STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

TUESDAY, JUNE 10, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 3:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Chabot, Forbes, King, Gohmert, DeSantis, Smith, Cohen, Conyers, Nadler, Scott, Johnson, and Deutch.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good afternoon, ladies and gentlemen, and thank you for all being here today. Today, the Subcommittee will examine the state of religious liberty in America. This continues a tradition of this Subcommittee holding a hearing on this topic each Congress. And I will now recognize myself for 5 minutes for an opening statement.

Thomas Jefferson once said, "The constitutional freedom of religion is the most inalienable and sacred of all human rights." Religious liberty is our first freedom. It is the cornerstone of all other human freedoms. The Bill of Rights passed by the first Congress included protections for religious freedom because without religious liberty and freedom of conscience all other liberties cease to exist. Indeed, religious liberty is the wellspring of our other liberties and the defining statement of freedom in America.

This belief is something that has set America apart from all other nations since the Declaration of Independence declared nearly 240 years ago that we hold it a self-evident truth that all men are created equal.

Ladies and gentlemen, the foundational and quintessential premise of America is that we are all created children of God equal in his sight and that we are endowed by our creator with the unalienable rights of life, liberty, and the pursuit of happiness.

America's founding premise is itself an intrinsic expression of religious conviction.

Consequently, the Obama administration's flippant willingness to fundamentally abrogate America's priceless religious freedom in the name of leftist social engineering is of grave concern to me and should be to all of us.

The most egregious examples from the administration include their concerted effort to force religious minorities, like the Little Sisters of the Poor, to purchase abortifacient drugs and contraceptives. With breathtaking arrogance, this administration also told the Supreme Court 2 years ago in the Tabor case that government should have a say in deciding who could be a pastor, priest, or rabbi—in short, who could preach and teach religion. This was unanimously rejected by the Supreme Court as untenable and extreme.

This administration seems to casually ignore the historical fact that religious liberty involves much more than freedom of worship alone and that fundamental rights of free speech and the free exercise of religion do not stop at the exit door of your local house of worship, but indeed extend to every other area of life. The so-called anti-discrimination policies that make no exception for religious beliefs threaten religious liberty. For most religious groups, public service is an essential element of their religious beliefs. Religious groups in America establish hospitals, operate homeless shelters, provide counseling services, and run agencies for adoption and foster care for children who might otherwise have no one else in the world to help them.

Those who refuse to respect the public component of religious liberty and fail to accommodate religion in our generally applicable laws are putting many innocent people, as well as the religious freedom that undergirds America, in grave danger. Oftentimes religious freedom is suppressed in the name of "a strict wall of separation between church and state."

Now, while that phrase did appear prominently in the Soviet constitution, it appears nowhere in the United States Constitution, and the profound historical misrepresentation of that phrase by the secular left leaves me without adequate expression.

Some time ago a Marxist economist from China was coming to the end of a Fulbright fellowship in Boston. When asked if he had learned anything that was surprising or unexpected, without hesitation he said, "Yeah. I had no idea how critical religion is to the functioning of democracy."

Ladies and gentlemen, it bears careful reflection that many men and women have died in darkness so that Americans could walk in the light of religious freedom. They gave all they had because they knew that religious freedom is critical to the survival of all other freedoms. It is so very important for us now and always to resist this ubiquitous effort by the secular left to do away with religious freedom in America as they have successfully done in so many other parts of the world.

In America, every individual has the right to religious freedom and First Amendment expression so long as they do not deny the constitutional rights of another. True tolerance does not mean that we have no differences. It means that we are obligated as members

of the human family to be kind and respectful to each other in spite of those differences, religious or otherwise.

I would like to again thank our witnesses for being here, and I look forward to hearing from them about some of the unique challenges now facing this cornerstone of freedom in the United States. And I would now yield to the Ranking Member, Mr. Cohen, for an opening statement.

Mr. COHEN. Thank you, Mr. Chair.

Religious freedom is indeed a fundamental pillar of American life. Whatever one's religious belief, our Constitution enshrines the notion that the government remain neutral with respect to religious belief, neither favoring one religion over others, nor favoring religious beliefs over nonbelief.

Our constitutional statutes also require that the government not substantially burden the free exercise of religion absent a compelling interest and a less burdensome means of meeting that interest. In expounding upon the meaning of these constitutional provisions, Thomas Jefferson wrote in a letter to the Danbury Baptist Association in 1802, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should, 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

Jefferson was a deist who strongly believed in each man and woman, at least White men and women, or at least White men, having certain rights, and inscribed at the Jefferson monument is a saying of his that says, "I swear upon the altar of God eternal hostility over all forms of hostility over the mind of man." Indeed men should be able to practice and women practice religion, but not have any thoughts superimposed upon them.

You know, when our country started, it's a great country, but we really didn't get started on the idea that all men are created equal because we had slavery until President Lincoln in the Emancipation Proclamation and then the 13th Amendment said no more. Up to then, if you were black, you weren't created equal, and if you were a woman, you really weren't either because you didn't have a right to vote really in this country till about the 1920's. Took a long way for our country to evolve, and we are doing the same thing with religious freedom. All of these things in the Constitution, they're wonderful, but they're evolving, and we learn as things change.

Some religions might say, or people say, because of their religion, they have to have peyote on a regular basis, and you have to figure how we should deal with that. And some religions might even think that being gay is something that they should be discriminatory against and that that's an evil, but our society is evolving on people's sexual orientations, too.

Religious freedom is very fundamental and it's protected in the First Amendment of the Bill of Rights, but Jefferson talked about constitutions not being sanctimonious documents, but like a child who grows and changes his clothes with times as it gets larger and grows and matures, that constitution should change as times change and people look upon it. So we can't just say the Founding Fathers said this, and then there were 10 commandments, and

thou shalt honor thy God and mother and father and not commit adultery and not kill and all those things, just maybe a few others come along.

It is also why I was the sponsor, all these things, I was the sponsor of Tennessee's Religious Freedom Restoration Act back in January 1998, so this is nothing knew to me, when I was a senator. Like the Federal RFRA, the Tennessee RFRA protects religious liberty by ensuring that any government action that substantially burdens the free exercise of religion is prohibited unless there is a compelling state interest.

Tennessee's RFRA, like the Federal RFRA, seeks to strike a balance between the fundamental right to practice one's religion free from government interference and the ability of the government to perform its basic duties, including the protection of public health and safety and fighting discrimination. So if a religious groups says, we can't do certain things for our employees because of our religion, there has to be a compelling interest to show the difference. Or maybe something about gays.

Any discussion of religious liberty must also include a discussion of the threats, both government and nongovernmental, to members of minority religions. As Reverend Barry Lynn, one of out witnesses, notes in his written testimony, a Muslim congregation in Murfreesboro, Tennessee, faced intimidation and threats of violence from the local community when it attempted to construct a new mosque. While the mosque ultimately was built, the legal fight over its construction ended only recently at a great cost to the congregation for a fight that it should never have had to fight. And we have things in New York like that, too, with a mosque and a community center not far from 9/11.

Unfortunately, this is only one of many instances that reminds me the Bill of Rights' fundamental purpose is to protect the minority, the unpopular, and the nonmainstream from majority tyranny. When one's right to free exercise of religion ends and a majority tyranny begins will be the crux of our discussion today.

Seven years ago this Committee heard from Monica Goodling, who at the time had just resigned as the Justice Department official, I think, dealing with personnel matters, concerning hiring there during the Bush administration. Ms. Goodling was a graduate of Regent University School of Law. According to its Web site, it seeks to provide legal training "with the added benefit of a Christian perspective through which to view the law," something I don't really know what that perspective might be. What's different from a Christian perspective and a Judeo-Christian perspective or a conservative perspective or a liberal perspective or an American perspective?

But there was evidence at the time Ms. Goodling and others screened job candidates for career positions at the Justice Department based on their religious and partisan affiliations. She denied it when asked, but it stands to reason religious belief could have played a definite role in her hiring policies. A religious litmus test for public office or for career public service positions has no place in a society that values religious liberty.

More broadly, attempts to remake our Nation's longstanding political and legal culture so as to give already dominant religious

groups more of a coercive power of government must be confronted, for if such attempts are successful the outcome would present a threat to a free society and ordered liberty and a government that can fundamentally provide a system, a network of systems that protects its citizens through health and welfare and other bases.

I look forward to our discussion and appreciate the Constitution.

Mr. FRANKS. And I thank the gentleman.

And I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Franks.

Members of the Committee and our distinguished witnesses, religious freedom was one of the core principles upon which our Nation was founded. The First Amendment protects this fundamental freedom through two prohibitions: The Establishment Clause prohibits the Federal Government from issuing a law respecting the establishment of religion and the Free Exercise Clause prohibits the government from affecting the free exercise thereof. And so when discussing the government's compliance with these prohibitions, we should keep in mind several considerations.

To begin with, the real threat to religious liberty is continuing religious bias or intolerance against the members of minority religions. For example, the American Muslim communities across the United States since September 11, 2001, have been targets of often hostile communities and sometimes even government actions. There have been numerous well-founded complaints of religious profiling by Federal, State, and local law enforcement agencies. In fact, bills have been introduced in Congress as well as in various State legislatures targeting Islam. It was recently reported that the Transportation Security Agency is using a behavioral detection program that appears to focus on the race, ethnicity, and religion of passengers.

As many of you know, I represent Detroit, the home of one of America's largest Muslim communities, so I'm particularly disheartened by the overt challenges these communities face. Targeting American Muslims for scrutiny based on their religion violates the core principles of religious freedom and equal protection under the law. All Americans, regardless of their religious beliefs, should know that their government will lead the effort in fostering an open climate of understanding and cooperation.

Yet, in the name of religious freedom, we cannot undermine the government's fundamental role with respect to protecting public health and ensuring equal treatment under the law. Currently pending before the United States Supreme Court are two cases, the *Sebelius v. Hobby Lobby Stores* and *Conestoga Wood Specialties v. Sebelius*, that will hopefully clarify this issue. The issue in those cases is whether the government can require for-profit corporations that provide group health plans for their employees to provide female employees with plans that cover birth control and other contraceptive services as required by the Affordable Care Act, notwithstanding the religious objections of the corporation's owners to contraceptives.

Along with 90 of my colleagues in the House, I filed an amicus brief in these cases disputing the claim that corporate plaintiffs are persons for the purposes of the Free Exercise Clause. Corporations

are not people. And even if they are capable of having religious beliefs, these corporations aren't entitled to relief under the Religious Freedom Restoration Act. Moreover, the Affordable Care Act's mandate, we argue, serves two compelling governmental interests—namely, the protection of public health and welfare and the promotion of gender equality—that outweigh whatever attenuated burden the mandate might place on the corporation's free exercise of rights.

And finally, as even some of the majority witnesses acknowledge, the Obama administration's enforcement efforts with regard to protecting religious freedom in the workplace and elsewhere are to be commended. On various fronts, the administration, to me, has striven to take a balanced approach to this issue. For example, it added a religious employer exemption to the HHS contraceptive mandate in response to objections from religious employers. These efforts ensure that America continues to foster a safe and welcoming environment for all religious practices and communities without sacrificing our other freedoms and needs.

And I thank the Chair for allowing me to conclude this statement. I yield back.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Chairman of the Judiciary Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

The religion clauses of the First Amendment of the United States Constitution state, "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof." Since the birth of our Nation, the central question regarding the religious liberty has been the degree to which religion and government can coexist.

Indeed, the Founding Fathers feared the effect of government on the free exercise of religion. In a letter dated June 12, 1812, to Benjamin Rush, John Adams stated that "nothing is more dreaded than the national government meddling with religion." This dread has resurfaced amidst the current administration's policies that ignore and are often hostile to the religious protections afforded by our Constitution.

Many regulations fail to accommodate Americans' religious beliefs. Others seek to single out religion for adverse treatment. From the HHS mandate to the infringement on the freedom of churches and other religious groups to choose their ministers, Americans' religious liberties seem to be under constant attack today.

In an effort to reaffirm the protections provided by the First Amendment, I supported the bipartisan effort to pass the Religious Freedom Restoration Act. The Federal Government must provide religious accommodation in our laws, and any laws passed that infringe upon religious freedom must be subject to the strictest scrutiny in our courts. My hope today is that this hearing will explore whether our Federal Government is complying with the constitutional and statutory protections afforded to all faiths.

And while religious liberty remains threatened, I am nevertheless encouraged by recent Supreme Court decisions that safeguard it. Last month, for example, the Supreme Court upheld legislative prayer in the May 5, 2014 decision *Town of Greece v. Galloway*.

The court held that a municipality did not violate the establishment clause when it opened its meetings with prayer consistent with the traditions of the United States. I am glad that the long-held tradition of prayer remains ever strong in our State and local governments, as well as in Congress.

In 2012, the Justices of the Supreme Court unanimously rejected the Federal Government's argument in Hosanna-Tabor. Astonishingly, the administration's lawyers argued in that case that the First Amendment had little application to the employment relationship between a church and its ministers. The court stated that requiring a church to accept or retain an unwanted minister or punishing a church for failing to do so intrudes upon more than a mere employment decision. The court described the administration lawyer's position as extreme. I hope that the Supreme Court will continue to protect religious liberty in the future, including later this month when it issues its opinion in the HHS mandate case.

I want to thank all of our witnesses for coming today to testify, and I extend a special welcome to a constituent of mine, Mat Staver, who is coming from Lynchburg, Virginia, today to testify. As a founding member and chairman of Liberty Counsel, Mat is a passionate defender of the Constitution and religious liberty. He is also working to educate future legal minds as dean of Liberty University's law school.

Welcome, Mat. I look forward to your testimony today and to that of all of our witnesses.

And, Mr. Chairman, thank you, and I yield back my time.

Mr. FRANKS. And I thank the gentleman.

And without objections, other Members' opening statements will be made part of the record.

I will now introduce our witnesses. Our first witness is Mathew Staver, dean of Liberty University School of Law. In 1989, Dean Staver became the founder, president, and general counsel of Liberty Counsel and currently serves as chairman of the board. Dean Staver has authored more than 10 books, written several hundred articles on religious freedom and constitutional law, and has published 10 law review and journal articles. In addition to writing numerous appellate briefs, he has argued twice before the United States Supreme Court.

And welcome, Mr. Staver.

Our second witness is Kim Colby, senior counsel for the Christian Legal Society's Center for Law and Religious Freedom, where she worked for over 30 years to protect students' rights to meet for religious speech on college campuses. Ms. Colby has represented religious groups in several appellate cases, including two cases heard by the United States Supreme Court. She has filed numerous amicus briefs in State and Federal courts.

And we welcome you, Ms. Colby.

Our third witness is Reverend Barry Lynn, executive director of Americans United for Separation of Church and State. In addition to his work as an activist and lawyer in the civil liberties field, Reverend Lynn is an ordained minister in the United Church of Christ. He appears frequently on television and radio broadcasts to discuss religious liberty issues. He has had essays published in outlets such as USA Today and The Wall Street Journal. In 2006, he

authored the book "Piety & Politics: The Right-Wing Assault on Religious Freedom."

And we welcome you, sir.

Our fourth witness is Greg Baylor, senior counsel with Alliance Defending Freedom. Mr. Baylor litigates cases to protect the rights of religious students, faculty, and staff at public colleges and universities across the Nation. Prior to joining Alliance Defending Freedom in 2009, he served as director with the Christian Legal Society Center for Law and Religious Freedom, where he defended religious liberty since 1994.

And we welcome you, sir.

Now, each of the witnesses' written statements will be entered into the record in its entirety, and I would ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you will please stand.

[Witnesses sworn.]

Mr. FRANKS. Please be seated.

Let the record reflect that the witnesses answered in the affirmative. And I would now recognize our first witness, Mr. Staver.

Please, sir, turn on your microphone before beginning.

TESTIMONY OF MATHEW STAVER, DEAN AND PROFESSOR OF LAW, LIBERTY UNIVERSITY SCHOOL OF LAW, FOUNDER AND CHAIRMAN, LIBERTY COUNSEL, AND CHAIRMAN, LIBERTY COUNSEL ACTION

Mr. STAVER. Thank you, Congressman Franks, Members of the Committee, and it's a pleasure to be here with my own Member of Congress, Congressman Goodlatte. Thank you for inviting me and for this important topic that we're going to be discussing.

The threat to religious freedom has reached unprecedented levels. It has reached a point where religious freedom is now being coerced to go against the core values of those who hold these sincerely held religious beliefs. My testimony will focus on two primary issues where the threat has reached a critical point. These involve conflicts between religious freedom and, number one, the sanctity of human life and, number two, human sexuality and marriage.

The Obamacare law that was passed in 2010 has a direct collision with religious freedom of unprecedented levels, both with regards to the rights of business owners in the HHS mandate that was promulgated under it and with regards to the individual mandate as well. Religious freedom with regards to licensed mental health counselors, minors, and their parents are also under unprecedented assault. In two states, California and New Jersey, laws have been passed that prohibit counselors from offering and minor clients and the parents from receiving any counsel whatsoever that would seek to reduce or eliminate same-sex sexual attractions, behavior, or identity.

The freedom of religious business owners with regards to their rights and operations are also under a threat with regards to the issues of marriage and human sexuality. First with regards to Obamacare. Liberty Counsel filed the first private lawsuit against Obamacare on behalf of Liberty University and some private individuals on the same day that it was signed into law by President Obama. In this particular lawsuit, we claim a violation of religious freedom under the First Amendment and the Religious Freedom Restoration Act.

There are two different violation under that. First of all, there is the individual mandate that doesn't get a lot of press, but under section 1303, individuals who are either in an exchange or in any insurance that offer any kind of elective abortion are forced to provide a separate payment in addition to their premium that goes into a segregated fund, the purpose of which is only to fund abortion. This breaks precedent with longstanding congressional Federal policy with regards to Federal funding or any other kind of funding of abortion.

The other is with regards to the employer mandate. Under the minimum essential coverage, the HHS mandate decided that, as part of that, employers were to be providing not only contraception, but abortifacients and abortion-inducing drugs and devices. With regards to Liberty University, Hobby Lobby, Conestoga Woods, or Little Sisters of the Poor, whoever it might be, failure to abide by that violation of their belief that God is the creator and that life begins at conception and therefore they are forced to take innocent human life would result in a penalty of $2,500 per employee per year. But in addition to that, under the Department of Labor, those fines go up to $15,000 per employee per day. It is designed to literally crush an employer who disagrees with that abortion drug and device mandate.

With regards to the other challenges involving human sexuality and marriage, in California, the first State to pass a law of unprecedented magnitude, even said so by the California counseling associations, is that no counselor or client may receive or offer any counsel whatsoever, under any circumstances, to reduce or eliminate unwanted same-sex attractions, behavior, or identity. That goes against the individual client's right of self-autonomy. No other area of counseling has been affected by this.

After California filed that particular bill and it was passed, New Jersey also passed a similar law. Both of those are currently in litigation. But this cuts to the very core of what a counselor is able to provide a client seeking information and what a client is able to receive. It's unprecedented because there's no other area of counseling that falls anywhere in that kind of restrictive mandate.

