

May 13, 2024

By E-Mail and Federal Express

Aaron Scott, Chief Park Ranger
Petersburg National Battlefield
1539 Hickory Hill Road
Petersburg, VA 23803

Application of Petersburg Knights of Columbus for Special Use Permit to Host Annual Memorial Day Mass at Poplar Grove National Cemetery

Dear Mr. Scott:

Together with co-counsel Roger Byron of the First Liberty Institute, I write on behalf of our client, the Knights of Columbus, Council 694, of Petersburg, Virginia, regarding your denial of a permit for the Knights to host their annual Memorial Day mass in the Poplar Grove National Cemetery to honor and pray for the soldiers buried there, as well as all those who have fallen in service to our Nation.

Founded almost 150 years ago in the United States, the Knights of Columbus is a Catholic fraternal service order with over 2 million members worldwide. The Knights' guiding principles are Charity, Unity, Fraternity, and Patriotism. One long-standing way the Knights have lived out their faith and their patriotism is by hosting Memorial Day masses.

In Petersburg, the Knights have held an annual Memorial Day mass in Poplar Grove National Cemetery for generations, in accordance with their religious beliefs. The tradition is so old that Council 694 has no written record of when it first began, but living memory confirms that the masses have been celebrated at Poplar Grove since at least the 1960s, and they likely started long before. Until last year, the National Park Service (NPS) always granted the Knights permission to hold the mass within the cemetery, and the mass or a prayer service (when a priest was not available) had been celebrated there annually without incident.¹

¹ On rare occasion, the mass was not held because the Poplar Grove National Cemetery was closed for renovations.

In 2023, for the first time in memory, NPS denied the Knights a permit to hold the service in the cemetery, citing a new policy which, you say, forbids a “religious service” in the cemetery as a prohibited “demonstration.” You invoked the policy again this year as justification for denying the Knights a permit to hold this year’s service in the cemetery. Instead, because the mass is religious, you insist that the Knights must hold their service, if at all, outside the cemetery walls in a designated “free speech” zone. But to be clear, that is not an adequate substitute. In accordance with the Knights’ sincerely held religious beliefs, the service they seek to hold must be held within the sacred ground of the cemetery, as it has been annually for scores of years.

We strongly urge you to reconsider your decision and promptly to grant the Knights a permit to host their annual Memorial Day mass within the walls of the Poplar Grove National Cemetery. If you persist in denying the permit, our clients intend to take all appropriate steps to protect their rights, including though litigation. We therefore ask that you preserve all relevant documents and materials in anticipation of litigation.

But we sincerely hope that litigation will not be necessary; there are many reasons why NPS should grant the Knights’ permit application.

(1) The requested permit is consistent with NPS policy and established practice, even under the new policy.

There is no reason under NPS regulations or Policy Memorandum 22-01 (“Managing Special Events and Demonstrations in National Cemeteries”) (August 15, 2022) to deny the Knights a permit to hold the service within the cemetery. Indeed, even since the adoption of Policy Memorandum 22-01, the Park Service has authorized Memorial Day masses in other National Cemeteries.²

To begin, there is no reason to think that the Knights’ annual mass is “reasonably likely to attract a crowd or onlookers” (so as to meet the regulatory definition of a “demonstration,” 36 C.F.R. § 12.3) because in the decades-long history of the Memorial Day mass, it has never drawn a crowd or onlookers. But even if the Memorial Day mass were considered a “demonstration,” NPS’s regulations specifically contemplate the approval of “demonstrations” as commemorative events held in National Cemeteries on Memorial Day, particular where the occasion has “special historic and commemorative

² This coming Memorial Day, the Knights of Columbus will be hosting a mass in the Andersonville National Cemetery in Georgia. The mass is listed in the Memorial Day Weekend schedule on the Park Service website, see 2024 Memorial Day Weekend Schedule for Andersonville National Cemetery, <https://www.nps.gov/ande/planyourvisit/memorialdayobservance.htm> (last visited May 10, 2024), and the official Facebook page for the Andersonville National Historic Site, see <https://www.facebook.com/AndersonvilleNPS/> (last visited May 10, 2024). The Knights of Columbus hosted a mass in the same cemetery last year, as well, also under the new policy. See Andersonville National Historic Site hosts Memorial Day weekend events, <https://www.nps.gov/ande/learn/news/andersonville-national-historic-site-hosts-memorial-day-weekend-events.htm> (last visited May 10, 2024).

significance to a particular national cemetery.” 36 C.F.R. § 12.4. The Knights’ annual Memorial Day mass more than meets that standard under any reasonable interpretation.

