not foolhardiness.
 - b. It is essential that the organization adopt, as quickly as is prudent, good organizational practices conducive to clarifying and displaying its religious convictions and identity.
 - c. A time of growing government and social misunderstanding of and opposition to traditional religion is the time for FBOs to become more, not less, precise and public about their RF convictions and practices.
 - d. American constitutional principles, laws, and court decisions broadly and strongly support institutional religious freedom, so FBOs should be confident yet watchful about asserting their religious identity and practices, not ignoring the concerns of government and society but not preemptively capitulating.
 - e. CLS lawyers need to know when to call for help and where to turn for that assistance.
2. Situations in which a Christian Attorney may be called upon to help: Casual/Legal Information - Offer this Legal Disclaimer: These oral and/or written resources are provided for general information purposes only and are not a substitute for legal advice particular to your situation. No recipients of these resources should act or refrain from acting solely on the basis of these resources without seeking professional legal counsel. I expressly disclaim all liability relating to actions taken or not taken based solely on the content. For specific legal advice, which will be needed, please see attorney referrals at the Christian Legal Society.
 - a. Organization becomes a paid or pro bono client.
 - b. Provide a referral to qualified legal assistance.

Module 2: Substantive Areas to Know at the Base Level

1. Religious Staffing
 - a. Title VII of the 1964 Civil Rights Act
 - i. Current law on what the Title VII religious exemption protects—only religious discrimination (versus Easterbrook minority position)
 1. Text: Title VII prevents discrimination in employment of employers with 15 or more employees, with an exception for religious discrimination: §702(a) of the Civil Rights Act of 1964 provides: “This

subchapter shall not apply 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.” 42 U.S.C. §2000e-1(a).

2. The Courts of Appeals have held that this applies only to co-religious discrimination in staffing, although some judges have suggested it should apply to all employment decisions motivated by religious belief. See J. Easterbrook concurring, *Starkey v. Roman Catholic Archdiocese of Indianapolis* (7th Cir. 2022) (collecting cases).
- ii. FBO must be religious
1. An organization is a religious institution for purposes of the federal staffing laws generally if its mission is marked by “clear or obvious religious characteristics.” *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004). Factors that evince clear or obvious religious characteristics include:
 - a. The organization’s bylaws or other documents expressly state that the purpose/mission of the organization is to establish and advance values of the faith (e.g. written statement of faith in organization’s handbook).
 - b. The organization is affiliated, through funding or formal connection, with organized faith (e.g. church/synagogue/denomination) (need not be a specific denomination; can be nondenominational).
 - c. The organization requires its employees to hold and/or adhere to certain religious views (e.g. hiring exclusive to Christians or sectarians).
 - d. The organization has public displays of its faith inside the institution (e.g. mezuzahs on doorposts, religious figures on walls/tables).
 2. *LeBoon* Factors: Summing up the circuits, the Third Circuit listed the following as factors for religiosity of an FBO (*LeBoon v. Lancaster Jewish Cmty.*, 503 F.3d 217 (3d Cir. 2007)):
 - a. whether the entity operates for a profit,
 - b. whether it produces a secular product,
 - c. whether the entity's articles of incorporation or other pertinent documents state a religious purpose,
 - d. whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue,
 - e. whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees,
 - f. whether the entity holds itself out to the public as secular or sectarian,
 - g. whether the entity regularly includes prayer or other forms of worship in its activities,
 - h. whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and
 - i. whether its membership is made up by coreligionists.
 3. A religious organization involved in what some might call “secular” humanitarian activities still can qualify as an FBO for purposes of Title

VII if it satisfies these factors of being organized for a self-identified religious purpose as set forth in foundational documents, engages in activity furthering that purpose, and holds itself out to the public as religious. *Spencer v. World Vision*, 619 F.3d 1109 (9th Cir. 2010).