In addition to the issues of the counseling associations and the individuals who are affected by it, there are also situations involving marriage and the human sexuality laws. In New Mexico we know of the case—obviously, that has been recently denied cert by the United States Supreme Court—involving the wedding photographer. That particular individual is not discriminating against anyone because of their sexual orientation. In fact, clearly said so. What she does say is that she does not want to participate in an event. She doesn't discriminate against people because they're cau-

casian, but if they put on a robe and start involving a KKK rally, she doesn't want to participate in photographing that event because it collides with her religious beliefs. But in this particular case, she is forced to either give up her wedding business or collide with her religious beliefs. That and many other instances can be listed ad nauseam with regards to the unprecedented clashes that we're facing today with respect to religious freedom.

Thank your for addressing this issue. Religious freedom is our first freedom. It's a freedom, I think, that is critically under assault.

[The prepared statement of Mr. Staver follows:]

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TESTIMONY OF MATHEW STAVER
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The threat to religious freedom has reached unprecedented levels. These threats are more significant and severe than at any time in recent history. My testimony will focus on two areas where this threat has reached a critical point. These involve conflicts between religious freedom and (1) the sanctity of human life, and (2) human sexuality and natural marriage.

The First Amendment protects the rights of every individual to enjoy the free exercise of religion and to be protected against discrimination because of their sincerely held religious beliefs. Unfortunately, in today's culture, the fundamental right to live according to the dictates of one's conscience and sincerely held religious beliefs is slowly being eroded. The Patient Protection and Affordable Care Act ("ObamaCare"), combined with the regulations promulgated in support of it, have introduced an unprecedented intrusion into the rights of businesses and organizations to operate consistent with the sincerely held religious beliefs of their owners and officers that life is a gift from the Creator and that providing anything to employees that would

destroy life is immoral and inconsistent with Scripture. The same is true of individuals under the individual mandate.

The religious freedom of licensed mental health professionals, minors, and their parents are also under unprecedented assault. Homosexual activists have attempted to enact laws throughout the country that would silence mental health professionals from expressing the truth that an individual can successfully reduce or eliminate unwanted same-sex attractions, behaviors, or identity and live consistent with their sincerely held religious beliefs concerning human sexuality. Those efforts are nothing more than an attempt to censor any viewpoint concerning Scriptural teaching on human sexuality, and they represent one of the greatest assaults on children and families that has arisen in recent times. Parents have a fundamental right to direct the upbringing and education of their children, consistent with their sincerely held religious beliefs, and these efforts are an affront to that fundamental relationship and an assault on religious freedom.

The freedom of religious business owners and organizations is also under unprecedented assault as a result of same-sex marriage, sexual orientation, and gender identity laws spread throughout the country. There are numerous challenges to states' constitutional amendments and statutes defining marriage as the union of one man and one woman. Judges have been tripping over one another to ignore the rule of law and the will of the people to invalidate the institution of marriage and silence any opposition to their ideology. The destruction of the institution of marriage is not only harmful to society at large, but it has resulted in unprecedented intrusion into the religious freedoms of individuals and businesses that have been attacked for operating their business according to the dictates of their conscience.

SUMMARY OF LIBERTY UNIVERSITY'S CHALLENGE TO OBAMACARE

Liberty Counsel filed the first private party challenge to the Patient Protection and Affordable Care Act on the date that it was signed into law, March 23, 2010. The Complaint was filed on behalf of Liberty University and various individuals and sought declaratory and injunctive relief under 42 U.S.C. §1983. Liberty Counsel alleged, *inter alia*, that the individual and employer mandates exceed Congress's delegated powers under Article I, §8 of the Constitution, including the Commerce Clause and Taxing and Spending Clause, and violate free exercise rights under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b) ("RFRA"), free speech and free association rights under the First Amendment, the Establishment Clause, the Fifth Amendment Equal Protection Clause, the Tenth Amendment, the Guarantee Clause, and other provisions against direct or capitation taxes.

The district court dismissed the Complaint on the grounds that Petitioners failed to state a claim upon which relief could be granted. *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010). In its initial consideration, the three-judge panel of the Fourth Circuit, consisting of two appointees or President Obama and one appointee of President Clinton, did not reach the merits because it concluded that the Anti–Injunction Act ("AIA") deprived the court of jurisdiction. *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011). Petitioners filed a Petition for Writ of Certiorari to the Supreme Court of the United States on the issue of whether the AIA applied to Petitioners' claims. The Court held the Petition and directed that the AIA argument in the Liberty University case be included in its consideration of other ObamaCare challenges, which were decided in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

In *NFIB*, the Supreme Court found that the AIA did not bar a challenge to the individual mandate, thereby abrogating the Fourth Circuit's decision. 132 S. Ct. at 2584. The Court initially denied Petitioners' Petition for a Writ of Certiorari but then granted Petitioners' Petition for Rehearing, granted the Petition, vacated the Fourth Circuit's decision, and remanded the case for further consideration in light of *NFIB*. *Liberty University v. Geithner*, 133 S. Ct. at 679.

On remand, the Fourth Circuit ordered supplemental briefing on (1) Whether the AIA bars a challenge to the employer mandate; (2) Whether the employer mandate exceeds Congress's powers under the Commerce, Necessary and Proper, and Taxing and Spending Clauses; and (3) Whether and how any developments since the previous briefing in this case may affect the constitutionality of the individual mandate and the employer mandate under the Free Exercise, Establishment, and Equal Protection Clauses. *Liberty University v. Lew*, 733 F.3d 72 (4th Cir. 2013).

Following briefing and oral argument, the Fourth Circuit found that the AIA did not bar review, that the individual and employer Petitioners had standing, and that the case was ripe for adjudication. The Fourth Circuit held that the Employer Mandate is a permissible exercise of Congress's Commerce Clause authority. The Fourth Circuit also found that the Employer Mandate is a permissible exercise of Congress's authority under the Taxing and Spending Clause. The Fourth Circuit dismissed Petitioners' Free Exercise challenge to both the individual and employer mandates, finding that the Act is a neutral law of general applicability that does not violate the Free Exercise Clause. Finally, the Fourth Circuit concluded that the individual and employer mandates did not impose a substantial burden upon Petitioners' exercise of religion in violation of RFRA. In dismissing the Free Exercise and RFRA claims, the Fourth Circuit

rejected Petitioners' request to consider the mandates as they existed at the time of remand, which included implementing regulations defining minimum essential coverage under the mandates to require free access to contraceptives, including abortion-inducing drugs and devices.

OBAMACARE AND RELIGIOUS FREEDOM

ObamaCare threatens religious liberty in a number of aspects in both the individual and employer mandates.

Religious "Conscience" Exemptions

The initial religious liberty issue is in the provisions that define who is subject to the individual mandate, 26 U.S.C. §5000A. Subsection (d) exempts two groups of people from the individual insurance mandate under "religious exemptions": (1) Individuals who are members or adherents of "recognized religious sects" under 26 U.S.C. §1402(g)(1); (2) Individuals who are members of "healthcare sharing ministries," defined as nonprofit organizations in existence since December 31, 1999, comprised of members who share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed, who retain membership even after they develop a medical condition.

These exemptions provide preferential treatment to those who have certain religious beliefs, while leaving those who do not adhere to those beliefs subject to the insurance mandate. The Supreme Court has established that the government cannot favor one set of religious beliefs over another or favor religion over irreligion.

The Abortion Premium Mandate

An abortion premium mandate originated in Section 1303 of the Affordable Care Act, as codified at 42 U.S.C. § 18023, and has been subsequently implemented in regulations governing Exchanges that were finalized on March 27, 2012.

The accounting scheme laid out in the provisions of Section 1303 was devised to overcome the political hurdle of "taxpayer subsidized abortion." This became necessary because the ACA allowed health plans to provide elective abortion coverage within the government-subsidized Exchanges, contrary to former federal policy. The ACA breaks with the consistent federal policy since 1996 of prohibiting coverage for elective abortion in subsidized plans offered through the Federal Employees Health Benefits Plan, military insurance through TRICARE, or Indian Health Services.[1] Section 1303 became known as the "Nelson Compromise" because it arose out of an attempt by Senator Ben Nelson, a pro-life Democrat, to find language that would "make it clear that [the healthcare bill] does not fund abortion with government money." Section 1303 provides:

> In plans that do provide non-excepted [elective] abortion coverage, a separate payment for non-excepted [elective] abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted [elective] abortion services. Insurers are prohibited from using funds attributable to premium tax credits or [federal] cost-sharing reductions . . . to pay for non-excepted [elective] abortion services.

ACA, § 1303(b)(2)(B), (C). The implementing regulations for Section 1303 provide that each enrollee in Exchange plans that happen to include abortion coverage is mandated to make "a

[1] Ernest Istook, The Real Status Quo on Abortion and Federal Insurance, The Heritage Foundation (November 11, 2009), available at http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/

separate payment" from his own personal funds or payroll deduction directly into an allocation account to be "used exclusively to pay for" other people's elective surgical abortion. 45 CFR §156.280(e) (implementing ACA, Section 1303(b)(2)(B), as codified at 42 U.S.C. § 18023). This abortion premium mandate applies "without regard to the enrollee's age, sex, or family status," 45 CFR § 156.280(e)(2)(i), and with no exemption for enrollees who consider the practice and direct funding of surgical abortion to be a grave moral evil.

An additional provision creates a "land mine" for those who object to paying for abortions, in that the ACA and its implementing regulations effectively instruct insurers to conceal elective abortion coverage and the separate abortion premium. Section (f)(1) of 45 CFR §156.280 provides that notice about a plan's inclusion of elective abortion coverage be disclosed, not in Exchange advertising, but rather "only . . . at the time of enrollment." Further, section (f)(2) prohibits issuers from disclosing the separate elective abortion premium in Exchange advertisements, and even in the summary of benefits provided at enrollment. Rather, it requires that the issuer must provide notice "only with respect to the total amount of the combined payments" of regular premiums and the abortion premium. The "secrecy clause" reads as follows:

> (f) Rules relating to notice.
>
> (1) Notice. A QHP [qualified health plan] that provides for coverage of services in paragraph (d)(1) of this section [elective abortion], must provide a notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage.
>
> (2) Rules relating to payments. The notice described in subparagraph (f)(1) of this section, any advertising used by the QHP issuer with respect to the QHP, any information provided by the Exchange, and any other information specified by HHS must provide information only with respect to the total amount of the

> combined payments for services described in paragraph (d)(1) of this section [elective abortion] and other services covered by the QHP.

45 C.F.R. § 156.280(f), 77 Fed. Reg. 18472-73.

Consequently, those whose religious beliefs prohibit them from facilitating, subsidizing or otherwise participating in abortions cannot ensure that their religious beliefs are protected.

Minimum Essential Coverage

Other religious liberty issues arise from the definition of the "minimum essential coverage" that is required in order for health insurance to qualify as an approved health plan under the individual or employer mandates. A policy must cover "essential health benefits," which were defined in the Act generally to include, "at a minimum," coverage for emergency treatment, prescriptions, mental health care, laboratory, maternity care, pediatric care, and no-cost preventive care services, immunizations, and screenings for infants, children, adolescents and women as described in guidelines supported by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. §18022(b); 42 U.S.C. §300gg-13.

"Preventive Care" Coverage

The Act vested the Secretary of Health and Human Services ("HHS") with discretion to further define "preventive care" under 42 U.S.C. §18022(b). HHS adopted regulations defining no-cost "preventive care" for women, 45 CFR §147.130, to encompass all FDA-approved "contraceptive" drugs and devices, which include abortion-inducing drugs and devices. HHS directed the Institute of Medicine ("IOM") to draft recommendations for the preventive coverage mandate. "Preventive health services for women" were defined as measures "shown to improve wellbeing, and/or decrease the likelihood or delay the onset of a targeted disease or condition."

IOM recommended that these measures include free "contraceptive" coverage, testing for sexually transmitted diseases, and screening and counseling for domestic violence. "Contraceptive coverage" ("Preventive coverage" or "Preventive mandate") includes contraceptive medication, sterilization, abortion-inducing drugs (referred to herein as abortifacients, which include the so-called "emergency" or "morning after" drugs), and intra-uterine devices ("IUDs"). Abortifacients and IUDs often cause abortion and are not merely contraceptives.

HRSA incorporated the IOM recommendations into its "comprehensive guidelines" on women's preventive coverage in 42 U.S.C. §300gg-13(4). Those guidelines require that health insurance policies must include, *inter alia*, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" in order to qualify as "minimum essential coverage" necessary to satisfy the individual and employer mandates. FDA-approved "contraception" includes so-called "emergency contraception," Levonorgestrel, also known as "Plan B" or the "morning after pill," and Ulipristal acetate, also known as "Ella" or the "week after" pill,[2] both of which often act as abortifacients by terminating the life of a pre-born child.[3] During hearings regarding FDA approval for Ulipristal, medical professionals presented evidence that "Ulipristal

[2] FDA Office of Women's Health Birth Control Guide, available at http://www.fda.gov/birthcontrol (last visited June 8, 2014).

[3] American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), Comment to Docket No. FDA–2010–N–0001Advisory Committee for Reproductive Health Drugs; Notice of Meeting Ulipristal acetate tablets, (NDA) 22–474, Laboratoire HRA Pharma. (June 2, 2010), *available at* http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf (last visited June 8, 2014).

acetate is an abortifacient of the same type as mifepristone ("RU-486") and that its approval as an emergency contraceptive raises serious health and ethical issues."[4]

> There is no doubt that Ulipristal acts as an abortifacient because the drug blocks progesterone receptors at three critical areas. These blocking capabilities form the basis of its embryocidal abortifacient mechanism. That mechanism is identical to the action of RU-486 in early pregnancy.[5]

The FDA guide to "contraceptives" states that "Plan B" and "Ella" prevent "attachment (implantation) [of the embryo] to the womb (uterus)."[6] FDA-approved "contraceptives" also include IUDs, which similarly prevent implantation of embryos and thereby terminate human life, and surgical sterilization.[7] Several religiously based organizations notified the HHS that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom."[8] The Administration responded by granting HRSA discretion to consider a religious employer exemption, saying "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate." The Administration specified that it only wanted "to provide for a religious accommodation that respects the unique relationship between a house of worship and

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[4] *Id.*

[5] *Id.*

[6] FDA Birth Control Guide at 16-17, http://www.fda.gov/birthcontrol (last visited June 8, 2014).

[7] *Id.* at 18-19.

[8] *See, e.g.*, Letter from General Counsel, U.S. Conference of Catholic Bishops to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (August 31, 2011), stating that the proposal violates the First Amendment and RFRA, available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf.

its employees in ministerial positions." The amendment provided only that HRSA "may establish exemptions" from the contraceptive mandate for "religious employers." "Religious employers" was initially defined as those whom HRSA determined met all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; and (4) The organization is a nonprofit church, integrated auxiliary, convention or association of churches or a religious order.

Faith-based organizations informed the Administration that the August 2011 exemption did not resolve the violations of right of conscience contained within the Preventive mandate. In response, the Administration postponed implementation of the Preventive mandate by creating a narrowly defined one-year "temporary enforcement safe harbor" for nonprofit organizations that had religious objections to contraceptives and abortifacients but did not fall within the "religious employer" exemption. 77 Fed. Reg. 8,725, 8,728 (February 15, 2012). The Administration represented that the safe harbor would be used to develop alternative accommodations for nonprofit organizations that do not meet the religious employer exemption and object to providing Preventive mandate services. Meanwhile, President Obama emphasized that any new accommodation must retain the provision of free contraceptives (and abortifacients) and that insurance companies would be required to cover contraceptives (and abortifacients) if the religious organization objected.

The final HHS regulations modify the "religious employer" exemption to remove the first three requirements so that an exemption is available to "a nonprofit church, integrated auxiliary,

convention or association of churches or a religious order." *Id.* at 8,474. No further exemptions are available, but there is an "accommodation" for "eligible organizations." An "eligible organization" is defined as a nonprofit organization that "holds itself out as a religious organization" and opposes providing some or all of the services under the Preventive mandate. *Id.* Organizations covered by an insurance carrier would allegedly not have to directly pay for the objectionable products. *Id.* at 8,475. The organization would notify its insurance carrier that it objects to paying for certain contraceptive or abortifacient coverage. *Id.* The insurer would then be required to "automatically provide health insurance coverage" for the objectionable services through a separate insurance policy without cost to employees. *Id.* According to the proposal, the issuer of the separate policy could not directly or indirectly charge a fee or premium to the non profit organization for the objectionable contraceptive or abortifacient services. *Id.* For these organizations, which are not self-insured, the Administration proposes that the cost of the separate contraceptive/abortifacient policy would be paid for through reductions in the fees the insurer would pay to government insurance exchanges. *Id.*

The Administration has not offered a final proposal for self-insured organizations, such as Liberty University, regarding how the third party coverage would be funded. *Id.* at 8,474. Instead, the Administration offered possible scenarios, each involving some sort of federal fee offset for a third party administrator providing separate contraceptive or abortifacient coverage, and asked for public comments for other approaches. *Id.* at 8,463-8,464. The Administration had no proposal for how self-insured, nonprofit organizations without third party administrators will be able to comply with providing free contraceptives or abortifacients without incurring costs themselves. *Id.* at 8,464. The contraceptives and abortifacients cost something, and someone has

to pay. The Administration says that the person receiving the drugs is not to pay, but also says that the employer who objects to providing such products will "not be required to contract, arrange, pay, or refer for contraceptive coverage." *Id.* at 8,463. It remains to be seen how that will be accomplished.

Challenges to the Preventive Care Mandate

The substantial burden posed on religious free exercise has sparked a firestorm of litigation. More than 100 lawsuits, representing over 300 plaintiffs including hospitals, universities, businesses, schools, and individuals, have been filed in federal courts throughout the country.

Two of those cases, *Conestoga Wood Specialties Corp v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. 2013), and *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) are now pending before the United States Supreme Court after conflicting rulings from the Third Circuit, which denied an injunction against the Preventive Care Mandate, and the Tenth Circuit, which granted an injunction.

Fifty-nine preliminary injunctions have been granted. Preliminary Injunctions have been denied in eight cases. Twenty-one cases have been dismissed.

The other cases challenging the Preventive Care Mandate as violative of religious liberty, in alphabetical order, include:

American Family Assn. v. Sebelius, Northern District of Mississippi Case No. 13-cv-00032, Voluntarily dismissed July 19, 2013

Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) Preliminary Injunction granted

Annex Medical, Inc. v. Sebelius, 2013 WL 1276025 (8th Cir. 2013) Granting Injunction pending appeal

Archdiocese of Miami v. Sebelius, SD of Fla. Case No. 12-cv-23820 Motion to Dismiss granted.

Archdiocese of St. Louis v. Sebelius, 920 F. Supp. 2d 1018 (E.D. Mo. 2013) Granting Motion to Dismiss

Armstrong v. Sebelius, District of Colorado Case No. 13-cv-00563 Preliminary Injunction Granted September 17, 2013.

Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) Affirming denial of Preliminary Injunction. Petition for Writ of Certiorari filed Oct. 15, 2013.

