Testimony of
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Hearing on Advancing and Protecting LGBTQI+ Rights Abroad
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Mr. Chairman Meeks, Mr. Ranking Member McCaul, and Members of the Committee: It is an honor to appear before you. I appreciate being able to appear via videoconference. At the outset, I want to emphasize that I am appearing in my personal capacity. In addition to my brief remarks, I have appended a Truth in Testimony Disclosure as required by this Committee's Rules regarding testimony of witnesses, and a short curriculum vita. As indicated in the attached short CV, I bring over forty years of experience working on international human rights issues, with an emphasis on freedom of religion or belief.

As others in this hearing have and no doubt will document, members of the LGBTQI+ community suffer significant violations of their human rights in many, if not most or all, countries in the world. These violations in foreign settings deserve the attention of this Committee in determining how these rights can best be advanced and protected abroad. In my testimony, I will focus not on the nature and scope of these violations, but on *how* these rights can best be advanced and protected.

The starting point of this analysis aptly begins with the words that helped launch our Republic: "We hold these Truths to be self-evident, that all Men are created equal, that they are

endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." These self-evident truths have found their way into accepted international norms such as the Universal Declaration of Human Rights and the larger panoply of rights embedded in modern international human rights law. They are also embodied in the constitutions of most nations. They reflect the innate dignity of human beings and deserve our abiding respect and concern. Central to these standards is the notion that all are entitled to equal protection of their rights, and that invidious discrimination is an evil that should be opposed.

In the effort to address this evil, however, we need to be discriminating about discrimination. Not every differentiation constitutes invidious discrimination. We praise those with discriminating taste in art and literature. We recognize that personal freedom includes the right to differentiate among those with whom we wish to associate. We understand that genuine liberty presupposes pluralism—a society with differentiated religious and philosophical world views. We believe that protecting freedom of speech and expression goes to the core of human dignity, and that these freedoms would be empty if differentiations were not allowed. As we know from experience in our increasingly polarized times, these differences can be deep, and lasting, and painful. But as the European Court of Human Rights has stated in a frequently cited paragraph:

> the Court recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, [but] it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[1]

What centuries of experience with principles of freedom of religion or belief have taught us is that social peace is best advanced and solidified by finding ways to optimize the respect for the

[1] Serif v. Greece, App. No. 38178/97 (ECtHR, 14 December 1999), para. 53.

equal freedom and dignity of all, thereby assuring that people can live together in peace and prosperity despite deep differences.

Fortunately, for the most part, human rights are mutually supportive. In the classic formula from the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993, "All human rights are universal, indivisible and interdependent and interrelated."[2] However, as we know from experience, different rights can come into conflict with each other. There are clearly areas where the interests of LGBTQI+ persons may collide with the interests of religious believers and communities. Advancing and protecting LGBTQI+ rights needs to take this reality into account and to find ways that optimize protections for all concerned. In many international settings, failure to find sensitive ways to do so can be profoundly counterproductive. Pressing for LGBTQI+ rights without finding ways to avoid discrimination against others can trigger social reactions that make needed progress more difficult to achieve.

Positive steps can draw on many resources. In the first place, there are in fact broad areas of consensus. Religious communities are generally opposed to invidious discrimination against LGBTQI+ persons in employment and housing. Similarly, while a number of nations continue to criminalize homosexual conduct, there is broad support for decriminalization in this area. Principled solutions on many issues can be found if care is taken to focus on what the differing communities need in order to live together.

Where conflicts remain, the widely recognized principle of insisting on "practical concordance" should be applied. Finding practical concordance involves a "search for a compromise in which both [conflicting] human rights give way to each other and a solution is

[2] A/CONF. 157/23 para. 5 (12 July 1993).

reached that keeps both rights intact to the greatest extent possible."[3] As Professor Heiner Bielefeldt, former UN Special Rapporteur for Freedom of Religion or Belief and Michael Wiener, his colleague at the Office of the UN High Commissioner of Human Rights, have summarized the principle:

> In situations where a normative conflict apparently does exist, it remains imperative to always consider all the human rights claims at stake. It would not be legitimate to waive one of the claims in the first place by constructing an abstract hierarchy between different human rights norms. Just as it would be wrong to devalue freedom of religion or belief by simply subjecting it to an abstract priority of gender-related rights, it would be equally problematic to dismiss gender-related rights claims when entering the territory of freedom of religion or belief. Positively speaking, the task is to do justice *to the maximum degree possible, to all the human rights involved* in a particular case or situation in order to produce "practical concordance" of the human rights claims involved. This requires a careful coordination of all the human-rights-based concerns at stake in a particular situation.[4]