4. RULE YOU SHOULD KNOW on religious identity: Be explicitly religious in your organizational documents, formal affiliations, employment practices, and public positioning.
 - iii. RULE YOU SHOULD KNOW on religious staffing: An FBO that is transparent, explicit, and consistent in its religious character is allowed to discriminate on the basis of an applicant's religion in all hiring.
 - iv. Prudential concerns: FBOs should be reminded to be consistent in their practices—consistent between like situations and between different employees.
- b. Ministerial Exception
- i. In 2012, the Supreme Court unanimously held that the First Amendment created a zone of autonomy for faith-based organizations to hire, fire, and oversee their own ministers without regard for federal employment law. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). The Supreme Court's four factors for identifying "ministerial" employees include a formal title reflecting ministerial substance and training, the minister holding themselves out as such, and whether the functions are ministerial. Recently, the Court clarified that where the record shows evidence that employees perform 'vital religious duties,' the employees are ministers for purposes of the First Amendment. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).
 - ii. A minister is someone who transmits the beliefs of the organization to others or is otherwise a key religious leader of the organization.
 - iii. RULE YOU SHOULD KNOW: FBO is allowed to ignore federal antidiscrimination law in its hiring and firing of ministers, which are those who function in the organization in ministerial roles, according to the bylaws and practices of the organization.
 - iv. *Areas where you need to seek more guidance*: disciplinary actions applied to ministerial employees. The lower courts do not have consensus yet on where the exception applies to claims like hostile work environments, although some like the Seventh Circuit have given broad protections. *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021).
 - v. Prudential concerns: Not all employees of an organization have actual "ministerial" responsibilities, no matter how the jobs are described.
2. SOGI Nondiscrimination Law
- a. General considerations
 - i. This is a rapidly changing area of law at the federal, state, and local levels.
 - ii. FBOs enjoy significant protections via constitutional principles, general religious freedom laws (e.g., the federal or a state RFRA), and exemptions built into statutes and regulations.
 - iii. Not every instance of differential treatment is a civil rights violation (Jonathan Rauch, "Nondiscrimination for All," National Affairs (Summer 2017)).
 - b. Bostock and Title VII
 - i. Bostock's Holding: Employment discrimination on basis of sex = discrimination on the basis of SOGI for all Title VII employers.
 - ii. Bostock's Implications: Increases potential for liability for religious employers on SOGI—open question right now.
 - iii. Bostock's Limitations:

1. Bostock opinion's pointed statement that it applies only to Title VII employment by secular employers, setting aside what SOGI nondiscrimination might entail for an employer protected by the religious organization exemption.
 2. Bostock does not displace RFRA or Ministerial Exception.
 3. Cf. the RMA below—Congress can and is continuing to provide federal protections.
- c. Institutional religious freedom defenses
- i. Federal and state RFRA
 1. Federal RFRA limits only federal law and action.
 2. Federal RFRA: FBOs have a right to be free from a substantial burden on the free exercise of religion by the federal government unless the government's enforcement of the law is the least restrict means of furthering a compelling government interest. 42 U.S.C. 2000bb-1.
 3. Prudential concerns: States and localities include different types of non-federal protections or lack thereof. Some states have state RFRA, while others have exemptions built directly into their employment or accommodation laws. It would be your duty to do further research on the state and local considerations. Some, like WA, can be quite restrictive and have been battlegrounds in recent years.
 - ii. Respect for Marriage Act: Congress's 2022 bill, requiring state actors to honor same-sex marriage across state lines, explicitly provided that no FBO can be required to promote, facilitate, or celebrate any kind of marriage it sincerely disagrees with and cannot be sued for declining to aid a same-sex wedding. Exempt status and other licenses cannot be taken from an FBO on this basis. 1 U.S.C. 7; 28 U.S.C. 1738C.
 - iii. Recent U.S. Supreme Court guidance: *Fulton*, *Masterpiece Cakeshop*, *303 Creative*
 1. Recently, the Supreme Court reaffirmed that FBOs have a First Amendment (speech) right to be free from government coercion through public accommodation laws as to messages put out by the FBO. *303 Creative LLC v. Elenis*, 600 U.S. __ (2023).
 2. Regardless of all state, local, and federal employment and accommodation laws, FBOs have a right to be free from direct government targeting of religious beliefs in the form of disparate treatment or open verbal or written hostility to religious belief. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. __ (2018).
 3. When a state, local, or federal law gives a government decisionmaker formal power to decide which organizations are exempted from laws and which aren't, the government must have a narrowly tailored compelling interest to deny FBOs an exemption. *Fulton v. City of Philadelphia*, 593 U.S. __ (2021).
- d. Employment
- i. **RULE YOU SHOULD KNOW:** An FBO is allowed to engage in religious staffing including making employment decisions based on religious conduct, including those that could conflict with SOGI antidiscrimination laws. Such decisions come with risk, though.
 - ii. State and local SOGI laws that are in actuality neutral laws of general applicability generally apply against FBOs. *Employment Division v. Smith*, 494 U.S. 872 (1990).