The most sensible thing to do—indeed, the *right* thing to do—is for NPS to approve the permit for the Memorial Day mass as an historically significant commemorative event. But, as explained below, even if NPS were to conclude that Policy Memorandum 22-01 required the denial of the Knights’ permit, that application of the policy would violate the Free Exercise and Free Speech Clauses of the First Amendment, as well as the Religious Freedom Restoration Act.

(2) Denying the permit based on the Knights’ intention to celebrate a religious sacrament violates the Free Exercise Clause of the First Amendment.

Whatever the regulations and NPS’s policy say, it violates the First Amendment of the U.S. Constitution to discriminate against and censor the Knights’ activities “solely because of their religious character.” *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 780 (2022) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). It is a firmly established constitutional principle that the “[g]overnment fails to act neutrally when it . . . restricts practices because of their religious nature.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). And because NPS’s rules specifically characterize activities as prohibited “demonstrations” if they involve a “religious service” (assuming your interpretation is correct), those policies necessarily “impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Trinity Lutheran*, 582 U.S. at 462 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

NPS policy, both on its face and as applied to the Knights’ annual Memorial Day mass, cannot possibly satisfy that exacting “strict scrutiny” standard, which requires that the policy and its application to the Knights be “justified by a compelling state interest and . . . narrowly tailored in pursuit of that interest.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (citing *Lukumi*, 508 U.S. at 546). Here, the NPS policy cites “a substantial government interest in maintaining a protected atmosphere in national cemeteries where individuals can quietly contemplate and reflect upon the significance of the contributions made to the Nation by those interred.” Policy Memorandum 22-01 (citing NPS, *National Cemetery Regulations*, 51 Fed. Reg. 8976, 8977 (Mar. 14, 1986)). Even if a substantial interest were adequate to meet strict scrutiny, a scheme that prohibits the Knights from hosting their annual Memorial Day mass is not narrowly tailored to further that interest. Indeed, the mass is entirely *consistent* with the goal of promoting quiet and reverent contemplation. There is certainly no substantial difference between the Knights’ Memorial Day service and a graveside committal service, which is permitted under the policy and regulations. See Policy Memorandum 22-01, at 5; 36 C.F.R. § 12.4. And in any event, the policy “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Kennedy*, 597 U.S. at 526 (quoting *Fulton*, 593 U.S. at 533). To take but one example, it would be consistent with the policy to allow a *reenactment* of the annual Memorial Day mass held at Poplar Grove National

Cemetery for generations based on its historical significance as a commemorative event; but to *conduct* the mass itself is prohibited because it constitutes a “religious service.” That absurd result does not satisfy the constitutional demands of strict scrutiny.

Thus, even if you were to conclude that you cannot grant the Knights’ permit under NPS policy (which would be a mistake), you must acknowledge that the policy, both on its face and as applied, violates the Knights’ rights under the Free Exercise Clause and grant the permit anyway.

(3) Denying the permit also violates the Religious Freedom Restoration Act by substantially burdening the Knights’ free exercise of religion without being the least restrictive means to serve a compelling government interest.

As a federal agency, NPS is also bound by the Religious Freedom Restoration Act (RFRA), see 42 U.S.C. § 2000bb *et seq.* RFRA “operates as a kind of super statute, displacing the normal operation of other federal laws.” *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 682 (2020). It imposes a strict-scrutiny standard on governmental actions that “substantially burden a person’s exercise of religion.” *Id.* § 2000bb-1(a). RFRA requires the government to “demonstrate[] that application of the burden to *the person*— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014) (emphasis in original) (quoting 42 U.S.C. §§ 2000bb–1(a), (b)). Notably, under RFRA the strict scrutiny standard applies “even if the burden results from a rule of general applicability.” 42 U.S.C. §§ 2000bb–1(a). When RFRA is violated, “[a] person whose exercise of religion has been unlawfully burdened. . . can sue Government officials in their *personal capacities*” for monetary damages, in addition to seeking other appropriate relief. *Tanzin v. Tanvir*, 592 U.S. 43, 46–47 (2020) (emphasis added).