Ave Maria University v. Sebelius, M.D. Fla. Case No. 13-cv-630, stayed pending Supreme Court decision in *Hobby Lobby and Conestoga Woods*

Barron Industries, Inc. v. Sebelius, D.C. District Court Case No. 13-CV-1330, Unopposed PI motion granted September 25, 2013

Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013) Granting Preliminary Injunction

Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 (D.D.C. 2012) dismissing case, appeal held in abeyance, 703 F.3d 551 (D.C. Cir. 2012)

Bick Holdings, Inc. v. Sebelius, E.D. of Missouri Case No. 13-cv-00462, Unopposed Motion for Preliminary Injunction and Stay granted April 1, 2013

Bindon (Trijicon) v. Sebelius, Dist. of D.C. Case No. 13-cv-1207-EGS, Unopposed Motion Preliminary Injunction granted August 14, 2013

Briscoe v. Sebelius, 2013 WL 4781711 (D. Colo. Sept. 6, 2013) Granting Preliminary Injunction

Catholic Diocese of Biloxi, Inc., v. Sebelius, S.D. Mississippi No. 12–158 Motion to Dismiss Granted Dec. 26, 2012

Catholic Diocese of Nashville v. Sebelius, Injunction Pending Appeal Granted by Sixth Circuit on Dec. 31, 2013

Catholic Diocese of Peoria v. Sebelius, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013) Granting Motion to Dismiss

College of the Ozarks v. Sebelius, WD Mo., Case No. 12-cv-03428 Voluntarily dismissed without prejudice January 14, 2013.

Colorado Christian Univ. v. Sebelius, 2013 WL 93188 (D. Colo. Jan. 7, 2013) Granting Motion to Dismiss; Complaint renewed August 7, 2013

Conlon (Diocese of Joliet) v. Sebelius, 923 F. Supp. 2d 1126 (N.D. Ill. 2013) Granting Motion to Dismiss

The Criswell College v. Sebelius, N.D. of Texas Case No. 12-cv-04409 Granting Motion to Dismiss April 9, 2013

Diocese of Fort Wayne v. Sebelius, ND Ind. Case No. 12-cv-00159 Preliminary Injunction Granted Dec. 27, 2013

East Texas Baptist University and Houston Baptist University v. Sebelius, S.D. Texas, Case No. 12-cv-03009; Preliminary Injunction Granted Dec. 27, 2013

Eden Foods, Inc. v. Sebelius, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013) Denying TRO; Petition for Writ of Certiorari filed Nov. 13, 2013

Eternal Word Television Network, Inc. v. Sebelius, 935 F. Supp. 2d 1196 (N.D. Ala. 2013) Motion to Dismiss Granted; Complaint renewed Oct. 28, 2013

Franciscan Univ. of Steubenville v. Sebelius, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) Granting Motion to Dismiss.

Geneva College. v. Sebelius, 2013 WL 3071481 (W.D. Pa. June 18, 2013) Granting Preliminary Injunction

Gilardi v. Sebelius, 926 F. Supp. 2d 273 (D.D.C. 2013) Denying Preliminary Injunction; affirmed in part and reversed in part 733 F.3d 1208 (D.C. Cir. 2013)

Grace Schools v. Sebelius, N.D. Ind. Case No. 12-cv-459 Amended Complaint filed September 6, 2013; Preliminary Injunction granted Dec. 2013

Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) Granting Injunction pending appeal

Hall v. Sebelius, District Court of Minnesota Case No. 13-0295, Unopposed Motion for Preliminary Injunction granted April 20, 2013

Hart Electric v. Dep't of Health and Human Servs., N.D. Ill. Case No. 13-cv-00253, Unopposed Motion for Preliminary Injunction granted April 18, 2013

Holland v. Dep't of Health & Human Servs., S.D. of W.V. filed June 24, 2013, Amended Complaint filed July 26, 2013, Motion to dismiss pending; stayed pending *Hobby Lobby* decision.

Infrastructure Alternatives v. Sebelius, W.D. of Michigan Case No. 13-cv-31 filed January 10, 2013 Dismissed Sept. 30, 3013

Johnson Welded Products, Inc. v. Sebelius, D.C. District Case No. 13-cv-00609 Unopposed Motion for Preliminary Injunction granted May 24, 2013

Korte v. Sebelius, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) Granting injunction pending appeal

Legatus (Weingartz) v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) Granting injunction to individual plaintiffs and denying injunction to corporate plaintiff.

Lindsay v. Dep't of Health and Human Servs., Northern District of Illinois Case No. 13 C 1210, Agreed Preliminary Injunction entered March 20, 2013

Little Sisters of the Poor v. Sebelius, Colo Dist. Case No. 13-cv-02611 filed September 24, 2013; Supreme Court granted Injunction Pending Appeal Dec. 31, 2013

Louisiana Coll. v. Sebelius, 2012 WL 3061500 (W.D. La. July 26, 2012) Denying as moot Motion to Dismiss following amendment of complaint. Being held in abeyance.

M&N Plastics v. Sebelius, E.D of Michigan Case No. 13-cv-12036, filed May 8, 2013, Voluntarily dismissed May 24, 2013

Mersino Mgmt. Co. v. Sebelius, 2013 WL 3546702 (E.D. Mich. July 11, 2013) Denying Preliminary Injunction

Midwest Fastener, Corporation v. Sebelius, D.C. District Court No. 13-cv-01337, filed September 5, 2013; Preliminary Injunction granted Oct. 16, 2013

MK Chambers Co. v. Dep't of Health & Human Servs., 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013) Denying Preliminary Injunction

Monaghan v. Sebelius, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) Granting Preliminary Injunction

Nebraska ex rel. Bruning v. U.S. Dep't of Health & Human Servs., 877 F. Supp. 2d 777 (D. Neb. 2012) Granting Motion to Dismiss

Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) Granting Preliminary Injunction; decision affirmed 542 F. App'x 706 (10th Cir. 2013)

O'Brien v. HHS, 894 F. Supp. 2d 1149 (E.D. Mo.2012), Denying Preliminary Injunction Eighth Circuit No. 12-3357 oral argument October 24, 2013, awaiting decision, stay pending appeal granted Nov. 28, 2013

Ozinga v. Dep't. of Health and Human Servs., N.D. of Illinois Case No. 13-cv-3292, Unopposed Motion for Preliminary Junction granted July 16, 2013.

Persico (Diocese of Erie) v. Sebelius, Preliminary Injunction granted Nov. 21, 2013

Priests for Life v. Dep't. of Health and Human Servs. D.C. District court Case No. 13-cv-01261 filed August 19, 2013; Injunction Pending Appeal granted Dec. 31, 2013

The QC Group, Inc. v. Sebelius, District of Minnesota Case No. 13-1726, Second Amended Preliminary Injunction entered on September 10, 2013

Roman Catholic Diocese of Dallas v. Sebelius, 927 F. Supp. 2d 406 (N.D. Tex. 2013) Granting in part and denying in part Motion to Dismiss

Roman Catholic Diocese of Fort Worth v. Sebelius, N.D, Texas Case No 12-cv-00314 Amended Complaint filed August 22, 2013; Preliminary Injunction granted Dec. 30, 2013

Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310 (E.D.N.Y. 2012) Granting in part and denying in part Motion to Dismiss

Roman Catholic Archbishop of Washington v. Sebelius, 2013 WL 3357814 (D.C. Cir. June 21, 2013) Holding appeal in abeyance.

Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); Preliminary Injunction granted June 28, 2013

Sioux Chief Manufacturing Co. v. Sebelius, W.D. of Missouri Case No. 3-0036-CV-W-ODS, Unopposed Motion for Preliminary Injunction granted February 28, 2013.

SMA LLC v. Sebelius, Minnesota District Court Case No. 13-CV-01375, Unopposed Motion for Preliminary Injunction granted July 8, 2013.

Southern Nazarene University v. Sebelius, W.D Okla. Filed September 20, 2013; Preliminary Injunction granted Dec. 23, 2013

Tonn and Blank Construction, LLC v. Sebelius, N.D of Indiana, Case No. 1:12-CV-325 JD, Agreed Preliminary Injunction entered April 1, 2013

Triune Health Group, Inc., v. U.S. Dep't of Health & Human Servs., N.D. Ill. Case No. 12 C 6756 Preliminary Injunction granted January 3, 2013.

Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012) Preliminary Injunction granted, appeal dismissed, 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013)

Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (affirmed denial of Preliminary Injunction)

Wheaton Coll. v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012) Appeals held in abeyance

Wieland v. Dep't of Health and Human Servs. E.D. of Mo. Case No. 13-cv-01577, filed August 14, 2013; case dismissed Oct. 16, 2013

Willis Law v. Sebelius, D.C. District Case No. 13-01124. Unopposed PI motion granted August 23, 2013.

Zubik v. Sebelius (*Roman Catholic Diocese of Pittsburgh*), 911 F. Supp. 2d 314 (W.D. Pa. 2012) Granting Motion to Dismiss

SUMMARY OF LIBERTY COUNSEL'S CHALLENGES TO SEXUAL ORIENTATION THERAPY BANS THROUGHOUT THE COUNTRY

Liberty Counsel has been at the forefront of the challenge to the homosexual activists' attempts to silence licensed mental health counselors who offer counseling on same-sex sexual attractions and behaviors from a religious perspective and address the client's sincerely held religious beliefs in that counseling. Homosexual activists throughout the country have been advocating for bans on so-called sexual orientation change efforts counseling ("SOCE"), and homosexual legislators have been introducing them in numerous state houses. Only two of those bans have successfully passed, California and New Jersey, and Liberty Counsel has led the charge to defeat these grossly unconstitutional laws. In both states, Liberty Counsel brought federal lawsuits against these SOCE prohibitions, alleging that they violate the First Amendment rights of counselors to provide and minors to receive SOCE counseling, the First Amendment

free exercise rights of the minor clients and their parents, and the First and Fourteenth Amendment rights of the parents to direct the upbringing and education of their children.

In California, Liberty Counsel filed suit on behalf of the American Association of Christian Counselors, the National Association for Research and Therapy of Homosexuality, two psychologists, two licensed marriage and family therapists, two minors currently receiving the counseling, and their parents challenging California Senate Bill 1172 ("SB1172"). SB1172 would compel mental health professionals, their minor clients, and their parents to terminate ongoing beneficial counseling or risk loss of professional licenses. One of the licensed professional counselors is a former homosexual who received SOCE counseling and was successfully able to eliminate his unwanted same-sex attractions. SB1172 requires that mental health professionals either violate their obligation to do no harm by withdrawing beneficial treatment or violate the law and face disciplinary action that places their livelihoods at risk.

The district court denied Liberty Counsel's motion for a preliminary injunction against SB1172. *See Pickup, et al. v. Brown, et al.*, No. 2:12-CV-02497, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012). Immediately after that denial, Liberty Counsel sought an emergency injunction pending appeal from the United States Court of Appeals for the Ninth Circuit, which was granted prior to the law taking effect. *See Pickup v. Brown*, No. 12-17681, 2012 WL 6869637 (9th Cir. Dec. 21, 2012). The merits panel of the Ninth Circuit upheld the constitutionality of the law claiming it was a mere regulation of professional counselors and that it did not raise any First Amendment implications whatsoever. *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). Liberty Counsel immediately filed a petition for a rehearing *en banc*, requesting the entire Ninth Circuit to hear the case, but did not garner sufficient support from the court to have the case

reheard. However, the original panel issued a modified opinion, which drew a vigorous dissent from three of the judges claiming that SB1172 was wildly unconstitutional. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). Liberty Counsel immediately sought a stay pending the United States Supreme Court's review of its petition for a writ of certiorari, which was granted by the Ninth Circuit. The petition for a writ of certiorari is now pending before the Supreme Court.

In New Jersey, Liberty Counsel has brought two separate lawsuits challenging New Jersey's virtually identical law known as Assembly Bill 3371 ("A3371"). The first case was filed on behalf of the American Association of Christian Counselors, the National Association for Research and Therapy of Homosexuality, a licensed psychologist, and a licensed professional counselor. One of those counselors is a former lesbian who received SOCE counseling and was successfully able to eliminate her unwanted same-sex attractions. The district court denied Liberty Counsel's request for a temporary restraining order and ultimately denied their challenge on the merits, saying that A3371 was merely a professional regulation with no First Amendment implications whatsoever. *See King v. Christie*, No. 13-5038, 2013 WL 5970343 (D.N.J. Nov. 8, 2013). Liberty Counsel immediately appealed to the United States Court of Appeals for the Third Circuit requesting a preliminary injunction pending appeal and a substantive review of the district court's decision. To date, the Third Circuit has not yet ruled on the requested injunction pending appeal, and oral argument is scheduled for early July.

In the second suit challenging A3371, Liberty Counsel brought suit on behalf of parents and a minor who was receiving counseling from a licensed social worker who wanted to refer him to a licensed psychologist to receive additional counseling. A3371 prohibits them from receiving such counseling. In that case, the same district court judge who rejected Liberty

Counsel's challenge in the first suit has denied injunctive relief as well and stayed the case pending the Supreme Court's determination of the petition for a writ of certiorari in *Pickup v. Brown*. Liberty Counsel has also appealed that case to the Third Circuit. *See Doe v. Christie*, No. 14-1941 (3d Cir. 2014).

Liberty Counsel has also worked with legislators in Florida, Illinois, Maryland, Massachusetts, Minnesota, New York, Pennsylvania, Virginia, and Washington to defeat these efforts before they were enacted and has been successful in nearly all of them, with some still pending before various committees. It is also worth noting that the Republican Party of Texas has recently added a position supporting SOCE counseling to their party platform.[9]

SEXUAL ORIENTATION CHANGE EFFORTS

SB1172 and A3371 both prohibit any counsel of a minor *under any circumstances* to reduce or eliminate unwanted same-sex sexual attractions, behavior, or identity. Counselors may affirm but may not offer counsel, and clients may not receive counsel, to reduce or eliminate unwanted same-sex sexual attractions, behavior, or identity. The language of both bills is virtually identical, with only some minor variations. SB1172 states that "[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age." Cal. Bus. & Prof. Code § 865.1. SOCE counseling is defined as "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual

[9] *See* Paul J. Weber & Will Weissert, *Texas GOP Advances 'Reparative Therapy' for Gays*, YahooNews (June 6, 2014), *available at* http://news.yahoo.com/texas-gop-advances-reparative-therapy-gays-052641549--politics.html

or romantic attractions or feelings towards individuals of the same sex." Cal. Bus. & Prof. Code § 865(b)(1). However, SB1172 provides that

> [s]exual orientation change efforts does not include psychotherapies that: (A) provide acceptance, support, and understanding of a clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

Id. The language in New Jersey's statutory SOCE prohibition mirrors that language with the exception of adding that "sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another." N.J. Stat. Ann. §45:1-55

The proponents of these SOCE prohibitions trumpet the parade of horribles that their activists describe about their former counseling and construct a false image of what this modern mental health counseling entails. Most of these arguments reference aversive therapeutic techniques that have not been used by ethical and competent mental health professionals *in decades*. Yet, those who actually engage in SOCE counseling simply engage in the same type of client-centered "talk therapy" as every other form of modern mental health counseling. It is simply two people sitting in a room discussing the clients' feelings, behaviors, desires, and goals, and for most SOCE counselors, helping the client to achieve their goal of conforming their attractions, behaviors, and identity to their sincerely held religious beliefs.

The primary source of support that proponents of these prohibitions rely upon is a 2009 Task Force Report issued by the American Psychological Association on SOCE counseling

("APA Report").[10] All of the bills that have been introduced on this issue rely heavily on this Report to assert that SOCE counseling is harmful to those who receive it and that it has no scientific claim to credibility. This assertion, however, represents a fundamental misrepresentation of the studies concerning SOCE counseling and its efficacy, and it is a grossly inaccurate representation of the findings of the APA Report.

Indeed, the APA Report provides no justification for banning SOCE counseling or for alleging that it is harmful to children. The APA Report was admittedly inconclusive as to the efficacy of SOCE counseling. It found that there was anecdotal evidence of both lack of success and benefit, which is not at all dissimilar to all methods of modern mental health counseling.[11] The APA Report concluded that "given the limited amount of methodologically sound research, we *cannot draw a conclusion* regarding whether recent forms of SOCE are or are not effective."[12] Yet, the only evidence of perceived harm was anecdotal.[13] Most importantly, the APA Report provides no basis for a conclusion regarding the effect of this counseling on minors, as it noted that "sexual orientation issues in children are *virtually unexamined*."[14] Moreover, this inconclusive study recognized that "there is a dearth of scientifically sound research on the safety

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[10] Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009) *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[11] *Id.* at 49-50.

[12] *Id.* at 43 (emphasis added).

[13] *Id.* at 42.

[14] *Id.* at 91 (emphasis added).

of SOCE," and that "[e]arly and recent research studies provide *no clear indication of the prevalence of harmful outcomes*."[15]

It is worth noting, too, that the mental health professionals assigned to the Task Force studying SOCE were all of a political persuasion against SOCE. Although many qualified conservative psychologists were nominated to serve on the Task Force, all of them were rejected. The director of the APA's Lesbian, Gay and Bisexual Concerns Office, Clinton Anderson, offered the following defense: "We cannot take into account what are fundamentally negative religious perceptions of homosexuality—they don't fit into our world view."[16] As is evidenced by this statement, the APA operated with a litmus test when considering Task Force membership—the only views of homosexuality that were tolerated are those that uniformly endorsed same-sex behavior as a moral good. As such, from the outset of the Task Force, it was predetermined that conservative or religious viewpoints would only be acceptable when they fit within their pre-existing worldview. One example of this is the APA Report's failure to recommend any religious resources that adopt a traditional or conservative approach to addressing conflicts between religious beliefs and sexual orientation. Yet, even this group of ideological and biased participants could not reach a conclusive finding that SOCE counseling is harmful.

The American Psychological Association's political position statement on this issue is also curious given its own admissions of the science behind homosexuality and same-sex

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[15] *Id.* at 42 (emphasis added).

[16] *Psychologists to Review Stance on Gays*, USAToday (July 10, 2007), *available at* http://usatoday30.usatoday.com/news/health/2007-07-10-gays-psychologists_N.htm.

attractions. It is important to note in this regard that the APA's own stance on the biological origin of homosexuality has softened in recent years. In 1998, the APA appeared to support the theory that homosexuality is innate and people were simply "born that way": "There is considerable recent evidence to suggest that biology, including genetic or inborn hormonal factors, play a significant role in a person's sexuality."[17] But in 2008, the APA described the matter differently:

> "There is *no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation.* Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that *nature and nurture both play complex roles*…."[18]

Yet, the APA has made minimal effort to publicize the change in its official position on such causation or to correct the accompanying popular misconception – often promoted by the media – that persons with same-sex attractions are simply "born that way." It is difficult not to perceive this as significant professional neglect. Most notably, however, is the fact that the past president of the APA has noted the extraordinary success of this type of counseling. Dr. Nicolas Cummings personally saw *hundreds* of patients successfully reduce or eliminate their unwanted same-sex attractions.[19]

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[17] American Psychological Association, *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality* (1998).

[18] American Psychological Association, *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality*, (2008), *available at* http://www.apa.org/topics/lgbt/orientation.pdf.