- iii. Check on the Rule: Attorneys advising FBOs should have up to date awareness of local, state, and federal law and recent court cases before giving ‘silver bullet’ rules because religious staffing practices in the context of SOGI nondiscrimination laws do come with risks to the FBO.
 - iv. An attorney should: Educate the FBO about ‘what to consider’ (categories of law and prudential decision-making) and ‘what to do’ (consistent holistic religion-evidencing practices).
 - e. Services
 - i. **RULE YOU SHOULD KNOW:** Organizations receiving government funding (grants, contracts, vouchers, etc.) may be required to serve without SOGI discrimination, although such a nondiscrimination “string” on government funds does not necessarily implicate staffing practices nor an FBO’s activities and programs that are privately funded.
 - ii. The government agency providing the funding may have a faith-based office or liaison official who can clarify what specific requirements apply when the recipient organization is religious.
 - f. Facilities Use
 - i. **RULE YOU SHOULD KNOW:** If you open your space to the public beyond your particular faith community you increase legal risk, particularly if you charge market rates.
 - ii. Check on Rule: Opening your facilities beyond coreligionists requires careful articulation of the faith-basis of how you select groups who use your space.
- (4) Government Funds
- a. Faith-based initiative: The federal faith-based initiative started with Charitable Choice provisions signed into law by President Bill Clinton several times. Presidents since then have maintained a White House faith-based office or advisor and faith-based Centers in major federal agencies. Their task is to encourage government partnerships with community-based and faith-based social service organizations and to ensure that the Charitable Choice and equivalent Equal Treatment regulations are respected by federal, state, and local officials administering federal funds to purchase social services.
 - i. *Direct Funding:* This is where a government body selects a provider and purchases services or awards funds (grants) to that provider to carry out services.
 - ii. *Indirect Funding:* This is where a government body provides an individual beneficiary with a voucher, certificate, or similar means of payment and then the beneficiary chooses a service provider.
 - b. Establishment Clause: The First Amendment allows for faith-based organizations to accept government vouchers, even when the money, once paid to the FBO, goes to explicitly religious programs and services. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
 - c. Free Exercise Clause: The First Amendment also requires that governments, when making funding programs available to service organizations, must not exclude faith-based organizations on the basis that they are religious. Government cannot limit otherwise available tuition assistance indirect payments to “nonsectarian” institutions, *Carson v. Makin*, 596 U.S. 767 (2022), cannot have “no-aid” provision targeting FBOs for a state tuition assistance program, *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___ (2020), and cannot otherwise discriminate on the basis of religious status while providing grants to various private organizations. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017).
 - d. **RULES YOU SHOULD KNOW:**