Even if NPS policy did not specifically prohibit a “religious service,” the denial of a permit for the Knights to host their annual Memorial Day mass would still constitute a substantial burden on their religious exercise prohibited under RFRA. It is the Knights’ sincere religious belief that they need to be within the cemetery for their Memorial Day mass and service. As memorialized in a resolution formally adopted by Council 694, their presence in the cemetery “aids and helps [them] to pray for the fallen, and . . . failure to hold the service in the national cemetery would diminish [their] ability to pray for the fallen.” They also believe their service should include the blessing for “Visiting a Cemetery on Memorial Day” from the Book of Blessings, which may be performed only within the cemetery. The Knights have therefore resolved that, “to be faithful to and act in accordance with the religious beliefs of [the] Council, [they] must continue to hold [their] annual religious memorial service on Memorial Day in the Poplar Grove National Cemetery here in Petersburg, Virginia, to include our Memorial Day Mass and from the Book of Blessings the blessing for Visiting a Cemetery on Memorial Day.” Holding a service outside the cemetery walls, down the hill, and out of sight of the vast majority of the gravesites simply does not provide a meaningful substitute.

Prohibiting the Knights from holding the service within the cemetery substantially burdens their religious practice and cannot satisfy strict scrutiny, as explained above. Even if the interest expressed in the policy were found compelling, “[t]he least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here.” *Burwell*, 573 U.S. at 728. The Park Service does not “lack[] other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the [Knights].” *Id.* The Knights, therefore, are “entitled to an exemption from the rule.” *Id.* at 695. RFRA demands it.

(4) Denying the permit based on the Knights’ intention to hold a religious service also represents content-based and viewpoint discrimination which violates the Free Speech Clause of the First Amendment.

The Supreme Court has recognized that restrictions on religious expression often violate the Free Speech Clause of the First Amendment, as well. See, e.g., *Kennedy*, 597 U.S. at 543 (holding that the post-game prayers of a high school football coach were “doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment”). “Indeed, in Anglo–American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis in original). The Court, therefore, “ha[s] not excluded from free-speech protections . . . acts of worship.” *Id.* And this is a case in point.

The Knights wish to gather at the Poplar Grove National Cemetery on Memorial Day in the sight of God, as they have done for generations, to celebrate the mass and honor and pray for our Nation’s fallen soldiers. If they were there for a secular purpose, it is doubtful that you would characterize their mass as a prohibited “demonstration” in the first place. But due to the religious content of their observance, they are shut out. The Free Speech Clause of the First Amendment does not countenance that result any more than the Free Exercise Clause does.

Under the Free Speech Clause, “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). Accordingly, “[w]hen a government does not speak for itself, it may not exclude speech based on religious viewpoint; doing so constitutes impermissible viewpoint discrimination.” *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 258 (2022) (quotations omitted) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). And “[d]iscrimination against speech because of its [religious] message is *presumed to be unconstitutional*.” *Rosenberger*, 515 U.S. at 828 (emphasis added).

The NPS’s prohibition of the Knights’ Memorial Day service due to its religious nature is not merely unlawful content-based discrimination on speech—it is textbook viewpoint discrimination, which is per se unconstitutional. See *id.* at 828-29.

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The Knights ask NPS to do the right thing and grant them permission to host their annual Memorial Day mass in Poplar Grove National Cemetery, as the Park Service has done since time immemorial—before last year—and as it has continued to do in other National Cemeteries.

If you have any questions or would like to discuss the issues I have raised in this letter, please do not hesitate to contact me.

Because Memorial Day is fast approaching, we ask that you please let us know by **no later than Friday, May 17, 2024**, whether you intend to grant the permit application for the Knights to hold their annual Memorial Day mass within the cemetery.

Sincerely,



John S. Moran

Counsel for Knights of Columbus, Council 694

- cc: Roger Byron, First Liberty Institute
Chuck Sams, Director, National Park Service
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