[19] Nicholas A. Cummings, Ph.D., *Sexual Reorientation Therapy Not Unethical*, USA Today (July 30, 2013), *available at* http://www.usatoday.com/story/opinion/2013/07/30/sexual-reorientation-therapy-not-unethical-column/2601159/.

Additionally, the American College of Pediatricians has forcefully stated that "[t]he scientific literature, however, is clear: *Same-sex attractions are more fluid than fixed, especially for adolescents— many of whom can and do change*."[20] The scientific evidence thus undercuts the ideological opposition of groups such as the American Psychological Association, which supports such overreaching legislation. Not only is such legislation unsupported by the evidence, but it would do affirmative harm to the very children it purports to protect: "Barring change therapy or SOCE will threaten the health and well-being of children wanting therapy. With no other options available, same-sex attracted young people will believe that they have no choice but to engage in homosexual behaviors. These behaviors place them at risk for grave physical and psychological harm."[21]

SOCE PROHIBITIONS AND RELIGIOUS FREEDOM

The focus and aim of those who have targeted SOCE counseling, because of its message, and legislators' principal reliance on those hostile to SOCE counseling for these laws reveal why these laws are a gross intrusion into the religious freedom of minors and their families. These laws aim to prevent any parent from raising their child consistent with their religious beliefs that homosexuality is unnatural, disordered, and sinful. Regardless of the First Amendment's protection on the free exercise of religion, the proponents of SOCE prohibitions seek one thing only—the removal of any opposing view from the marketplace of ideas that does not wholly adopt their sinful and disordered lifestyle as a moral good.

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[20] Press Release, *American College of Pediatricians, Legislators are Not Psychotherapists* (Jan. 27, 2014), available at http://www.acpeds.org/legislators-are-not-psychotherapists (emphasis added)

[21] *Id.*

SOCE prohibitions unconstitutionally infringe on the First Amendment rights of parents and minors to seek counseling consistent with their sincerely held religious beliefs that change is possible and desirable. Minors are prohibited from receiving and parents are prohibited from assisting their children with receiving counseling consistent with their sincerely held religious beliefs and from directing the upbringing of their children in accordance with those beliefs. These laws impose a substantial burden on the religious beliefs of parents and minors because they have no options in seeking SOCE counseling from those *licensed* professionals who are best able and most experienced at providing such counseling. Instead, these individuals who desire such counseling are forced to elevate what the State has determined is an appropriate ideology over their own sincerely held religious beliefs about something as fundamental as their personal identity. *This is the very essence of a substantial burden on religion.*

The statements of many proponents of SOCE prohibitions make this very plain. Dr. Haldeman, a proponent of SOCE prohibitions and witness in the New Jersey litigation, has stated that "the codification of antigay attitudes on the part of powerful religious institutions invariably instills in some individuals profound discomfort with their sexual orientation."[22] The sentiments of Dr. Haldeman are echoed by others supportive of these prohibitions. Dr. Drescher, a member of the APA Task Force on SOCE, stated that

> [s]ome significant contrasts between reparative therapists and DSM-V Workgroup members who treat gender variant children are that *none of the latter practice from a religious orientation*, their published works do not explicitly cite religious dogma, *they do not think homosexuality is a sin* or an illness, they do not think it is wrong to be gay, they do not see a gay outcome as a treatment failure, they do

[22] Douglas Haldeman, *When sexual and religious orientation collide: Considerations for psychotherapy with conflicted gay men*, The Counseling Psychologist, 32(5), 691, 706 (2004), *available at* http://www.drdoughaldeman.com/doc/WhenOrientationCollide.pdf (emphasis added).

> not call what they do reparative therapy, and they do not reference reparative therapy literature in support of their clinical approaches."[23]

Dr. Cummings, the past president of the APA, noted that many of the efforts in this area are political and ideological rather than having anything to do with science. Indeed, he stated that "the role of psychotherapy in sexual orientation change efforts has been politicized."[24] He also noted that "[g]ay and lesbian rights activists appear to be convincing the public that homosexuality is one identical inherited characteristic. To my dismay, some in the organized mental health community seem to agree, including the American Psychological Association, though *I do not believe that view is supported by scientific evidence*."[25] Most notably, however, he stated that "contending that all same-sex attraction is immutable is a *distortion of reality*. Attempting to characterize all sexual reorientation therapy as unethical violates patient choice and gives an outside party a veto over patients' goals for their own treatment."[26] He concluded that "[a] political agenda shouldn't prevent gays and lesbians who desire to change from making their own decisions."[27]

Nevertheless, it is not merely the activist mental health professionals that reveal the true intentions of these laws. Many of the legislators sponsoring these efforts and introducing the bills into the various state houses are openly advocating for the suppression of religious freedom in

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[23] Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, Arch. Sex. Behav. 39(2):427-60 (2010), *available at* http://www.cpath.ca/wp-content/uploads/2009/08/DRESCHER.pdf (emphasis added).

[24] *See* Cummings, *supra* note 10.

[25] *Id.* (emphasis added).

[26] *Id.* (emphasis added).

[27] *Id.*

this area. Even a mere sampling of the statements of those legislators who have introduced SOCE prohibitions reveals the ideological and political basis for these laws. Senator Lieu, who was the floor sponsor of the California legislation, stated that "[t]he attack on parental rights is exactly the whole point of the bill because we don't want to let parents harm their children."[28] Clearly, Senator Lieu and the proponents of this bill aimed at nothing more than prohibiting parents from instructing their children in their sincerely held religious beliefs concerning homosexuality. The sponsor of the Illinois ban, Representative Cassidy, stated that she was introducing the measure despite the fact that there "had *not* been a tremendous number of complaints about such therapy."[29] She was essentially admitting that this is a solution without a problem. It is about ideological opposition to a viewpoint espoused in SOCE counseling. Other supporters of the proposed ban in Illinois further revealed its ideological basis, "[e]x-gay charlatans will come to the Illinois legislature with junk science and promises of love for LGBT kids, but their records show that their motivations are beyond insincere."[30] The sponsor of Maryland's attempted SOCE ban, Delegate Jon Cardin, stated that his reason for proposing the bill was that he finds the idea of ex-gay organizations or SOCE counseling to be "incredibly

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[28] Kim Reyes, *Controversy Follows Efforts to Ban Gay Conversion Therapy*, Orange Cnty. Register (July 27, 2012), *available at* http://www.ocregister.com/articles/therapy-365822-parents-orientation.html; Jim Crogan, *California Law Barring Parents from "Curing" Gay Children Moves through Legislature*, FoxNews.com (Aug. 18, 2012), www.foxnews.com/politics/2012/08/18/California-law-barring-parents-from-curing-gay-children-moves-through/)

[29] Matt Simonette, *Conversion Therapy Ban Proposed for Illinois*, Windy City Times (Feb. 23, 2014), *available at* http://www.windycitymediagroup.com/lgbt/Conversion-therapy-ban-proposed-for-Illinois/46338.html (emphasis added).

[30] *Id.*

repulsive."[31] The sponsor of Virginia's attempted SOCE prohibition, Delegate Patrick Hope, stated that his reason for proposing the bill was that "[c]onversion therapy is based on the false assumption that homosexuality is a sin . . . and it is not."[32]

As these quotations reveal, these laws are more about a clash of viewpoints and worldviews than about any ephemeral harm from SOCE, and such a clash takes direct aim at the religious beliefs of minors, their parents, and the counselors they seek. This clash of worldviews is precisely what the religion clauses of the First Amendment were intended to protect against. At their root, these SOCE prohibitions are an attack on the traditional religious teaching – shared by all the major world religions – that homosexual behavior is immoral (or "sinful"). Nevertheless, those traditional and deeply held religious convictions are protected by the First Amendment. These SOCE prohibitions impose a substantial burden on the religious beliefs of minors and their parents because it forces them to elevate what the State has determined is an appropriate ideology over their own sincerely held religious beliefs about something as fundamental as their personal identity and the protection and upbringing of their child. This is the very essence of a substantial burden on religion, and it represents the fundamental clash between religious freedom and these attempted efforts to prohibit SOCE counseling.

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[31] Michael K. Lavers, *Trans Rights Bill, Ex-Gay Therapy Ban Top Maryland Legislative Agenda*, Washington Blade (Jan. 8, 2014), *available at* http://www.washingtonblade.com/2014/01/08/trans-rights-bill-ex-gay-therapy-ban-top-maryland-legislative-agenda/.

[32] Jessica Martinez, *Virginia Lawmaker Introduces Bill to Ban Reparative Gay Therapy for Minors, Says Homosexuality 'Is Not a Sin'*, The Christian Post (Jan. 22, 2014), *available at* http://www.christianpost.com/news/va-lawmaker-introduces-bill-to-ban-reparative-gay-therapy-for-minors-says-homosexuality-is-not-a-sin-113158/.

ATTACKS ON NATURAL MARRIAGE AND FAMILY

The Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 1521 (2013), striking down Section 2 of the Defense of Marriage Act ("DOMA") has created a firestorm of activist assaults in nearly every state that recognizes the traditional and only definition of marriage. It has also resulted in a destruction of the rule of law by activist federal judges tripping over themselves to ignore principles of federalism, to trample the States' authority to define marriage in their jurisdictions, to ignore inherent biological truths concerning the perpetuation of the species, and to ignore the undeniable fact that children are raised best in a home with one father and one mother. Without precedent, and with an ever-alarming arrogance, many federal district courts have trampled the rule of law and the institution upon which society is built – the family. Without the institution of the traditional family, mankind cannot live on and prosper. It is clear that states have a fundamental interest in preserving and protecting that institution, but many activist judges have blatantly ignored scientific fact, sociological research, and common sense to invalidate numerous states' recognition of traditional marriage.

Statutes and constitutional amendments which define marriage as the union of one man and one woman are not, as those seeking to redefine the institution argue, laws that "ban same-sex marriage" or "discriminate against same-sex couples." Instead, constitutional and statutory provisions, such as those under consideration in these cases, simply memorialize the nature of a fundamental social institution. No governmental entity creates a "definition of marriage" by which certain subgroups are somehow discriminated against or through which those groups are denied "rights." Long before modern governments were formed, marriage was, and still is, a union of opposite sexes that is uniquely structured toward procreation and child-rearing and

therefore ensures the continuation of humankind and society. Only the union of a man and a woman can provide the biological, psychological, and sociological connections upon which a stable social structure can be built. By memorializing that unique relationship in the law and providing for certain obligations, responsibilities, and benefits, governments acknowledge that marriage, the comprehensive union of one man and one woman, is indispensable to the very future of society

Marriage between one man and one woman is a public good that is best for society, particularly its children and future generations. Forcing states to legalize same-sex marriage would equalize same-sex relations with marriage and parenthood. In doing so, marriage and parenthood would be severed, and the structure of children raised with a mom and a dad would suffer. It is one thing to tolerate personal relationships that are different from the traditional male-female relationship, but it is an entirely different thing for society to elevate such a relationship to a preferred status, and that is what these activist courts are doing across the country. The nation has never supported every conceivable combination of human relationships through law and policy. To the contrary, marriage has always been a national policy between one man and one woman, and forcing the states to change their laws to this activist norm ignores this indisputable history and common sense. As a policy matter, same-sex marriage promotes a dangerous notion that boys and girls do not need mothers and fathers. Same-sex marriage permanently deprives boys and girls of moms and dads. Research and common sense underscore the importance of moms and dads to the well-being of children.

EFFECTS OF SAME-SEX MARRIAGE, SEXUAL ORIENTATION, AND GENDER IDENTITY LAWS ON RELIGIOUS FREEDOM

The recognition of same-sex marriage, and laws including sexual orientation and gender identity, have also led to calamitous results in the social arena, whereby those who claim simply to want equality want nothing more than to impose their viewpoint on others who have religious beliefs opposed to their lifestyle choice. The end goal in this assault on the family and religious freedom is about silencing opposition and forcing those who disagree with a homosexual lifestyle and with the notion of same-sex marriage out of the marketplace for their beliefs. One need only see the stories of supporters of traditional and natural marriage to understand that this is nothing more than an attempt to impose a totalitarian regime designed solely to mandate recognition of a belief system diametrically opposed to society's understanding since time immemorial.

In a recent case in New Mexico, *Elaine Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013), a Christian photographer who owned a business was subjected to a human rights complaint for declining to exercise her talents and personal skills to lend her stamp of imprimatur on a same-sex wedding ceremony. The owner of Elaine Photography has sincerely held religious beliefs that marriage is a Biblical institution, ordained and holy to God that is solely between one man and one woman. When two women sought to employ her services for their same-sex "marriage" ceremony, the photographer informed them that she does not photograph *any image or event* that violates her sincerely held religious beliefs. The owner of Elaine Photography informed the homosexuals that she was certainly willing to provide services to them for any number of things, but that her sincere religious beliefs simply prohibited her

from providing services for a ceremony that violates her beliefs. The homosexuals filed a complaint with the New Mexico Human Rights Commission, arguing that she discriminated against them because of their sexual orientation.

The Elaine Photography case reached the New Mexico Supreme Court, which unbelievably affirmed the decision of the Human Rights Commission, stating that the business had no right to refuse services based on the owner's sincerely held religious beliefs. In a concurring opinion by one of the justices on the court, the inevitable collision of religious freedom and those forcing the homosexual agenda on others was made abundantly clear. Justice Bosson said that there is no doubt that individuals can be "compelled by law to compromise the very religious beliefs that inspire their lives," and that "[a]t its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others." *Id.* at 80 (Bosson, J., concurring). The collision course these activist judges and homosexuals have placed religious freedom on with the homosexual agenda is staggering, and this can only be expected to continue unless something is done to stem the tide of this totalitarian onslaught. The case was appealed to the Supreme Court of the United States, but they declined to review it.

Additionally, in Colorado, the owner of Masterpiece Cakeshop, Inc. was forced to compromise his religious beliefs by using his personal skills and talents to create a wedding cake for a same-sex marriage ceremony, which is fundamentally inconsistent with his sincerely held religious beliefs. *See Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc.*, CR 2013-

0008 (Col. Admin. Ct. 2013).[33] The owner informed the two homosexual men that he would be happy to provide his services for anything else they wanted, but that he could not place his personal stamp of imprimatur on their wedding ceremony by using his talents for their ceremony. The court stated that individuals were free to believe whatever they wanted about same-sex marriages but that they had no legitimate right to refuse to provide their personal services to ceremonies that they find religiously objectionable.

In Oregon, Sweet Cakes by Mellissa was similarly subjected to a civil rights complaint for merely following her sincerely held religious beliefs.[34] The Oregon Bureau of Labor and Industries investigated the religious business, and it held that the owners had violated Oregon civil rights laws by refusing to perform services for the same-sex wedding. The business has since closed its doors, being forced out of the marketplace simply for the exercise of their sincerely held religious beliefs.

In New Jersey, even a religious organization affiliated with the United Methodist Church was not safe from the attacks of the homosexual activist. In *Bernstein v. Ocean Grove Camp Meeting Association*, the group did not want to lease its facilities on a private boardwalk to two homosexuals wanting to host a same-sex "marriage" ceremony.[35] The religious organization explained that it did not rent the facility to homosexuals for same-sex marriages because the

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[33] For a copy of the administrative court opinion in *Masterpiece Cakeshop*, see https://www.aclu.org/lgbt-rights/charlie-craig-and-david-mullins-v-masterpiece-cakeshop (last visited June 8, 2014).

[34] Everton Bailey, Jr., *Gresham Bakery Finding Buyers, Backers Amid Wedding Cake Controversy*, OregonLive (Jan. 20, 2014), *available at* http://www.oregonlive.com/gresham/index.ssf/2013/02/gresham_bakery_finding_buyers.html

[35] For the administrative law court's opinion in *Ocean Grove*, see http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf (last visited June 8, 2014).

boardwalk was part of its wedding ministry and was therefore subject to the Scriptural doctrines on marriage. The New Jersey administrative law judge rejected this, saying that calling the religious organization's program a ministry does not suffice to evoke a religious mission. The organization was forced to rent the facility to homosexuals for their ceremony that was fundamentally at odds with the teaching of the Bible and the Methodist Church with which the group was affiliated.

Supporters of Proposition 8 in California, which passed by significant margins even in California, have also been tarnished, assaulted, and had their livelihoods destroyed for simply participating in or supporting the traditional definition of marriage. A recent prominent example is that of the Mozilla Chief Executive Officer being forced to resign for donating money to a campaign to defend traditional marriage in California.[36] Brendan Eich contributed $1,000 in 2008 for the California marriage campaign, and when it was revealed in 2014, the homosexual activists once again revealed their intentions to eliminate any dissent whatsoever from the marketplace. The clash between the homosexual agenda and religious freedom could not be more clear than in these cases involving a totalitarian agenda to normalize homosexuality and ostracize anyone whose religious beliefs inform them otherwise.

In Massachusetts, after the court created a right to same-sex marriage out of whole cloth, the collision between religious freedom and the homosexual agenda reached another phase. The Catholic Charities of Boston, one of the oldest and most respected adoption agencies in the country, lost its state certification for refusing to provide adoption services to same-sex

[36] Alistar Barr, *Mozilla CEO Brendan Eich Steps Down*, Wall Street Journal (Apr. 3, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702303532704579479741125367618

couples.[37] The Commonwealth attempted to force the religious organization to place children in the homes of same-sex couples, and when Catholic Charities objected based on the teachings of their faith, they were denied certification and licensing to continue to provide adoption services.

While these examples are certainly illustrative of a serious problem, unfortunately this is just the tip of the iceberg of the assault on religious freedom. The list of attacks on religious individuals and organizations for their sincere religious convictions that homosexuality is unnatural and sinful is potentially limitless. That this is true is beyond peradventure. As the above cases make abundantly clear, it is also true that activists with an agenda will stop at nothing to drive any dissent out of the marketplace of ideas and out of the commercial marketplace. This is a zero sum game, and the implications for religious freedom are staggering.

It is imperative that Congress take decisive action to protect the religious freedom of individuals and organizations. The same-sex marriage, sexual orientation, and gender identity agenda is eroding the most cherished of all liberties – the right to live according to the dictates of one's conscience without overbearing actions of the government.

I urge Congress to act to protect religious freedom. The time to act is now.

CASES INVOLVING SAME-SEX MARRIAGE POST-WINDSOR

Federal Cases:

Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Id. May 13, 2014)

Gray v. Orr, No. 13 C 8449, 2013 WL 6355918 (D. Ill. Dec. 5, 2013)

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[37] *Boston Catholic Charities Stop Adoptions Because of Gay Parent Law*, FoxNews.com (Mar. 10, 2006), *available at* www.foxnews.com/story/03/10/boston-catholic-charities-stop-adoptions-because-gay-parent-law/ (last visited June 9, 2014).

Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ken. Mar. 19, 2014)

DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014)

Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014)

Obergefell v. Wymyslo, 962 F. Supp. 2s 968 (S.D. Ohio 2013)

Bishop v. Holder, 962 F. Supp. 2d 1252 (N.D. Okl. 2014)

Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264 (D. Ore. May 19, 2014)

O'Connor v. Tobits, No. 11-0045, 2013 WL 3878688 (E.D. Penn. July 29, 2013)

Tanco v. Haslam, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014)

De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014)

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah Dec. 20, 2013)

Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014)

McGee v. Cole, No. 3:13-24068, 2014 WL 321122 (S.D.W.V. Jan. 29, 2014)

Baskin v. Bogan, No. 1:14-cv-003555-RLY-TAB, 2014 WL 1567774 (S.D. Ind. Apr. 18, 2014)

Harris v. Rainey, 5:13cv00077, 2014 WL 1292803 (W.D. Va. Mar. 31, 2014)

State Cases:

Garden State Equality v. Dow, 434 N.J. Super. 163 (2013)

Greigo v. Oliver, 316 P.2d 865 (N.M. 2013)

Commonwealth v. Hanes, 78 A.3d 676 (Penn. Comm. Ct. 2013)

Mr. FRANKS. Thank you, Mr. Staver.

And I would now recognize our second witness, Ms. Colby.

Please turn on your microphone.

TESTIMONY OF KIMBERLEE WOOD COLBY, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY

Ms. COLBY. Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to participate in this important hearing on the state of American religious liberty.

The Christian Legal Society has long believed that a free society prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech or religious beliefs. Therefore, CLS supported passage of the Religious Freedom Restoration Act to protect the religious liberty of all Americans.

Congress' passage of the Religious Freedom Restoration Act was a singular achievement. Senator Edward Kennedy and Senator Orrin Hatch led the bipartisan effort to pass RFRA in the Senate 97-3. The House passed RFRA by unanimous voice vote, and President Clinton signed RFRA into law. For two decades, RFRA has stood as the preeminent Federal safeguard of all Americans' religious liberty, ensuring a level playing field for Americans of all faiths.

Yet, recently RFRA has been targeted by some who would deny robust protection to religious liberty. This hearing is timely because in a few weeks Congress may face calls to weaken RFRA after the Supreme Court decides the HHS mandate cases. But for several reasons such a threat to religious liberty—weakening RFRA—should be rejected.

First, RFRA creates a level playing field for all Americans by putting minority faiths on an equal footing with any majority faith. Without RFRA, a minority faith would need to seek a statutory exemption every time Congress considered a law that might unintentionally infringe on religious practices.

Second, RFRA gives citizens needed leverage in dealing with government officials. By requiring government officials to justify their unwillingness to accommodate citizens' religious exercise, RFRA enhances government's accountability.

Third, RFRA ensures religious diversity in America and reduces conflict along religious lines. Such conflict is unnecessary when everyone's religious liberty is guaranteed.

Fourth, RFRA does not predetermine the outcome of any case. Instead, RFRA implements a sensible balancing test, a test approved unanimously by the Supreme Court 8 years ago, and the government continues to win its fair share of RFRA cases.

Fifth, RFRA reinforces America's commitment to limited government and pluralism. RFRA reminds us that America's government is a limited government that defers to its citizens' religious liberty. In RFRA, Congress recommitted the Nation to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed according to their religious beliefs.

Now, let me turn briefly to a second threat to religious liberty, the ongoing effort to exclude religious voices from the public square. One example of this threat is the exclusion of religious student groups from college campuses because they require their leaders to share the groups' religious beliefs. Obviously, it is basic religious liberty, not discrimination, for a religious group to require its leaders to share its religious beliefs. But at one university, administrators told a Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution: personal commitment to Jesus Christ. The students left rather than recant. In total, 14 religious groups left that campus rather than forfeit their religious liberty.

The freedom of religion must not become the freedom to recant. As Professor Douglas Laycock recently warned, and I'm quoting, "For the first time in nearly 300 years important forces in American society are questioning the free exercise of religion in principle, suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized," end quote.

Religious liberty is America's most distinctive contribution to humankind, but religious liberty is fragile, too easily taken for granted, and too often neglected. Religious liberty is a great gift, a gift we are in grave danger of squandering. Thank you.

[The prepared statement of Ms. Colby follows:]

Testimony of
Kimberlee Wood Colby
Director, Center for Law and Religious Freedom
Christian Legal Society

Before the Judiciary Committee of the
United States House of Representatives,
Subcommittee on the Constitution and Civil Justice

Written Statement on
"The State of Religious Liberty in the United States"
June 10, 2014

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to participate in this important hearing on the state of religious liberty in the United States. I have worked on religious liberty issues for over three decades and currently serve as the Director of the Center for Law and Religious Freedom of the Christian Legal Society.

The Christian Legal Society ("CLS") has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech or religious beliefs. For that reason, CLS was instrumental in the passage of three landmark federal laws that protect religious liberty: 1) the Equal Access Act of 1984 that protects the right of all students, including religious groups and LGBT groups, to meet for "religious, political, philosophical or other" speech on public secondary school campuses;[1] 2) the Religious Freedom Restoration Act of 1993 that protects the religious liberty of all Americans;[2] and 3) the Religious Land Use and Institutionalized Persons Act of 2000 that protects religious liberty for congregations of all faiths and for prisoners.[3]

Religious liberty is America's most distinctive contribution to humankind. The genius of American religious liberty is that we protect every American's

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[1] *See, e.g.*, 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

[2] *See* Brief Amicus Curiae of the Baptist Joint Committee, the National Association of Evangelicals and other Religious and Public Policy Organizations in Support of Respondents, 2005 WL 2237539 at *1 (2005), *filed in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). *See also,* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act,* 39 Vill. L. Rev. 1, 1 n.a (1994) (thanking the Center for Law and Religious Freedom, "one of the prime proponents of the Religious Freedom Restoration Act," for research assistance).

[3] *See, e.g.*, *Protecting Religious Freedom After* Boerne v. Flores *(Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty Protection Act:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 151-59 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

religious beliefs and practices, no matter how unpopular or unfashionable those beliefs and practices may be at any given time. By protecting all religious beliefs and practices regardless of their popularity or political power, religious liberty makes it possible for citizens who hold very different worldviews to live peaceably together.[4] Robust religious liberty avoids a political community riven along religious lines.

But religious liberty is fragile, too easily taken for granted and too often neglected. A leading religious liberty scholar, Professor Douglas Laycock of the University of Virginia, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized."[5] Other respected scholars share the assessment that the future of religious liberty in America is endangered.[6]

I. Congress's Passage of the Religious Freedom Restoration Act was a Singular Achievement that Protects All Americans' Religious Liberty.

Congress's passage of the Religious Freedom Restoration Act of 1993 (hereinafter "RFRA"), 42 U.S.C. §§ 2000bb (1)-(4), was a singular achievement. For two decades, RFRA has stood as the preeminent federal protection of all Americans' religious liberty. RFRA ensures a level playing field for Americans of all faiths. It puts "minority" faiths on an equal footing with any "majority" faith.[7]

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[4] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 840-41 (2014) (forthcoming 2014) ("Religious liberty has largely ended religious warfare and persecution in the West. It has enabled people with fundamentally different views on fundamental matters to live in peace and equality in the same society. It has enabled each of us to live, for the most part, by our own deepest values.")

[5] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). *See generally*, Laycock, *supra* note 4.

[6] *See generally, e.g.*, Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. Rev. 787 (2014); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013).

[7] An excellent introduction to RFRA's importance to religious Americans is a ten-minute video that features Native Americans, Presbyterians, Jews, and Sikhs recounting RFRA's importance

Yet RFRA has recently become a prime target for those who would deny robust protection to religious liberty. This hearing is timely because it is possible that, within the next few weeks, this Congress will come under pressure to amend RFRA and diminish its protection, if the Supreme Court upholds RFRA's protection of Americans whose religious consciences will not allow them to comply with the HHS Mandate.[8] Congress should withstand such pressure for a number of reasons that are critical to the future of American religious liberty, as this testimony will briefly discuss.

The Need for RFRA: RFRA was an urgent response to the Supreme Court's decision in 1990 in *Employment Division v. Smith,* 494 U.S. 872 (1990), authored by Justice Scalia, which dealt a serious setback to religious liberty. Before the *Smith* decision, the Supreme Court's free exercise test had prohibited the government from burdening a citizen's religious exercise unless the government demonstrated that it had a compelling interest that justified overriding the individual's religious practice.[9] The *Smith* decision reversed this traditional presumption. The government no longer had to show an important reason for overriding a person's religious convictions, but instead could simply require a citizen to violate her religious convictions no matter how easy it would be for the government to accommodate her religious conscience.

Broad Bipartisan Support for RFRA: In response to the *Smith* decision, a 68-member coalition of diverse religious and civil rights organizations, including such groups as Christian Legal Society, Baptist Joint Committee for Religious Liberty, Americans United for Separation of Church and State, National Association of Evangelicals, American Jewish Congress, and American Civil Liberties Union,[10] coalesced to encourage Congress to restore substantive

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to their religious practices. The 2013 video, produced by The Becket Fund for Religious Liberty, is available at http://www.youtube.com/watch?v=J3TbItCxWdk (last visited June 8, 2014).

[8] The Supreme Court is expected to hand down its decisions in *Sebelius v. Hobby Lobby Stores, Inc.,* No. 13-354, and *Conestoga Wood Specialties Corp. v. Sebelius,* No. 13-356, on or before June 30, 2014.

[9] *Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[10] The following religious and civil rights organizations formed the Coalition for the Free Exercise of Religion to secure RFRA's passage: "Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for

protection for religious liberty.[11] RFRA restored the "compelling interest" test by once again placing the burden on the government to demonstrate that a law is sufficiently compelling to justify denial of citizens' religious freedom.[12]

Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex. L. Rev. 209, 210 n.9 (1994) (listing these groups and noting that "[t]he American Bar Association did not formally join the Coalition, but repeatedly endorsed the bill.")

[11] On November 7, 2013, the Newseum co-sponsored an event in observance of the twentieth anniversary of the passage of RFRA, entitled "*Restored or Endangered? The State of Free Exercise of Religion in America.*" During the event's first panel, several participants in the RFRA coalition walked through the key events that led to RFRA's passage. The panel's discussion is available at http://www.newseum.org/programs/2013/1107-institute/the-state-of-free-exercise-of-religion-in-america.html (last visited June 4, 2014). *See also*, Baptist Joint Committee for Religious Liberty, "*The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom,*" *available at* http://bjcmobile.org/wp-content/uploads/2013/11/RFRA-Book-FINAL.pdf (last visited June 9, 2014).

Senator Edward Kennedy and Senator Orrin Hatch together led the bipartisan effort to pass RFRA in the Senate.[13] RFRA passed by a vote of 97-3 in the Senate and a unanimous voice vote in the House.[14] President Clinton signed RFRA into law on November 16, 1993. In his signing remarks, President Clinton observed, "We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom." He noted that the Founders "knew that there needed to be a space of freedom between Government and people of faith that otherwise Government might usurp." President Clinton attributed to the first amendment the fact that America is "the oldest democracy now in history and probably the most truly multiethnic society on the face of the Earth." He explained that RFRA "basically says [] that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[15]

RFRA in the Supreme Court: Although it has excluded state and local laws from RFRA's scope,[16] the Supreme Court has interpreted RFRA to provide potent protection for religious liberty at the federal level. In *Gonzales v. O Centro*

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[12] *See* Richard Garnett and Joshua Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 Cato Sup. Ct. Rev. 257, 259 (2006) ("By enacting RFRA, however, Congress codified an apparently broad, bipartisan, and ecumenical consensus that the *Smith* rule does not adequately protect and respect religious liberty."). *See generally*, Douglas Laycock and Oliver S. Thomas, *supra* note 10; Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249 (1995); Berg, *supra* note 2.

[13] *See The Religious Freedom Restoration Act:* Hearing Before the Senate Committee on the Judiciary on S. 2969, A Bill to Protect the Free Exercise of Religion 2 (1992) (statement of Sen. Kennedy) ("The Religious Freedom Restoration Act, which Senator Hatch and I, and 23 other Senators have introduced, would restore the compelling interest test for evaluating free exercise claims."); *id.* at 7 (statement of Sen. Hatch) ("I want to thank you, Senator Kennedy. I appreciate your leadership on this vital legislation, and I am pleased to be a principal co-sponsor with you of the Religious Freedom Restoration Act of 1992.").

[14] 139 Cong. Rec. 26,416 (cumulative ed. Oct. 27, 1993); 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993).

[15] President William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, Nov. 16, 1993, *available at* http://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf (last visited June 8, 2014).

[16] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Espirita Beneficente Uniao do Vegetal,[17] the Court *unanimously* held that RFRA requires the federal government to demonstrate an actual compelling interest, unachievable by less restrictive means, before it may restrict a citizen's religious practice. The Court required the government to show that granting an exemption to the *specific individual* citizen would actually undermine the government's ability to achieve its compelling interest.[18]

What RFRA Does Not Do: RFRA does not predetermine the outcome of any case or claim. As Senator Kennedy accurately predicted during hearings on RFRA, "Not every free exercise claim will prevail."[19]

Instead, RFRA implements a *sensible balancing* test by which a religious claimant first must demonstrate that the government has substantially burdened a sincerely held religious belief.[20] The government then must demonstrate a compelling interest that cannot be achieved by a less restrictive means. As the Supreme Court explained in *O Centro,* "Congress has determined that courts should strike *sensible balances,* pursuant to a compelling interest test that requires

[17] 546 U.S. 418 (2006).

[18] Nineteen states have enacted state RFRAs, modeled on the federal RFRA, to require state and local governments to comply with the "compelling interest" standard. Those states are: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Laycock, *supra* note 4, at 845 n.26 (providing the statutory citations for each state RFRA). In fourteen states, the state courts have interpreted state constitutions to protect religious conduct from generally applicable laws. Those states are: Alaska, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin. *Id.* at 844 n.22. Thus, a total of 31 states generally provide religious exemptions as a matter of state law. (Two states overlap both categories.)

[19] *The Religious Freedom Restoration Act:* Hearing Before the Senate Committee on the Judiciary on S. 2969, A Bill to Protect the Free Exercise of Religion 2 (statement of Sen. Kennedy).

[20] 42 U.S.C. § 2000bb(a)(5) ("the compelling interest test as set forth in prior Federal court rulings is a workable test for striking *sensible balances* between religious liberty and competing prior governmental interests") (emphasis supplied).

the Government to address the particular practice at issue."[21] As a RFRA scholar explains, "[t]he compelling interest test is best understood as a balancing test with the thumb on the scale in favor of protecting constitutional rights."[22]

In the final analysis, after hearing both sides, a court determines whether the government interest is strong enough to override the religious exercise in question. In the twenty years that RFRA has been in place, judges frequently have ruled in favor of the government, finding either that the government had not substantially burdened the religious exercise at issue or that the government had a compelling interest.

Rather than giving religious citizens a free pass, RFRA gives citizens much needed leverage in their dealings with government officials. RFRA ensures that the government must explain its action if it restricts citizens' religious exercise. By requiring government officials to explain their unwillingness to accommodate citizens' religious exercise, RFRA enhances governmental transparency and accountability.

As Chief Justice Roberts observed for the unanimous *O Centro* Court, RFRA rebuffs the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[23] Or as scholars have observed, "boilerplate findings and assertions by the government about a program's aims and importance are not enough to sustain its burden in RFRA cases."[24] Instead, RFRA incentivizes government officials to find mutually beneficial ways to accomplish a governmental interest while respecting citizens' religious exercise – a win-win solution for all.

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[21] 546 U.S. at 439 (emphasis supplied). *See also id.* ("Congress . . . legislated 'the compelling interest test' as the means for the courts to 'strik[e] *sensible balances* between religious liberty and competing prior governmental interests.'") (emphasis supplied).

[22] Douglas Laycock, *The Religious Exemption Debate,* 11 Rutgers J.L. & Religion 139, 151-52 (2009).

[23] 546 U.S. at 436 . *See also, id.* at 438 ("under RFRA invocation of such general interests, standing alone, is not enough").

[24] Garnett and Dunlap, *supra* note 12, at 271.

What RFRA Does:

RFRA creates a level playing field for Americans of all faiths: RFRA puts "minority" faiths on an equal footing with "majority" faiths. Essentially RFRA makes religious liberty the default position in any conflict between religious conscience and federal regulation. Without RFRA, a "minority" faith would need to seek individual exemptions every time Congress considered a law that might unintentionally infringe on its religious practices. With RFRA, a "minority" faith is automatically *presumed* to be entitled to an exemption from a law that infringes its religious practices, unless the government demonstrates that such an exemption would violate a compelling governmental interest. [25]

The default posture can be overridden if Congress chooses to do so,[26] or if a court determines the government's interest is compelling and unachievable by a

[25] As Professor Michael McConnell explained at the time RFRA was being debated, the Supreme Court's *Smith* ruling gave "a decided advantage to 'majority' religions . . . . [which,] because their numbers give them substantial political influence, will be able to enter and win protection in the political arena. In addition, their members are often involved in the drafting of legislation, and they generally design the laws (consciously or unconsciously) in light of their religious mores." Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?,* 15 Harv. J.L. & Pub. Pol'y 181, 186-87 (1992). *See also,* Garnett and Dunlap, *supra* note 12, at 260 (The Constitution "allows – and even invites –governments to lift or ease the burdens on religion that even neutral official actions often impose. Notwithstanding our constitutional commitment to religious freedom through limited government and the separation of the institutions of religion and government, it is and remains in the best of our traditions to 'single out' lived religious faith as deserving accommodation.").

[26] Congress has never exercised its option under 42 U.S.C. § 2000bb-3(b) to "explicitly exclude[]" a law from RFRA's application. The philosophical underpinnings of RFRA have always weighed strongly against any carve-out because there is no limiting principle for why any particular governmental interest should be given a special permanent exemption, or a carve-out, from RFRA. Any carve-out would immediately result in the disadvantaging of some faith(s) in relationship to other faiths, precisely the result that RFRA was intended to prevent. The Newseum panelists repeatedly emphasized how loath the RFRA Coalition was to create any carve-out whatsoever. *See supra* note 11.

As was explained soon after its passage, RFRA's sponsors "insisted instead on a unitary standard for evaluating all free exercise claims" because:

> "The bill's sponsors, as well as the Coalition supporting the bill . . . felt strongly that Congress had no business picking and choosing which religious claims should be protected and which should not. . . . [T]he bill's supporters feared that an exemption for prisons would lead to other exemptions, possibly jeopardizing

less restrictive means. RFRA simply makes religious liberty the default position, which is as it should be for a country that values religious liberty.[27]

RFRA protects America's religious diversity: If Americans belonged to only one religion, RFRA might not be necessary. In that case, the government might realistically be expected either to exempt the monopolistic religion's practices from any law they would otherwise violate, or to not pass the law in the first place.

But America is a country of tremendous religious diversity.[28] As a result, "it is not surprising that well-intentioned, broadly-applicable legislation often conflicts, sometimes severely, with the religious beliefs of certain groups of people."[29] Rather than force religious people to a choice between obeying their government or obeying God, "it makes sense to create exceptions for those groups whenever that can be reasonably done," especially in light of "our society's dedication to religious toleration and pluralism."[30]

For this reason, the oft-heard argument that America must *limit* religious freedom *because* it has become more religiously diverse has it precisely

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the bill's passage. Similar exemptions had already been demanded by pro-life groups, public schools, landmark commissions, and other interest groups."

Laycock and Thomas, *supra* note 10, at 240.