Significantly, typical juridical tests for analyzing conflicting rights call for careful balancing of rights that analyzes whether conflicting rights are being minimally impaired, and whether the least burdensome configuration of rights is achieved. In this regard, Bielefeldt and Wiener note,

> the metaphor of 'balancing' conjures up the idea of two competing goods being placed on the weighing scales. The 'balancing' metaphor insinuates a zero-sum conflict as well as the search for some sort of middle ground as the probably most adequate solution. However, the task at hand is not to strike a sort of fifty-fifty compromise between opposite claims, but to coordinate and maximize the competing human-rights-based concerns in a manner that comes as closely as possible to a full implementation for both of them.[5]

Careful analysis of what differing groups genuinely need can arrive at practical solutions that are workable for both LGBTQI+ groups and religious communities. Making genuine efforts in this direction in priority areas can contribute to general amelioration of relations. One of the

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[3] Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict,' 26 *American University Int'l L. Rev.* 183, 188-89 (2011).
[4] Heiner Bielefeldt and Michael Wiener, *Religious Freedom under Scrutiny* 99 (Philadelphia: University of Pennsylvania Press, 2020) (emphasis in original).
[5] Bielefeldt and Wiener, *supra* note 4, at 99.

important lessons from Utah's legislation in this area a few years ago is that significant efforts to protect both LGBTQI+ rights and religious rights has gone far toward improving general attitudes toward protection of LGBTQI+ rights. As a result, Utah is now tied for second place among states in the nation in popular support (77%) for LGBTQI+ rights.[6] This Committee should pay careful attention to whether initiatives aimed at advancing and protecting LGBTQI+ rights abroad are structured so as to achieve practical concordance, optimizing the rights for all.

Let me address a number of recent practical examples where this Committee's influence could be significant. Last month, in the case of *Pavez v. Chile*, the Inter-American Court heard one of its first cases squarely raising questions of freedom of religion or belief. In this case, a woman who had previously provided Catholic religious instruction in a public school in Chile lost her authorization to provide such instruction when she adopted a lesbian lifestyle. The Inter-American Commission held that this constituted unlawful discrimination on the basis of sexual orientation. The case has now been argued before the full Inter-American Court, and a decision is pending. Significantly, Ms. Pavez did not lose her employment. In accordance with her contract, she was transferred to another position involving administrative tasks and higher pay. She was able to stay at the same school during the remainder of her career. She may feel that her dignity was adversely affected, but if her rights are enforced exclusively, the dignity of everyone with an interest in authorized Catholic teaching is also adversely affected. Such a decision interferes with the rights of pupils to receive such education, with the rights of parents to raise their children as they prefer, and it assumes that the state has power to determine who is authorized to provide Catholic instruction. This is a case where practical concordance could be

[6] See Daniel Greenberg, Emma Beyer, Maxine Najle, Oyindamola Bola, and Robert P. Jones, 'Americans Show Broad Support for LGBT Nondiscrimination Protections," https://www.prri.org/research/americans-support-protections-lgbt-people/?fbclid=IwAR1KiNmd_zCiiJoGLEg87_rDMf1XA1ymLuTvQ-_yGmLZU-LYdR6SVL981v4.

better achieved by the solution that Chilean authorities chose: to protect the right of Ms. Pavez to employment (albeit without teaching Catholic religion classes), while simultaneously respecting the rights of individuals and the autonomy of the Church to structure religious education in accordance with its beliefs. Significantly, the European Court of Human Rights has affirmed the right of member states to respect the autonomy of religious communities to determine the credentials of religious instructors, even when those instructors lost their employment.[7] This is the kind of case that this Committee can monitor to determine whether principles of practical concordance and optimization of the rights of all is being pursued.

Another example from Latin America is the Convention Against All Forms of Discrimination and Intolerance that has been adopted by the Organization of American States ("OAS"). It was adopted in June or 2013, and thus far has been ratified by only two countries. This is sufficient for the treaty to have gone into effect, and there is a strong likelihood that this will be applied by the Inter-American Court as part of "established international law." On its face, the Convention has the seductively laudable objective to "prevent, eliminate, prohibit and punish all acts and manifestations of discrimination and intolerance," but it is dangerous in that it is hopelessly overbroad. The Convention specifically states that ratifying countries will undertake to prohibit and punish:

- ***"****public or private support provided to discriminatory activities or that promote intolerance, including the financing thereof"* (Article 4.i);
- *"publication, circulation or dissemination, by any form and/or means of communication, including the Internet, of any materials that defend, promote or incite hatred, discrimination and intolerance"* (Article 4.ii);
- *"preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions"* (Article 4.x); and
- *"denying of access to… private education … based on any of the … forbidden grounds or suspect categories,"* as defined in the Convention. (Article 4.xi).