- i. If the government funds are received “indirectly” (via a beneficiary who specifically selected the FBO), the FBO can incorporate religious teaching and activities into the funded service.
 - ii. Direct funds –these funds may not be expended on religious teaching, religious activities, or religious items. The FBO can invite a beneficiary to participate voluntarily in separately offered religious activities.
 - iii. While some federal programs that provide funds to private service providers include a ban on employment discrimination without a religious organization exemption, the Office of Legal Counsel in the Department of Justice has opined that, because of the Religious Freedom Restoration Act, an FBO that staffs on a religious basis may be able to participate in such a program without changing its religious staffing practices. See “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act” (June 29, 2007).
 - e. Prudential concerns:
 - i. Know what the law is, not what commentators and scholars hope or predict that it will be with the current Supreme Court. There are more restrictions than some commentators suggest.
 - ii. Federal and State and Local: attorneys advising FBOs should be aware of current local, state, and federal law on what is or is not allowed in receipt of funds.
 - iii. Monitor changes at the federal level. Organizations like IRFA and CLS monitor what the current presidential administrations do. See List of Resources.
- (5) Nonprofit Management
- a. Incorporation – State
 - i. Most States requires nonprofits to form as a nonprofit corporation by filing Articles of Incorporation.
 - ii. Incorporator: An organization must have an incorporator who signs the original Articles and designates the Board. The Incorporator, like Board members and officers, should be a person of faith committed to the purpose of the organization.
 - iii. Bylaws: Bylaws must be adopted that set forth how the organization will function as a state entity, including things like how many Board members, how Board members are selected, the powers of the Officers, process fo amending the Bylaws (important for preventing or reversing mission drift) and everything else. These control the “who decides” of organizational identity. Bylaws for an FBO should be reviewed by a Christian lawyer.
 - iv. The incorporation papers or application should clearly state the nonprofit has a religious mission and intends to operate consistent with particular (named) religious standards.
 - v. Prudential concerns: know state-specific issues for incorporation.
 - b. IRS/federal compliance – (c)(3) setup
 - i. The exempt purposes set forth in Internal Revenue Code section 501(c)(3) are 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. 26 U.S.C. § 501. An FBO service organization should state that it has a charitable purpose, to be carried out in accordance with its particular (named) religious convictions.
 - ii. To obtain (c)(3) status, an organization must submit a Form 1023 to the IRS, providing proof of the charitable purpose and the nonprofit status of the FBO.
 - c. Separate Account / LLC for government funds (government-funded services):

- i. As discussed above, organizations that receive government funds directly must limit some of their religious activities and must segregate the funds based on the nature of the government funds. To limit audits and to promote good governance, it is wise for the FBO to establish a separate bank account to receive the federal funds and out of which to pay for the relevant expenses. Some organizations, in particular houses of worship, choose to set up a separate entity—itsself a faith-based entity but with its own governing board, purposes, and standards— for delivering services based on direct or indirect government funds.
- ii. Essential Organizational Practices to Protect Institutional Religious Freedom (SEE APPENDIX A)

Module 3: For special attention

1. Starting an FBO: defining a religious mission, character, and practices
2. Guiding an FBO to reassert its religious mission and character
3. Casual requests for legal guidance – how to respond?
4. The organizational practices FBOs should adopt for both missional and religious-freedom/legal reasons

Appendix A: Essential Organizational Practices

Religious Staffing

1. Ground religious commitments in sacred texts, denominational statements, theological explanations, or other religious resources
2. Provide an explanation of policies and standards that are shaped by religious commitments
3. Explain why employee compliance for these standards is important to the organization and its mission
4. Define expectations for employee belief and conduct, including what they can or cannot do
5. Explain how these expectations flow from the organization's religious beliefs and are vital to its mission and identity
6. Designate a final authority (board or other leadership) to determine acceptable beliefs and conduct and to carry out disciplinary action
7. Address the issue positively. Instead of articulating faith commitments in a negative or condemning fashion, use positive language. Include policies and employee characteristics besides sexual conduct that are important to the organization because of its religion
8. Explain the measures the organization will employ to verify an applicant's or employee's adherence to its belief and conduct standards and what will be regarded as clear evidence of a lack of adherence

Government Partnerships (accepting government funding)

1. Do:
 - a. Study all of the restrictions and freedoms that accompany the funding.
 - b. Evaluate the processes and staff needed to comply with the rules and reporting requirements.
 - c. Track all funds received, the terms under which they were given, and how the funds are expended.