[27] "What is at stake in the debate over religious exemptions is whether people can be jailed, fined, or otherwise penalized for practicing their religion in the United States in the twenty-first century." Laycock, *supra* note 22, at 145.

[28] *See also,* Mark L. Rienzi, Why Tolerate Religion? By Brian Leiter. Princeton, N.J.: Princeton University Press. 2013. Pp. Xv, 187. $24.95. Defending American Religious Neutrality. by Andrew Koppelman. Cambridge, Mass.: Harvard University Press. 20, 127 Harv. L. Rev. 1395, 1395 & n.1 (2014) (("The United States is a place of enormous religious diversity."), *citing* The Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 10 (2008), archived at http://perma.cc/L58D-977M ("The Landscape Survey details the great diversity of religious affiliation in the U.S. at the beginning of the 21st century. The adult population can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups.")).

[29] McConnell, *supra* note 25, at 184. As Professor McConnell notes, "[f]rom the point of view of religious believers, it does not really matter whether a law is directed at them; the injury to their religious practice is the same regardless of the legislators' motivation." *Id.* at 185.

[30] *Ibid.*

backwards. Robust religious liberty is the reason for America's dramatic diversity and remains essential to maintaining that diversity. RFRA ensures religious diversity by protecting all religions, including the hundreds of numerically disadvantaged faiths, by increasing the likelihood that those faiths will obtain sensible exemptions from well-intentioned laws that unknowingly restrict their religious practices. In short, "[a]ccommodations are a commonsensical way to deal with the differing needs and beliefs of the various faiths in a pluralistic nation."[31]

RFRA allows Congress to legislate without fear that it unknowingly will burden a religious practice: RFRA is a commonsense approach that allows Congress to legislate without holding extensive hearings on every potential effect that a bill might have on Americans' religious liberty. This is particularly comforting given that much legislation is significantly changed as it wends its way through the legislative process, often after hearings have been held. RFRA also helps to protect against administrative abuses of delegated rulemaking authority.

RFRA reduces long-term social and political conflict: In the long-term, RFRA maximizes social stability in a religiously diverse society. Simultaneously, it minimizes the likelihood, in the long-term, of political divisions along religious lines. The reason is simple: "religious liberty reduces social conflict; there is much less reason to *fight* about religion if everyone is guaranteed the right to *practice* his religion."[32] In other words, RFRA implements the Golden Rule in the context of religious liberty: in protecting others' religious liberty, we protect our own religious liberty. Just as controversy frequently flares when free speech protections are triggered for an unpopular speaker, so controversy will sometimes accompany a particular application of RFRA. But our society has prospered by protecting all Americans' free speech, and it will prosper only if all Americans' free exercise of religion is protected.

RFRA honors the deep American tradition of granting exemptions for religious citizens: Religious liberty is embedded in our Nation's DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact.

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[31] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics,* 60 Geo. Wash. L. Rev. 685, 694 (1992) ("Exemptions from such laws are easy to craft and administer, and do much to promote religious freedom at little cost to public policy.").

[32] Laycock, *supra* note 4, at 842 (original emphasis).

RFRA embodies America's tradition of protecting religious conscience that predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court.[33] Jewish persons were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century.

Perhaps most remarkably, when America was fighting for its liberty against the greatest military power of that time, Congress stalwartly adopted the following resolution:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[34]

RFRA protects the right of all women and men to seek the truth and live lives of authenticity: Perhaps most importantly, religious exemptions allow human beings to seek the truth. As Professor Garnett eloquently posits, "human beings are made to seek the truth, are obligated to pursue truth and to cling to it when it is found, and [] this obligation cannot meaningfully be discharged unless persons are protected against coercion in religious matters." Therefore, "secular governments have a moral duty . . . to promote the ability of persons to meet this obligation and flourish in the ordered enjoyment of religious freedom, and should

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[33] *See, e.g.*, Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990) (discussing religious exemptions in early America); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1804-1808 (2006) (same); Laycock, *supra* note 22, at 139-153 (same).

[34] McConnell, *supra* note 25, at 186 n.20 (*quoting* Resolution of July 18, 1775, *reprinted in* 2 Journals of the Continental Congress at 187, 189 (1905)).

therefore take affirmative steps to remove the obstacles to religion that even well meaning regulations can create."[35]

RFRA reinforces America's foundational commitments to religious liberty as an inalienable right, to a government that recognizes limits on its power, and to a healthy pluralism essential to a free society: RFRA is remarkable not only for Congress's renewal of its pledge to respect and protect religious liberty – first given in 1789 when Congress framed the First Amendment – but also for Congress's renewed pledge to the constitutional principle that our government is to be one of limited power. Rarely does any government voluntarily limit its own power, but RFRA stands as such a too-rare reminder that America's government is a limited government that defers to its citizens' religious liberty except in compelling circumstances. By evenhandedly protecting religious freedom for all citizens, RFRA embodies American pluralism.

In RFRA, Congress re-committed the Nation to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed according to their religious beliefs. In RFRA, a Nation begun by immigrants seeking religious liberty renewed its pledge to be a perpetual haven for persons of all faiths.[36]

II. Has the Freedom of Religion Become the "Freedom to Recant"?

Religious liberty is also threatened by the ongoing effort to exclude religious groups from the public square. For example, some colleges have excluded, or threatened to exclude, religious student groups from campus because the groups require their leaders to share the groups' religious beliefs.[37] A similar

[35] Garnett and Dunlap, *supra* note 12, at 281. *See also,* Laycock, *supra* note 4, at 842 ("Protecting religious liberty reduces human suffering; people do not have to choose between incurring legal penalties and surrendering core parts of their identity.")

[36] *See* Hearing, *supra* note 13, at 8 (statement of Sen. Metzenbaum) ("We all know that America . . . was founded as a land of religious freedom, as a haven from religious persecution. . . . I am proud to be an original cosponsor of the Religious Freedom Restoration Act, which restores the high standards for protecting religious freedom.")

[37] *See* Attachment I (Statement of Kimberlee Wood Colby, Senior Counsel, Center for Law & Religious Freedom of the Christian Legal Society, *"Peaceful Coexistence? Reconciling Non-discrimination Principles with Civil Liberties,"* United States Commission on Civil Rights Briefing, March 22, 2013).

exclusion of religious groups from the public square is New York City's eighteen year-long fight to exclude religious congregations from weekend use of public school buildings, based on Establishment Clause fears, even though the Supreme Court repeatedly has made clear that the Establishment Clause is not violated by equal access for religious speakers.

Exclusion of religious groups by some colleges: It is common sense, not discrimination, for a religious group to require its leaders to agree with its religious beliefs. But in 2012, Vanderbilt University administrators excluded fourteen Catholic and evangelical Christian groups from campus because they required their leaders to share the groups' religious beliefs. Vanderbilt administrators told a Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution: "personal commitment to Jesus Christ."[38] Students in that group left campus rather than recant their belief in Jesus Christ. Vanderbilt administrators informed the Christian Legal Society student chapter that its expectation that its leaders would lead its Bible studies, prayer, and worship was religious discrimination, as was its requirement that its leaders agree with its core religious beliefs.[39] Vanderbilt is just one example. Other recent threats to exclude religious student groups have included California State University[40] and Boise State University.[41]

On a typical university campus, hundreds of student groups meet to discuss political, social, cultural, and philosophical ideas. These groups usually apply to the university administration for recognition as a student group. Recognition allows a student group to reserve meeting space, communicate with other students, and apply for student activity fee funding available to all groups.

[38] Attachment I includes the redacted email in its Attachment B.

[39] Attachment I includes the redacted email in its Attachment A. While Vanderbilt refused to allow religious groups to have religious leadership requirements, it specifically announced that fraternities and sororities could continue to engage in sex discrimination in the selection of both leaders and members.

[40] Attachment II includes the letter describing the exclusion policy but granting a one-year moratorium.

[41] Attachment II includes a letter from the Boise State University student government. Last year, the Idaho Legislature enacted Idaho Code § 33-107D to prohibit public universities from denying recognition to religious student groups because of their religious leadership requirements.

Without recognition, a group finds it nearly impossible to exist on campus.

At too many colleges, religious student groups are being told that they cannot meet on campus if they require their leaders to agree with the groups' religious beliefs. But it is common sense and basic religious liberty – not discrimination -- for religious groups to expect their leaders to share their religious beliefs.

Colleges' efforts to exclude religious groups began 40 years ago when some administrators claimed that the Establishment Clause required them to prohibit religious student groups. After the Supreme Court rejected the Establishment Clause as a justification for denying religious groups recognition,[42] university nondiscrimination policies became the new justification. Nondiscrimination policies are good and essential. But, at some colleges, nondiscrimination policies are being *misinterpreted* and *misused* to exclude religious student groups. Nondiscrimination policies are intended to *protect* religious students, not *prohibit* them from campus.

Such misuse of nondiscrimination policies to exclude religious groups is unnecessary. Many colleges recognize that strong nondiscrimination policies and robust religious liberty are entirely compatible and have embedded protection for religious liberty within their nondiscrimination policies.[43]

Our nation's colleges are at a crossroads. They can respect students' freedoms of speech, association, and religion. Or they can misuse nondiscrimination policies to exercise intolerance toward religious student groups who refuse to abandon their basic religious liberty. The colleges' choice is important not only to the students threatened with exclusion, and not only to preserve a diversity of ideas on college campuses, but also because the lessons taught on college campuses inevitably spill over into our broader civil society.

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[42] *Widmar v. Vincent*, 454 U.S. 263 (1981) (the Establishment Clause did not justify the University of Missouri's denial of recognition to an evangelical Christian group; instead the religious student group's free speech and association rights were violated); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (the Establishment Clause did not justify the University of Virginia's denial of funding to a religious student publication; instead the University violated the religious student publication's free speech rights).

[43] Attachment I has examples of such policies in its Attachment C.

Misuse of nondiscrimination policies to exclude religious persons from the public square threatens the pluralism at the heart of our free society. The genius of the First Amendment is that it protects everyone's speech, no matter how unpopular, and everyone's religious beliefs, no matter how unfashionable. When that is no longer true -- and we seem dangerously close to the tipping point -- when nondiscrimination policies are misused as instruments for the intolerant suppression of traditional religious beliefs, then the pluralism so vital to sustaining our political and religious freedoms will no longer exist.

New York City's marathon effort to deny religious congregations access: An analogous effort to exclude religious citizens from the public square, New York City has waged an eighteen year-long battle to deny religious congregations the same access that other community groups enjoy to public school buildings for weekend and evening use.[44] Almost all urban school districts welcome community use of school facilities on weekends, including the additional revenue it sometimes brings. But New York City claims that its "fears" that the Establishment Clause might be violated justifies its exclusion of religious groups that want to engage in "religious worship services," even though the City agrees that it must allow religious groups access for "religious speech" and "religious worship" under prevailing Supreme Court precedent.

Many religious congregations wish to meet in the City's school facilities on weekends because they cannot afford to buy real estate, or they have outgrown their old facilities, or they have suffered a fire or hurricane damage and need temporary meeting space. But in 2012, the Second Circuit agreed that New York City could deny meeting space to these congregations despite numerous Supreme Court precedents protecting equal access for religious community groups.[45] Their eviction has been delayed by further court proceedings, but in April 2014, the Second Circuit ruled yet again that the City could close its doors to the religious congregations. In an *amicus curiae* brief filed by the Christian Legal Society on behalf of hundreds of New York City congregations from the Catholic, Jewish, and Protestant faiths, the congregations registered their deep

[44] *Bronx Household v. Bd. of Educ.*, 2014 WL 1316301 (2d Cir. Apr. 3, 2014).

[45] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

dismay at the hostility they are experiencing.[46]

While the City has relied on a non-credible Establishment Clause fear to justify excluding the congregations, in its 2007 and 2012 decisions, one judge opined that the City might consider denying a church access because its meetings might not be "open to the general public" if the church reserved communion to baptized persons.[47] Although not repeated in the most recent 2014 opinion, this ominous observation from a federal appellate judge is cause for future concern.

III. Current Religious Liberty Issues involving the Federal Executive Branch

The federal executive branch has itself been a source of significant threats to religious liberty. The executive branches' positions taken in *Hosanna-Tabor v. EEOC*[48] and the HHS Mandate represent religious liberty threats of a different order of magnitude than has been seen since the nineteenth century in America.[49]

Actions that have positive ramifications for religious liberty: Certain actions of the executive branch should be commended. The Department of Justice filed a strong *amicus curiae* brief[50] in support of prisoners' religious liberty as protected by the Religious Land Use and Institutionalized Persons Act of 2000[51] on

[46] The Statement in Support of Petition for Rehearing *En Banc* of *Amici Curiae* the Council of Churches of the City of New York; Union of Orthodox Jewish Congregations of America; Brooklyn Council of Churches; Queens Federation of Churches; American Baptist Churches of Metropolitan New York; National Council of the Churches of Christ in the USA; General Conference of Seventh-day Adventists; National Association of Evangelicals; Ethics & Religious Liberty Commission of the Southern Baptist Convention; American Bible Society; Anglican Church in North America; Interfaith Assembly on Homelessness and Housing; the Synod of New York, Reformed Church in America; and the Rev. Charles Straut, Jr., *filed in Bronx Household v. Bd. of Educ.*, No. 12-2730 (2d Cir. Apr. 21, 2014), is available at http://www.clsnet.org/document.doc?id=746 (last visited June 8, 2014).

[47] *Bronx Household v. Bd. of Educ.*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring).

[48] 132 S. Ct. 694 (2012).

[49] In the 1870s, the Grant Administration presided over draconian attempts to limit the religious liberty of the Church of the Latter-Day Saints and the Catholic Church.

[50] http://www.becketfund.org/wp-content/uploads/2014/05/13-6827tsacUnitedStates.pdf.

[51] 42 U.S.C. § 2000cc *et seq.* (2012).

May 29, 2014. It filed a masterful *amicus curiae* brief in *Town of Greece v. Galloway.*[52] The Department is defending the constitutionality of the ministerial housing allowance in *Lew v. Freedom from Religion Foundation.*[53]

The executive branch has also maintained a consistent federal policy on religious hiring by religious organizations that receive federal grants and contracts. With respect to grants, the rules on employment discrimination are set by Congress, which often makes no rules about grantees' employment practices but has in some programs prohibited religious (and other) employment discrimination. The Office of Legal Counsel in 2007 issued a memorandum stating that such a prohibition is subject to the Religious Freedom Restoration Act, such that a religious organization that engages in religious hiring can claim that the requirement to end such hiring in order to participate in the program constitutes a substantial burden on its religious exercise that the government cannot justify as required by a compelling interest for which there is no less burdensome way to accomplish.[54] This 2007 OLC memorandum was applied by the Department of Justice's Office on Violence Against Women ("OVAW") in the case of the Violence Against Women Act to which Congress added an employment nondiscrimination requirement during reauthorization in 2013. The OVAW issued a memorandum on April 9, 2014, explaining the new nondiscrimination requirement and referencing the 2007 OLC memorandum. It explains how a religious organization can appeal to RFRA against the requirement and links to a Department of Justice form that a religious organization can complete and file with its grant application in order to take part in the program while maintaining its religious hiring practices.

With respect to contracts, where the employment nondiscrimination rules are set via Executive Order, the Obama Administration has left in place the Bush Administration's amendment to the nondiscrimination rules which created an exemption for religious organizations to enable them to accept federal contracts despite engaging in religious hiring.[55] President Obama amended this executive

[52] 134 S. Ct. 1811 (2014).

[53] 2013 WL 6139723 (W.D. Wis. 2013), *on appeal* No. 14-1152 (7th Cir. 2014).

[54] *See* Carl H. Esbeck, *The Application of RFRA to Override Employment Non-discrimination Clauses Embedded in Federal Social Service Programs,* 9 Engage: J. Federalist Soc'y Prc. Groups 140 (June 2008).

[55] Executive Order 13279 of December 12, 2002, 67 Fed. Reg. 77141, Dec. 16, 2002.

order, in part,[56] but did not change the Bush amendment permitting religious hiring by federal contractors. Finally, the Administration has been under considerable pressure, according to press reports, to issue an executive order forbidding employment discrimination on the bases of sexual orientation and gender identity by federal contractors, an action that would raise significant concern by many religious organizations that have a belief and conduct requirement as part of their religious hiring policy. Such an executive order has not been issued and is unnecessary.

Actions with negative ramifications for religious liberty:

A. In *Hosanna-Tabor,* the executive branch urged the Supreme Court to rule that the Free Exercise Clause did not protect religious congregations' hiring decisions as to who their ministers would be: The Department of Justice stunned the religious liberty community when it filed a brief arguing that the right of religious congregations to hire and fire their ministers without governmental interference was not protected by the Religion Clauses of the First Amendment.

In a unanimous decision, the Supreme Court condemned the Solicitor General's argument, describing it as "untenable" and "hard to square with the text of the First Amendment itself." [57] The Court rejected the "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." [58] The Court concluded:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[59]

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[56] Executive Order 13559 of November 17, 2010, 75 Fed. Reg. 71319, Nov. 17, 2010.

[57] 132 S. Ct. at 697; *id.* at 706.

[58] *Id.* at 706.

[59] *Id.* at 710.

B. The HHS Mandate represents a remarkable attempt by the government to minimize Americans' religious liberty for several reasons:

1. The Mandate's definition of "religious employer" fails to protect most religious ministries that serve as society's safety net for the most vulnerable. The Mandate's current definition of "religious employer" is grossly inadequate to protect meaningful religious liberty. When adopting the Mandate's definition of "religious employer," the executive branch bypassed time-tested federal definitions of "religious employer" – for example, Title VII of the Civil Rights Act of 1964 and its definition of "religious employer" -- in favor of a controversial definition devised by three states.[60]

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable epitomized the quintessential "religious employer" and, therefore, were protected under responsible federal definitions of "religious employer." But the Mandate unilaterally re-defined most *religious employers* to be *non-religious employers*. By administrative fiat, religious educational institutions, hospitals, associations, and charities were deprived of their religious liberty.

In August 2011, Health Resources and Services Administration of the Department of Health and Human Services issued a "religious employer" exemption that protected only a severely circumscribed subset of religious organizations.[61] To qualify as a "religious employer" for purposes of the exemption, a religious organization was required to: 1) inculcate values as its purpose; 2) primarily employ members of its own faith; 3) serve primarily members of its own faith; and 4) be an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii).[62] The fourth criterion referred only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

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[60] In observing that the controversy may have been avoided had the government begun with Title VII's definition of "religious employer," it is not suggested that Title VII's definition encompasses all the employers legally entitled to an exemption under RFRA and the First Amendment.

[61] *Id.* at 46623; 45 C.F.R. § 146.130.

[62] 45 C.F.R. § 147.130(a)(1)(iv)(B).

The exemption failed to protect most religious employers, including colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other religious organizations. This failure was intentional. HHS itself stated that its intent was "to provide for a religious accommodation that respects the unique relationship between *a house of worship and its employees in ministerial positions.*" [63]

Arbitrarily transforming the majority of *religious* employers into *nonreligious* employers, HHS reached for a controversial definition of religious employer that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state courts.[64] The fact that these state mandates had been challenged by Catholic Charities as a violation of their religious liberty demonstrated that HHS officials knew the exemption would be unacceptable to many religious organizations. But at least religious organizations could avoid *state* contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the *federal* Mandate.