[7] *See, e.g.*, Fernandez Martinez v. Spain, App. No. 56030/07 (ECtHR, Grand Chamber, 12 June 2014); Travas v. Croatia, App. No. 75581/13 (ECtHR, 4 Octtober 2016).

These provisions are sufficiently open-ended that they could be construed to threaten both freedom of religion or belief and freedom of expression in a variety of ways. For example:

- it could obligate a country to prohibit teaching by a church in support of the traditional view of marriage or publication of any religious literature supporting the traditional view, even in purely private settings.

- Churches could be prohibited from refusing to perform marriages or other ordinances, even private ones, based on any religious conviction or doctrine deemed intolerant of others.

- Teaching by churches that homosexual conduct, or any other conduct, is "sinful" could be deemed intolerant and could be banned. Any expression of belief that someone finds "offensive" could be prohibited.

- The Convention could also obligate a country to preclude the private funding from any source of a local religious group whose views were deemed to be intolerant. It thus could become illegal for members to donate to their church or for local churches to receive financial support from outside the country.

- Religious organizations that are found to be "intolerant" could become "illicit associations" under the criminal codes of many nations which could lead to criminal sanctions against religious leaders and supporters.

- Religiously based schools could be threatened. No person could be denied access to any private school based on their religious affiliation or lack thereof. The teaching at a religious school could have to pass the "tolerance" test which could prohibit most value and moral based instruction. "Honor codes" at religious schools could be prohibited. Religiously based schools could lose accreditation by the state, and their graduates could be prohibited from being licensed in their professions.

- Freedom of expression as part of religious freedom could be effectively eliminated. Any expression of religious belief or opinion, public or private, that is deemed intolerant of any opinion, conviction or characteristic of another person or group could be punished.

Even those sympathetic to the Convention in principle recognized its problematic features. Canada, for example, originally supported drafting the Convention, but ultimately withdrew support from the final version because of concerns that "*many provisions of the current draft may undermine or be incompatible with international protection for human rights such as freedom of thought, belief and expression.*"[8] Canada further stated: "*The broad limitations called for in [the Convention]*

[8] Permanent Mission of Canada, *Note by the Permanent Mission of Canada Withdrawing from the Negotiations on the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.G

could lead to clashes with other human rights, including freedom of expression (and in some cases freedom of religion).'[9] What these examples underscore is the importance of monitoring emerging treaty language, as well as parallel reform language in various countries to assure that overly broad language that fails to optimize and protect the rights of all is avoided.

What is important in each of these areas is to make certain that reduction of discrimination against LGBTQI+ persons is not achieved by engaging in comparable discrimination against religious individuals and communities. The *Fulton v. City of Philadelphia* case recently unanimously decided by our Supreme Court is an important reminder that concerns to protect against discrimination on the basis of sexual orientation do not justify discrimination on the basis of religion. In its oversite capacity, this Committee should make sure that the United States, whether through its foreign policy or through funding programs, is not supporting policies abroad which would be inconsistent with fundamental commitments to human rights for all. The strategy of actively seeking practical concordance that will optimize the rights for all is vital. Such policies need to be pursued in ways that will advance and protect LGBTQI+ rights while reducing rather than intensifying social polarization. This can best be accomplished by finding ways that will examine the practical interests of all stakeholders. Demonstrating respect for the dignity of all involved is the best recipe for genuine progress.

CAJP/GT/RDI/INF.21/10 (November 30, 2010), p. 1, at http://scm.oas.org/IDMS/Redirectpage.aspx?class=CAJP/GT/RDI/INF&classNum=21&lang=e.

[9] *Id.* page 3, n. iii

Truth in Testimony Disclosure

In response to the 'Truth in Testimony' requirement of the House Foreign Affairs Committee Rules with respect to Testimony of Witnesses, I am submitting the following disclosure as well as the attached short biography that summarizes key elements of my full curriculum vita. The full CV can be made available on request, but is roughly fifty pages, and the short one-page document should suffice.

With respect to the required disclosure, I hereby affirm that during the past 36-months, neither I nor any entity represented by me has received any federal grant, subgrant, contract, or subcontract, or any contract, grant or payment originating with a foreign government that is related to the subject matter of the hearing or any representational capacity I have at the hearing. I am also not negotiating or awaiting approval to receive a contract with, a grant or payment from a foreign government. I am not a fiduciary of any organization or entity that has an interest in the subject matter of the hearing. I am also not an active registrant under the Foreign Agents Registration Act (FARA). I am currently retired from the position I formerly held as Director of the International Center for Law and Religion Studies at Brigham Young University and I am appearing at the hearing in my personal capacity only. This declaration and the attached short CV is incorporated in my testimony by this reference.