- d. Take care to comply with all requirements of an award, including its applicable restrictions, if you choose to accept it.
2. Do not:
- a. Take funds if you object to the accompanying rules or with the donor's interpretation of those rules.
 - b. Change or "water down" your sacred mission and identity in order to secure funding, whether competing for government or private funding.
 - c. Neglect to communicate your religious identity and the values that are rooted in your sacred texts and beliefs.

Appendix B: Resources for Quick Reference

1. Center for Law and Religious Freedom (Christian Legal Society) religious freedom guidance webinars and white papers at <https://www.christianlegalsociety.org/center/religious-freedom-guidance-webinars/>
2. Religious Freedom Institute Crisis toolkit for religious organizations at <https://religiousfreedominstitute.org/crisis-toolkit/>
3. Alliance Defending Freedom religious freedom resources for religious organizations at <https://adflegal.org/forms/download-protect-your-ministry>
4. Eric Kniffin, "Protecting Your Right to Serve: How Religious Ministries Can Meet New Challenges without Changing Their Witness," Heritage Foundation (Nov. 9, 2015). <https://www.heritage.org/civil-society/report/protecting-your-right-serve-how-religious-ministries-can-meet-new-challenges>

Please Note: The foregoing resources are provided for guidance, background, and detailed information regarding the legal challenges and opportunities facing faith-based organizations. However, the items listed do not provide legal advice that covers every possible situation faced by you or the ministries you support or are asked to help. For those situations where you need to make a referral, you may seek resources from the Christian Legal Society at <https://www.christianlegalsociety.org/need-help/>.

Workshop presenters

Stanley Carlson-Thies is the founder and senior director of the Institutional Religious Freedom Alliance at the Center for Public Justice. CPJ is a Washington, DC, based think tank devoted to equipping Christian citizens, developing leaders, and shaping public policy to reflect pluralism and justice. IRFA works with a multifaith network of faith-based organizations to safeguard the religious freedom they need to be able to make their distinctive contributions to the common good. IRFA does not engage in litigation but interacts with federal legislators and the executive branch, and equips, informs, and mobilizes faith-based organizations. Stanley was part of the initial staff of the George W. Bush White House Office of Faith-Based and Community Initiatives and was an advisor to the church-state taskforce of President Obama's Advisory Council on Faith-Based and Neighborhood Partnerships. He holds a Ph.D. and M.A. in political science from the University of Toronto and an A.B. degree in political science from the University of California, Davis. He has published on religious freedom issues in legal and scholarly publications, including the University of St. Thomas Law Journal, the Harvard Journal of Law and Public Policy, and the Human Rights magazine of the American Bar Association.

Chelsea Langston Bombino is an attorney who graduated from Michigan Law, studying religious freedom under Prof. Douglas Laycock. For the past 14 years, she has worked at the intersection of religion, religious freedom and public life. She has served as a Fellow for the Center for Public Justice's Institutional Religious Freedom Alliance since 2013. She also served as a Director for the Institutional Religious Freedom Alliance from 2015-2020, focusing on equipping faith-based organizations with practical and public policy literacy of institutional religious freedom. In addition, Bombino has written as a subject matter expert on religious freedom related matters for such publications as Christianity Today, Religion Unplugged, Shared Justice, Mount St. Mary's Institute for Leadership, Ethics, Application and Development, and the Journal for Faith and International Affairs, as well as contributed chapters to several books. Bombino has taught faith-based organizational development with an emphasis on religious freedom at Pepperdine's DC campus and has taught religious freedom integrated ethics at Mount St. Mary's. She currently serves as a Program Officer for the Fetzer Institute, specializing in religion and public life.

Caleb Acker is an associate with Holtzman Vogel and focuses his practice in the areas of election and political law, including religious freedom litigation and nonprofit compliance with government agencies like the IRS and FEC. He has recently co-authored a book chapter on the ministerial exception with Richard W. Garnett in *The Palgrave Handbook of Religion and State*. Before joining Holtzman Vogel, Caleb clerked for Thomas Kirsch on the Seventh Circuit. Caleb is barred in Virginia, Pennsylvania, and D.C., has a J.D. from Notre Dame Law School, and received a B.A. and M.A. in Biblical Exegesis from Wheaton College.