As soon as this definition was made public, forty-four Protestant, Jewish, and Catholic organizations immediately sent a letter to the Administration explaining the severe problems with the proposed definition of "religious employer." [65] Their critique of the exemption was two-fold. First the definition of "religious employer" was unacceptably narrow. Even many houses of worship failed to fit the Mandate's procrustean bed because of the exemption's peculiar design. To qualify as a "religious employer," a house of worship would have to serve primarily persons of the same faith. But many houses of worship – indeed, many religious charities – would deem it to be a violation of their core religious beliefs to turn away persons in need because they did not share their religious beliefs.

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[63] 76 Fed. Reg. at 46623. *See also* 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012).

[64] *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

[65] *See* Letter to Joshua DuBois, Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322 (last visited Oct. 21, 2013).

Although a revised definition of religious employer was adopted on July 2, 2013, that definition continues to violate religious liberty. Only churches, conventions or associations of churches, integrated auxiliaries, or religious orders fall within the Mandate's definition of religious employer.[66] Many, if not most, religious educational institutions and religious ministries do not qualify for the "religious employer" exemption. The many religious ministries that are independent of, and unaffiliated with, any specific church seemingly are no longer "religious employers."

Because the government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer," even religious educational institutions and religious ministries that *are* affiliated with churches do not necessarily qualify as religious employers. Former Secretary Sebelius stated that: "[A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the [contraceptive] benefit package," and "*Catholic hospitals, Catholic universities, other religious entities will be providing [contraceptive] coverage to their employees starting August 1st.*"[67]

For those that fall outside of the Mandate's crabbed definition of "religious employer," the so-called "accommodation" does not offer adequate religious liberty protections. The religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. A religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees. The government's argument rests on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences.

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[66] 78 Fed. Reg. 39,870 (July 2, 2013).

[67] Secretary Kathleen Sebelius, U.S. Secretary of Health and Human Services, Remarks at the Forum at Harvard School of Public Health (Apr. 8, 2013), http://the forum.sph.harvard.edu/events/conversation-kathleen-sebelius (Part 9, Religion and Policymaking, at 4:50 and 2:48) (last visited Sept. 16, 2013). The enforcement date was delayed until January 1, 2014. 78 Fed. Reg. 39,870 (July 2, 2013).

The government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality. As a practical matter, Secretary Sebelius has acknowledged, contraceptives are "the most commonly taken drug in America by young and middle-aged women" and are widely "available at sites such as community health centers, public clinics, and hospitals with income-based support."[68] Even if contraceptives were not already widely available, the government itself has several conventional means to provide contraceptives coverage to any and all employees, including: 1) a tax credit for the purchase of contraceptives; 2) direct distribution of contraceptives through community health centers, public clinics, and hospitals; 3) direct insurance coverage through state and federal health exchanges; and 4) programs to encourage willing private actors, e.g., physicians, pharmaceutical companies, or interest groups, to deliver contraceptives through their programs.

Given that in 2012 HHS spent over $300 million in Title X funding to provide contraceptives directly to women, why is the government unwilling to spend a modest amount to protect the priceless "first freedom" of religious liberty? In light of the bureaucratic expense and waste that implementation of the "accommodation" will necessarily create for the government and religious organizations, as well as insurers and third-party administrators, it would seem clearly more economical, easy, and efficient for the government itself to provide contraceptives through direct distribution, tax credits, vouchers, or other government programs.

2. The Mandate's inadequate definition of "religious employer" departs sharply from the Nation's historic bipartisan tradition that protects religious liberty, particularly in the context of abortion funding. For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[69]

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[68] *See* Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

[69] *See* Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records*, April 30, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5306 (last visited Sept. 16, 2013).

Before the ink had dried on *Roe v. Wade*,[70] a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect doctors and nurses who refuse to participate in abortion.[71] The Senate vote was 92-1.[72]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[73] In upholding its constitutionality, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[74] Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act,[75] to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers

[70] 410 U.S. 113 (1973).

[71] 42 U.S.C. § 300a-7.

[72] Most States have enacted conscience clauses, specifically 47 states as of 2007. James T. Sonne, *Firing Thoreau: Conscience and At-will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007).

[73] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976).

[74] *Harris v. McRae*, 448 U.S. 297, 325 (1980). In the companion case to *Roe*, the Court noted with approval that Georgia law protected hospitals and physicians from participating in abortion. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("[T]he hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.").

[75] 42 U.S.C. § 238n.

could not be prevented from purchasing insurance that excluded coverage of abortion or other services. Hospitals, doctors and other health care workers who refused to participate in the performance of any health care service on the basis of religious belief or moral conviction were protected. Commercial insurance companies and self-insurers likewise were protected.[76]

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[77]

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion."[78] The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits."[79] "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." [80]

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that "longstanding Federal Laws to protect conscience . . . remain intact and new

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[76] Doerflinger, *supra* note 69. See 103rd Congress, Health Security Act (S. 2351), introduced Aug. 2, 1994 at pp. 174-75 (text at www.gpo.gov/fdsys/pkg/BILLS-103s2351pcs/pdf/BILLS-103s2351pcs.pdf); Sen. Finance Comm. Rep. No. 103-323, *available at* www.finance.senate.gov/library/reports/committee/index.cfm?PageNum_rs=9 (last visited Sept. 16, 2013).

[77] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

[78] 42 U.S.C. § 18023(c)(2).

[79] *Id.* § 18023(b)(1)(A)(i).

[80] *Id.* § 18023(b)(1)(A)(ii).The Mandate is also at odds with 21 States' laws that restrict abortion coverage in all plans or in all exchange-participating plans. The ACA does not preempt State law regarding abortion coverage. 42 U.S.C. § 1301(c)(1).

protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide, pay for, provide coverage of,* or refer for abortions." [81] Former Representative Bart Stupak (D-Mich.), who voted for ACA based on his belief that Executive Order 13535 would protect conscience rights, has stated that the Mandate "clearly violates Executive Order 13535" [82] and has filed an amicus brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.[83]

Conclusion: By trampling religious conscience rights, the Mandate disregards the ACA's own conscience protections and defies the traditional commitment to bipartisan protection of religious conscience rights. Both the Religious Freedom Restoration Act and the First Amendment require that the government respect religious liberty by restoring a definition of "religious employer" that protects all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage. At the end of the day, this case is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive -- but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths.

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[81] 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added).

[82] Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at* http://www.democratsforlife.org/index.php?option=com_content&view=article&id=773:bart-stupak-on-contraception-mandate&catid=24&Itemid=205 (last visited Sept. 16, 2013).

[83] Brief *Amici Curiae* of Democrats for Life of America and Bart Stupak in Support of Hobby Lobby and Conestoga Wood, U.S.S.C. Nos. 13-354 & 356 (filed Jan. 28, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_dfla.authcheckdam.pdf.

Mr. FRANKS. Thank you, Ms. Colby.

And I now recognize Reverend Lynn.

TESTIMONY OF REV. BARRY W. LYNN, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Rev. LYNN. Thank you very much.

This panel certainly represents the two major world views about the state of religious freedom in America. Mine is this. Those in the majority faith, Christians like myself, are not the ones who suffer significant threats to their religious liberty. They have no serious impediments in believing, worshipping, obtaining taxpayer-supported grants, generally doing whatever they deem appropriate. This doesn't mean that there are no occasional errors made by government officials that need correction, but a few anecdotes do not make a war on Christianity.

There are, sadly, many efforts to regulate and relegate religious minorities and nontheists to a second-class status in parts of the country. They range from efforts to block construction of mosques to impeding high school students from forming nontheistic clubs where existing religious clubs are being permitted as required by Federal law.

Ironically, the single greatest threat to religious freedom comes from a radical redefinition of the idea itself. Religious freedom does not mean what many of my copanelists assert, it does not mean that for-profit companies that sell wind chimes or wood cabinets can trump the moral and medical decisions of women employees who would choose contraceptive services that their corporate owners would deny them in insurance coverage. It does not mean that a university must provide funds to school clubs that will not admit gay and lesbian students. It does not mean that religious groups seeking government grants and contracts should be allowed to discriminate on the basis of religion in hiring people for those State or federally funded positions.

There are legitimate instances when religious accommodations and exceptions need to be made; however, the government need not accede to every religious demand for an exception to a law that applies to everyone else. Such reaction would court anarchy.

At first, the government's entitled to ask how substantial a burden is being placed on the religious person. Regulations issued under the Affordable Care Act, for example, exempt many religiously affiliated institutions from covering employee or student contraceptive services in their insurance plans. If a college or a hospital objects, it signs a 635-word document so indicating and mails it to the government, making the government then responsible for locating third-party birth control coverage at no cost.

I found it absurd when Notre Dame University now claims it has a religious right to refuse even to opt out by signing this form and dropping it in a mailbox. Such a trivial action cannot seriously be construed under law as any kind of burden on religious practice. Until Judge Richard Posner rejected its claim, however, the three women graduate students Americans United represents at Notre Dame could neither get coverage through their university nor from

a third-party insurer under the rules, and that is not a speculative or attenuated burden on them.

Even if the burden on religion is not ephemeral, governments have a responsibility to assess the damage to third parties caused by any special exception. If a recently proposed Kansas statute had been enacted, one of its clear consequences would have been to allow hotel operators who object to marriage equality, even on idiosyncratic religious grounds, to refuse to rent to a gay couple, not only depriving those persons of the room they desire, but offering a direct and offensive insult to their very dignity as human beings. When a religiously affiliated entity cites Christian scripture to justify unequal payments to male and female employees there is a clear, easily measured downside for those women.

Some accommodations, of course, do not impinge on the rights of others. Three of us here today have filed friend of the court briefs in a Supreme Court case where a Muslim prison inmate was unfairly told he could not grow a short beard consistent with his religious obligations. Facial hair on person A does not affect person B. Allowing a same-gender couple to marry cannot conceivably offend the religious liberty of a person across town who doesn't even know that couple exists.

I think the Framers of the Constitution would be appalled at the radical revisionism of the First Amendment being advocated by some. More importantly, I think the America of the future will look askance at efforts to elevate majority faiths or subject not so traditional believers to the status of an orphan class to be denied genuinely equal treatment in this diverse country.

In that 5-4 decision in the Supreme Court's recent Town of Greece case, which came dangerously close to embracing the concept of majority rule in legislative prayer practices, I noted on Fox News' "The Kelly File" five members of the court seem to be running counter to the entire culture of the United States where we try to be more sensitive to the diversity of religion, the diversity of belief.

Where real assaults and religious freedom occur, they should be condemned. Where a claimed defense is really a special privilege operating to the detriment of others, it should simply be rejected.

Thank you, Mr. Chairman.

[The prepared statement of Rev. Lynn follows:]

Testimony of the

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Americans United For Separation of Church and State

Submitted to the

U.S. House of Representatives Judiciary Committee Subcommittee on the Constitution and Civil Justice

***Written Testimony* for the Hearing Record on**

"The State of Religious Liberty in the United States"

June 10, 2014

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for this opportunity to present testimony on the "State of Religious Liberty in the United States."

As both an ordained minister in the United Church of Christ and an attorney, I take matters of religious liberty very seriously. And I have appreciated serving as the Executive Director of Americans United for Separation of Church and State for the last 22 years.

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship, or not, as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

The good news is that the United States is one of the most religiously diverse countries in the world and our constitution grants us some of the strongest religious liberty protections in the world. Nonetheless, we still face threats to religious liberty in our country every day.

The largest threats as I see them today can be placed into two broad categories: threats to religious minorities and non-believers, and efforts to radically redefine religious liberty. Threats to the Christian majority are few, far between, and sometimes, frankly, untrue.

Non-believers and adherents to less popular faiths are still denied the basic rights that many of us practicing a majority faith take for granted every day. They face religious coercion, harassment, exclusion, and overt religious employment discrimination.

Another threat is the mounting attempts to radically redefine religious liberty. To me, religious freedom means having the right to practice your religion free of harassment and undue influence from governments at any level. Categorical religious or "faith specific" exemptions to law and other generally applicable rules and regulations should be granted only where they will not unduly burden the legitimate rights of others. But what are often described as threats to religious freedom today are really attempts to obtain sweeping exemptions that could deny others fundamental rights to make lawful moral choices and exercise their own individual conscience; efforts to seek privileges reserved for religious entities by organizations that are engaged in commercial enterprises or that serve as a government provider of services; and attempts to use the machinery of government to promote particular religious beliefs, often resulting in the coercion of others to follow those doctrines. Ironically, under these circumstances, the accommodations and privileges sought in the name of religion become a real threat to religious freedom overall.

I. Threats to the Religious Liberty of Members of Minority Faiths

A. Prevention of the Right to Assemble and Worship

In America today, some religious minorities are denied the right to even construct houses of worship and other buildings for their congregations. They face not just the difficulties that some majority faiths must overcome, such as zoning roadblocks. They also face community—and sometimes national—protests, intimidation, and threats of violence.

For example, when a Muslim congregation in Murfreesboro, TN sought to build a new mosque to replace their overcrowded building, they encountered "public protests, vandalism, arson of a construction vehicle and a bomb threat."[1] Even though the local zoning board approved the project, members of the community sued to stop construction, arguing that Islam is not a true religion.[2] The intimidation influenced construction companies, which became too afraid to even work on the project, delaying the construction.[3] And, the threats led to new costs for expensive security measures, such as cameras.[4] In August 2012, the new mosque finally opened,[5] but the lawsuit to challenge their use of the property continued for another two years. In fact, the case came to an end just last week when the Supreme Court denied certiorari.

Unfortunately, these problems are not unique to Murfreesboro. Muslim congregations elsewhere have faced similar pushback, including, to name a few: a petition of 300 signatures to stop the construction of a mosque in Madison, MS;[6] community outrage over the construction of a mosque in Lilburn, GA, leading to DOJ intervention;[7] and a lawsuit to halt the construction of a mosque in Boynton Beach, FL, alleging it would lead to terrorist activities.[8] And, minority religious groups in communities all across the country continue to encounter threats to their ability to congregate and worship. In Glendale, AZ, a Muslim mosque was attacked with an acid bomb.[9] In Oak Creek, WI, a

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[1] Travis Loller, *Islamic Center of Murfreesboro: After Long Fight, Opening Day For Tennessee Mosque*, HUFFINGTON POST (Aug. 11, 2012), http://www.huffingtonpost.com/2012/08/11/after-long-fight-opening-day_n_1768915.html.
[2] *Id.*
[3] *Id.*
[4] Scott Broden, *Murfreesboro Mosque Members Celebrate Groundbreaking*, TENNESSEAN (Sept. 29, 2011). http://www.tennessean.com/article/20110929/NEWS06/309290061/ Murfreesboro-mosque-members-celebrate-groundbreaking.
[5] Loller, *supra*, note 1.
[6] Adam Lynch, *Mosque Construction Planned in April*, JACKSON FREE PRESS (Mar. 22, 2010), http://www.jacksonfreepress.com/news/2010/mar/22/mosque-construction-planned-in-april/.
[7] Joel Anderson, *Mosque Dispute Divides Lilburn*, ATLANTA J.-CONST. (Oct. 5, 2011), http://www.ajc.com/news/news/local/mosque-dispute-divides-lilburn/nQMK9/.
[8] Matt Sedensky, *Suit Seeks to Stop Building Mosque*, LEDGER (May 2, 2007), http://www.theledger.com/article/20070502/NEWS/705020464.
[9] *Arizona Mosque Targeted in "Acid Bomb" Attack*, REUTERS (Aug. 8, 2007), http://www.reuters.com/article/2007/08/08/us-crime-usa-mosque-idUSN0833871920070808

gunman killed six people during Sunday services at a Sikh gurdwara.[10] Most recently, in Overland Park, KS a man opened fire on a Jewish Community Center.[11]

B. *Coercion and Intimidation in our Public Schools*

Students of minority faiths sadly face harassment, bullying, and coercion in our public schools on the basis of their religion, not just from students but also from school administrators. Given the incredible diversity of American society and the fact that school attendance is mandatory, it is especially important that our public schools respect the beliefs of every student. As explained by the U.S. Supreme Court: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[12] There are, unfortunately, a significant number of reported examples of non-compliance with this principle.

Recently, a 6th grade student at a Louisiana public school was bullied so badly by teachers and students for being Buddhist "that he became physically sick every morning before going to class."[13] The student wasn't trying to convert other students to Buddhism, proselytize his fellow students about his religion, disparage the religion of others, or require others to engage in his religious practices at each and every school event. He was just trying to get through the school day. But school employees and fellow students forced him to engage in their religious practices, required him to acknowledge their religion as true, and chastised him as "stupid" for having different beliefs.[14] When his parents attempted to resolve the issue, a school official told them that the solution was to change the child's religion.[15]

Harassment and threats also recently forced a 15-year old student to give up on her efforts to start a Secular Student Alliance at Pisgah High School in Canton, NC.[16] At first, her school, which had already recognized the Fellowship of Christian Athletes at the time she sought the secular club, refused to allow the club. School officials ignored her

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[10] Brendan O'Brien, *Wisconsin Shooting: 7 People Killed at Sikh Temple, Including Shooter*, HUFFINGTON POST (Aug. 5, 2012), http://www.huffingtonpost.com/2012/08/05/wisconsin-shooting-sikh-temple_n_1744256.html?utm_hp_ref=religion&ir=Religion.

[11] Saeed Ahmed et al., *Jewish Center Shooter 'Knocked Family to Its Knees,' Relative Says*, CNN (Apr. 15, 2014), http://www.cnn.com/2014/04/14/us/kansas-jewish-center-shooting/.

[12] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

[13] Carol Kuruvilla, *ACLU sues Bible Belt school for allegedly bullying Buddhist student*, N. Y. DAILY NEWS (Jan. 24, 2014), http://www.nydailynews.com/news/national/aclu-sues-bible-belt-school-allegedly-bullying-buddhist-student-article-1.1590578#ixzz33ix0otzw

[14] *Id.*

[15] *Id.*

[16] Kimberly Winston, *Student Reverses Course on Secular Club*, WASH. POST (Feb, 28, 2014), http://www.washingtonpost.com/national/religion/student-reverses-course-on-secular-club-citing-threats/2014/02/28/2555d50e-a0c1-11e3-878c-65222df220eb_story.html

requests and then claimed that such a club "didn't fit in" at the school.[17] Eventually she forced the school to comply with the Equal Access Act and recognize the club. But shortly after, community backlash and harassment forced her to abandon her efforts altogether.[18]

C. *Exclusion of Minority Faiths at Public Meetings*

Just last month, the Supreme Court decided *Town of Greece v. Galloway,*[19] which held that local governments may open their meetings with ceremonial prayers and that those prayers may include religion-specific references. We served as counsel for the plaintiffs in this case, so it is no surprise that we were greatly disappointed with this decision. Sectarian prayers do not represent the traditions of many people who subscribe to non-Judeo-Christian beliefs or practice no religion, and the prayers send a message to these residents that their government does not represent their interests or welcome their participation in debates over matters of concern to the community. As explained by retired U.S. Supreme Court Justice Sandra Day O'Connor in a 2008-opinion written for the Fourth Circuit: "The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith."[20] Local governments should work to encourage their citizens to participate in government rather than create policies that discourage such engagement.