Respectfully submitted,

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Summary Curriculum Vita of

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A graduate of Harvard College and Harvard Law School, where he was a Note Editor of the Harvard Law Review and Managing Editor of the Harvard International Law Journal, Professor Cole Durham has been heavily involved in comparative law scholarship, with a special emphasis on comparative constitutional law. Currently he serves as President of the G20 Interfaith Forum Association. He is the immediate past President of the International Consortium for Law and Religion Studies based in Milan, Italy, and a Co-Editor-in-Chief of the Oxford Journal of Law and Religion. From 1989 to 1994, he served as the Secretary of the American Society of Comparative Law, and he is also an Associate Member of the International Academy of Comparative Law in Paris. He served as a General Rapporteur for the topic "Religion and the Secular State" at the 18th International Congress of Comparative Law held in July 2010. He has also served as Chair both of the Comparative Law Section and the Law and Religion Section of the American Association of Law Schools in earlier years. He has taught at the Brigham Young University Law School from 1976 until 2019 and was awarded the honorary designation of University Professor there in the fall of 1999. As of January 1, 2000, he was appointed to be the Director of the International Center for Law and Religion Studies at BYU and served in that capacity until May 2016. From 1994 until 2020, he has also been a Recurring Visiting Professor of Law at Central European University in Budapest, where he teaches comparative constitutional law to students from throughout Eastern Europe, and increasingly from Asia and Africa as well. He has also been a guest professor in Gutenberg University in Mainz, Germany and at the University of Vienna. In January2009, he was awarded the International First Freedom Award by the First Freedom Center in Richmond, Virginia. He was awarded an honorary doctorate by Ovidius University in Constanţa, Romania in June 2013. He is currently the President of the G20 Interfaith Forum Association.

Professor Durham has been involved in constitutional drafting projects in Nepal (2011 and 2009), Thailand (2007), and Iraq (2005-06). He has worked on constitutional and statutory drafting projects throughout Eastern Europe and in most former Soviet bloc countries. He has been particularly active in matters involving relations between religion and the state, though he also has extensive experience with comparative criminal law and non-profit law. He served from 1997 until February 2013 as a member of the OSCE/ODIHR's Advisory Council on Freedom of Religion or Belief. He serves as a board member of the International Religious Liberty Association, and of the International Advisory Board of the Oslo Coalition on Freedom of Religion or Belief. He has also been active in work on laws governing the civil society sector, having served as Chairman of the Board of the International Center for Not-for-Profit Law in Washington, D.C. (and as a member of its board for many years). Professor Durham's involvement in similar organizations globally has enabled him to play an active role in advising governments throughout the world on constitutional provisions and legislation dealing with criminal law and procedure, court structure, general constitutional issues, and the law of associations, including particularly religious associations. He has helped organize technical assistance to law reform projects and comparative law conferences in over fifty countries—typically involving academics, government officials, and other opinion leaders. This has included consultations on constitutional and law and religion issues in Albania, Argentina, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Chile, China, Croatia, the Czech Republic, Dominican Republic, Estonia, Ethiopia, France, Georgia, Hungary, Indonesia, Iraq, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Mexico, Nepal, Nigeria, Peru, Romania, Russia, Rwanda, Samoa, Serbia, Slovakia, Slovenia, Tajikistan, Thailand, Ukraine, and Vietnam. He has co-organized several conferences over the past several years in India. He has also helped organize training programs on freedom of religion or belief in China, Indonesia, Myanmar, United Kingdom (Oxford),Vietnam, and Central Asia.

In the U.S., Professor Durham has organized a series of conferences on comparative law issues at Brigham Young University and at other institutions in the United States which have brought over 1000 scholars and experts dealing with comparative constitutional law themes from over 100 countries to the United States. He is a co-author with Brett Scharffs of *Religion and the Law: National, International and Comparative Perspectives* (Aspen 2010; 2d ed. 2019), and with William Bassett, Robert Smith, and Mark Goldfeder of *Religious Organizations and the Law*, an annually updated treatise published by Thompson Reuters/West. He is the editor (with Noel Reynolds) of *Religious Liberty in Western Thought*, and (with Silvio Ferrari) *Law and Religion in Post-Communist Europe.* He is also a co-editor of *Facilitating Freedom of Religion or Belief: A Deskbook,* which was published in 2004 by Brill under the Martinus Nijhoff imprint, and *Religious Organizations in the United States*, published in 2006 by Carolina Academic Press. He is the co-editor (with Gerhard Robbers and Donlu Thayer) of the *Encyclopedia of Law and Religion* (Brill 2016). He has authored numerous law review articles dealing with religious liberty and other comparative law themes. Over the past several years, he has testified before the U.S. Congress on religious intolerance in Europe and the Religious Liberty Protection Act.