The Court did make clear in its decision, however, that the First Amendment still imposes important limits on legislative prayer practices, including that the government cannot exclude potential speakers from giving the opening message on the basis of religion. The Court explained that the government must "maintain[] a policy of nondiscrimination"[21] and "must welcome a prayer by any minister or layman who wished to give one."[22] Nonetheless, the very day the decision was issued, Roanoke County (VA) Board of Supervisors member, Al Bedrosian, declared his intent to adopt a county policy that would allow *only* Christians to give prayers at Supervisor meetings.[23] A few days later he doubled-down on his plan. When asked "how he would respond to a non-Christian's request to offer the invocation at the Roanoke County Board of Supervisors meetings," he said: "I would say no."[24] Why would he do this? Because

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[17] Letter from The ACLU of North Carolina and the Freedom From Religion Foundation to Dr. Anne Garrett, Superintendent of Haywood County Schools (Feb. 11, 2014), *available at* https://www.secularstudents.org/sites/default/files/LetterToHaywoodCountySchools.pdf

[18] *Student Reverses Course on Secular Club, supra*, note 16.

[19] 134 S. Ct. 1811 (2014).

[20] *Turner v. City Council of City of Fredricksburg*, 534 F.3d 352, 356 (4th Cir. 2008).

[21] *Greece*, 134 S.Ct. at 1824.

[22] *Id.*

[23] Chase Purdy, *Group Warns About Legal Risks of Bedrosian-Proposed Prayer Policy,* ROANOKE TIMES (May 9, 2014), http://www.roanoke.com/news/local/roanoke_county/civil-liberties-group-decries-bedrosian-proposal-on-prayers/article_99b2a9bc-d7ae-11e3-80e0-0017a43b2370.html

[24] *Id.*

non-Christians giving prayers at the meetings would be "trying to infringe on [his] right, because [he] doesn't believe that."[25]

Although this policy would clearly run afoul of the decision in *Greece*, it represents yet another battle that members of minority faiths and non-believers must fight simply for equal treatment. In order to conduct public business, these members of our communities are subjected to prayers of faiths other than their own and their faith community is often excluded from even having the opportunity to participate in the practice.

D. *Grooming and Appearance Requirements in the Military*

Since the 1980's, the Department of Defense policies regarding grooming and appearance in the military have preemptively excluded members of minority religious communities from serving because of their mandated religious articles of faith. Kamaljeet Kalsi, a Sikh American, grew up in New Jersey and came from a family with three generations of military service.[26] The U.S. Army recruited him while he was in medical school, as part of the Health Professionals Scholarship Program and assured him that his religiously required external articles of faith—unshorn hair and the turban—would be accommodated.[27] Kalsi spent several years as an Army reserve officer while attending medical school. In 2009, upon completion of his medical education he was called to active duty. At that time, the Army told him that, in fact, military policy did prohibit his religious articles of faith. Unless he shaved his beard, cut his hair and removed his turban, he could not attend basic training and continue his military duties.[28]

It took two years of legal maneuvering before the Army finally granted Dr. Major Kalsi an accommodation to maintain his articles of faith. This was the first accommodation granted to a Sikh American in more than twenty-five years.[29] After receiving the accommodation, Dr. Major Kalsi was deployed to Afghanistan as Officer-in-Chief of a tented Emergency Room in Helmand province. During his tour in Afghanistan, Dr. Major Kalsi personally treated over 750 combat casualties and local nationals who suffered from IED blasts, gunshot wounds, and other emergent conditions. For his service in Afghanistan, Dr. Major Kalsi was awarded the Bronze Star.[30]

In addition to Dr. Major Kalsi, there are only two other Sikh Americans, Captain Tejdeep Rattan and Specialist Simran Singh Lamba, who have fought for and successfully been

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[25] *Id.*

[26] *Is the Federal Government Adequately Protecting the Civil Rights of Our Veterans and Service Members Who Have Fought for Our Rights?*: Briefing before the U.S. Comm'n on Civil Rights (2013) (personal statement of Major Kamaljeet Singh Kalsi to the U.S. Comm'n on Civil Rights) http://sikhcoalition.org/images/kalsicivilrightstestimony.pdf.

[27] Tony Lombardo, *Army Tells Sikh Officers to Change Appearance*, ARMY TIMES (Apr. 25, 2009), http://www.armytimes.com/article/20090425/NEWS/904250308/Army-tells-Sikh-officers-change-appearance.

[28] James Dao, *Taking On Rules to Ease Sikhs' Path to the Army*, N.Y. TIMES,(Jul. 7, 2013), http://www.nytimes.com/2013/07/08/us/taking-on-rules-so-other-sikhs-join-the-army.html?_r=0.

[29] *Id.*

[30] Letter from U.S. Comm'n on Civil Rights to Chuck Hagel, U.S. Sec'y of Def. (Dec. 3 2013), *available at* http://www.usccr.gov/pubs/Letter_Sikh-Military-Service.pdf.

granted accommodations and are currently serving in the U.S. Army.[31] These accommodations, however, are not permanent.

Although the Department of Defense recently released a revised version of its religious accommodation policy,[32] the new policy does not go far enough and could continue to prevent adherents of minority faiths from joining or maintaining their military careers. First, current policy states that those who make the request must "refrain . . . from beginning unauthorized grooming and appearance practices, [or] wearing unauthorized apparel . . . until the request is approved."[33] Second, service members must re-apply for an accommodation upon each new assignment, transfer of duty stations, or other significant change in circumstances, including deployment, making their military future uncertain.[34]

We believe that an entire class of service members who can otherwise successfully perform their military duties, should not be denied the ability to serve their country simply because their religion requires them to wear a head covering or a beard. Current policy fails to properly and practically accommodate many service members who need an appearance and grooming accommodation. These concerns should be addressed so that Sikhs, and other adherents of minority faiths do not have to choose between their faith and their country.

It is important to note that in these cases the "accommodation" requested has no negative impact on the rights of any third parties whatsoever, a distinction sometimes lost by those seeking more sweeping exemptions from law or regulation.

E. *Federally Funded Employment Discrimination*

Another affront to religious freedom in the United States is that qualified individuals can be denied government-funded jobs based on nothing more than their religious beliefs or lack thereof. In accordance with current statutes, executive orders, regulations, and memoranda on the books today, religious organizations can both perform government services with government money and claim an exemption to the general rule that government contractors and grantees hire without regard to religion. Those who are most likely to suffer under this scheme, of course, are non-believers and members of minority faiths.

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[31] McDermott Will & Emery, L.L.P. & The Sikh Coalition, *The Case for Ending the Presumptive Ban on Observant Sikhs in the U.S. Armed Forces*, Mar. 10, 2014, *available at* http://www.mwe.com/files/Uploads/Documents/Pubs/Sikhs%20in%20Army%20White%20Paper%20and%20Exhibits.pdf.

[32] Department of Defense Instruction No. 1300.17: Accommodation of Religious Practices Within the Military Services, (Jan. 22, 2014), *available at* http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf.

[33] *Id.*

[34] *Id.*

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, national origin, color, religion, and sex.[35] Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.[36] Before the mid-90's, it had been generally accepted that this exemption applies only when the religious organization is using its own funds. Accordingly, religious organizations that had partnered with the government for generations did not engage in religion-based hiring for positions that were funded with taxpayer money.

Then came the Faith-Based Initiative. Ushered in by the Bush Administration, it allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on his or her religious beliefs or lack thereof. Because significant, direct government funding of religious organizations is of relatively recent vintage, neither the Supreme Court nor any court of appeals has directly addressed whether the Title VII exemption can constitutionally be interpreted to permit a religious organization to discriminate on the basis of religion for jobs that are funded with government dollars. We agree with the statement made by then-candidate Barack Obama in a 2008 campaign address in Zanesville, OH: The federal government should never fund employment discrimination on the basis of religion.[37] Indeed, the government should *never* subsidize discrimination.

Unfortunately, the current Administration has not taken any steps to restore the decades-old federal ban on employment discrimination in publicly funded programs. Indeed, it still allows religious organizations "to receive federal funds and to continue considering religion when hiring staff even if the statute that authorizes the funding program generally forbids consideration of religion in employment decisions by grantees."[38] The organization needs only to sign a form asserting it "sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of a particular religion is important to its religious exercise; and that having to abandon its religious hiring practice in order to receive the federal funding would substantially burden its religious exercise."[39]

This issue is not just an abstract policy issue. Real people are suffering actual religious discrimination as a result of the policy. For example, World Vision is "one of the largest

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[35] 42 U.S.C. § 2000e-2 (1964).
[36] 42 U.S.C. § 2000e-1(g) (1964).
[37] On July 1, 2008, in Zanesville, OH, President Obama stated that: "If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion." Jeff Zeleny and Michael Luo, *Obama Seeks a Bigger Role for Religious Groups*, N.Y. TIMES (July 2, 2008), http://www.nytimes.com/2008/07/02/us/politics/02obama.html?pagewanted=all&_r=0.
[38] *Certificate of Exemption for Hiring Practices on the Basis of Religion*, OFFICE OF JUSTICE PROGRAMS, http://gb1.ojp.usdoj.gov/search?q=cache:iM-f0jYSmTwJ:www.ojp.usdoj.gov/funding/forms/fbo_sample.pdf+certificate+of+exemption&site=OJP&client=ojp_frontend_new&proxystylesheet=ojp_frontend_new&output=xml_no_dtd&ie=UTF-8&access=p&oe=UTF-8 (last visited June 8, 2014).
[39] *Id.*

recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm."[40] Government grants "amount to about a quarter of the organization's total U.S. budget."[41] Nonetheless, "World Vision hire[s] only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed."[42] It is essentially a hiring practice that says: "No Muslim, Jews, Hindus, Atheists or even Unitarians need apply."

Thus, even in Mali, a predominantly Muslim country, World Vision hires non-Christians only when they cannot find a Christian for the position.[43] Bara Kassambara, a non-Christian, therefore, was only eligible for a temporary job. And, Lossi Djarra applied for a job as a driver, but a Protestant man was hired. Djarra said the World Vision policy of preferring Christians makes the locals "angry" because "if you're not in their church on Sunday, you won't get the job. People don't have a chance." It is particularly frustrating to locals because "positions with foreign aid agencies are often the most lucrative gigs available."[44]

Fabiano Franz, World Vision's national director for Mali, defended the policy, explaining: "We're very clear from the beginning about hiring Christians. It's not a surprise, so it's not discrimination."[45] But, having a stated policy of discrimination hardly negates its discriminatory effects.

Government-funded religious discrimination strikes at the heart of the issue before us. Religious freedom must mean, at least, that the government can't make you pass a religious test administered by a third party before applying for a government-funded job.

II. The Radical Redefinition of Religious Liberty

The right to practice one's religion is conditioned on a collateral legal respect for the equal rights of others. Special religious accommodations and exemptions should only be granted when they ease a genuine and substantial burden on religious practice and when granting the accommodation would not impinge on the rights, or otherwise harm the interests, of others. Subordinating the rights of some to the religious choices of others risks fomenting the religious strife that the Establishment Clause was designed to forestall.

There is a strategic effort today, and I daresay from some of my co-panelists this afternoon, however, to dramatically redefine religious liberty as the right to an accommodation for even de minimus, highly attenuated burdens in disregard of how

[40] Krista J. Kapralos, Non-Christians Need Not Apply, GLOBALPOST (Jan. 11, 2010), http://www.globalpost.com/dispatch/ngos/100110/world-vision-religion-foreign-aid.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

the accommodation would affect third parties. Today, for-profit corporations are using religion to deny women government-required health benefits; businesses are seeking the right to deny services to LGBT patrons in the name of religion; individuals are labeling religious neutrality and equality for all as religious oppression; and government employees are characterizing conduct as "religious freedom" for themselves that is, in fact, imposing their religion on others.

There are certainly situations where religion is deserving of reasonable and appropriately tailored accommodations. But, it is not a trump card that supersedes all other interests or that can justify imposing significant burdens on others. Efforts to make it so, threaten true religious liberty.

A. *Attempts to Change the Intent and Effect of the Religious Freedom Restoration Act (RFRA)*

In *Employment Division of Oregon v. Smith*,[46] the Supreme Court ruled that the Free Exercise Clause of the U.S. Constitution does not require the application of "strict scrutiny" to neutral and generally applicable laws. Many viewed *Smith* as a step backwards for religious freedom, as the Court previously had applied strict scrutiny in these cases: The government could not substantially burden religion unless the government had a compelling interest and the law was narrowly tailored.[47] In response, Congress passed RFRA to reinstate the pre-*Smith* standard. In passing RFRA, Congress quelled fears that, post-*Smith*, religious exercise would garner no protections. The examples of RFRA's power often used by supporters then included that it would prevent dry communities from banning the use of wine in communion services, government meat inspectors from requiring changes in the preparation of kosher food, the government from regulating the selection of priests and ministers,[48] or a public school from forbidding a student to wear a yarmulke.[49]

Noticeably absent from that list of examples: that RFRA would allow large secular corporations to deny employees and customers rights and protections to which they would otherwise be entitled; or, that RFRA would allow secular businesses to ignore non-discrimination laws. None of the exemptions contemplated by Congress would have required a third-party to forfeit federal protections or benefits otherwise available widely. Indeed, when Congress passed RFRA 20 years ago, supporters—including Americans United—intended for the bill to be a shield for religion and not a sword to harm others. No one imagined that today the bill would be manipulated in such a way. If they had, I, as a person there at the conception of this bill and following it through its three-year gestation, am reasonably confident the bill never could have passed.

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[46] 494 U.S. 872 (1990).

[47] *See, e.g., Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

[48] 139 Cong. Rec. S. 2822 (Mar. 11, 1993)(floor statement of Sen. Edward Kennedy), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s2822-24-1993.pdf

[49] 139 Cong. Rec. S. 9821 (July 2, 1992) (floor statement of Sen. Orrin Hatch), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s9821-23-1992.pdf

1. *Denying Women Healthcare in the Name of Religious Freedom*

One of the most widely discussed religious freedom issues in the United States today involves the insurance coverage mandate for contraceptives under the Affordable Care Act. Opponents of the mandate argue that it violates the religious freedom rights of employers. In contrast, we believe that allowing employers to use religion as a reason to deny their employees rights and benefits is the real threat to religious freedom. Such overly broad exemptions quickly change from religious accommodation to religious privilege and compulsion.

Regulations promulgated under the Affordable Care Act require that most group insurance plans provide coverage for preventative health care, including contraceptives. Houses of worship and other similar organizations are *fully exempt* from this coverage mandate. Their insurance plans *do not* have to include coverage for contraceptives. Women working for these organizations will have to pay for or find coverage for contraceptives on their own. A broader set of religious organizations that are *not exempt* from the mandate, are provided an *accommodation*. Organizations that qualify for the *accommodation* also are not required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. Their employees, however, will still be provided contraceptive coverage at no additional cost.

But, the exemption for houses of worship and the accommodation for religious organizations have not appeased opponents of the contraception mandate. They argue that all employers—religious and secular, non-profit and for-profit—are entitled to a full exemption, regardless of the effects those exemptions would have on employees.

a. For-Profit Secular Businesses

The Supreme Court will soon issue an opinion in *Hobby Lobby Stores v. Sebelius*.[50] Hobby Lobby is a for profit corporation. Its 567 stores around the country[51] employ over 10,000 people and sell crafts.[52] Hobby Lobby does not predominantly sell religious items or items used for religious practice. It is not owned by a church or similar entity. And, it is not run as a non-profit to perform a religious obligation. Nonetheless, its owners, the Green family, have argued that, in accordance with RFRA, the corporation is entitled to an exemption from the insurance mandate.

Hobby Lobby entered into commercial activity as a matter of choice and as a way to earn money. It should not be allowed to reap the benefits, protections, and profits of a commercial enterprise and also be exempted from the rules, restrictions, and regulations placed on all other for-profit entities. In short, "voluntary commercial activity" should not receive the same treatment as "directly religious activity."[53] In

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[50] 723 F.3d 1114 (10th Cir. 2013) *cert. granted* 2013 WL 3869832 (Nov. 26, 2013) (No. 13-354).
[51] *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited June 8, 2014).
[52] Roy Edroso, *Rightbloggers Go to Holy War for Hobby Lobby, Against Abortion Pills, Lady Judges*, VILLAGE VOICE (Mar. 30, 2014), http://blogs.villagevoice.com/runninscared/2014/03/rightbloggers_g_5.php.
[53] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994).

United States v. Lee,[54] the Supreme Court denied an exemption to an Amish employer who objected to the payment of Social Security taxes for his employees. The Court explained:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[55]

Even if corporate entities like Hobby Lobby deserve protection under RFRA, it is hard to understand how providing insurance coverage to employees creates a substantial burden. The connection between an employer who objects to the use of contraceptives and an employee's usage of contraceptives that are covered by insurance is highly attenuated. The employer does have to include contraceptive coverage, but it does not have to buy the contraceptives or support their use. It is the individual employee who will make the independent private choice whether to avail herself of prescription contraception as one of the many services under the group insurance plan. In fact, under the regulation, an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the employees themselves.

In the end, the provision of a comprehensive set of healthcare benefits is really no different than the provision of a paycheck; employees are free to utilize both kinds of benefits in any manner that they wish, and the employer cannot reasonably be perceived to support or endorse any particular use thereof. Therefore, the requirement that entities include coverage for contraceptives as part of group insurance plans places no substantial burden on the employer. Employers have the right to make moral decisions for themselves, but not force these decisions upon their employees.

Even making the leap that Hobby Lobby and similar corporations do suffer a religious burden, one still must ask why it should trump the rights and interests of their employees. Granting Hobby Lobby an exemption is far different from allowing exemptions for religious garb, or for the use of communion wine in dry towns. Whereas those kind of exclusions don't cause harm to others, the exemption sought by Hobby Lobby causes great harm to women, who are denied coverage for critical medical care.

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[54] 455 U.S. 252 (1982).
[55] *Id*. at 261.

Exempting Hobby Lobby from the insurance-coverage requirements would make it difficult and sometimes impossible for its employees to obtain and use several forms of contraception. Access to contraception is important to women for many reasons, including that it decreases unwanted pregnancies[56] and allows women to control the "birth spacing" of their children to decrease premature births.[57] Hobby Lobby, however, would deny coverage for some of the most effective contraception, including the intrauterine device (IUD), which is significantly more effective than some of the alternatives.[58] Furthermore, some of the very drugs vetoed by Hobby Lobby for coverage are also used for non-contraceptive coverage of serious medical conditions. This cannot be trivialized.

The logical conclusion of those urging a more expansive exemption is that *any employer*—whether an individual or corporation—could refuse to cover *any* procedure to which they objected on religious grounds regardless of the harms it causes to the employees. Such an astonishingly broad and far sweeping exemption would endanger patient health and threaten to overturn the important medical decisions of employees: an employer who believes the Bible proscribes blood transfusions could deny employees coverage for emergency care; an employer who opposes psychiatric services could deny employees mental health care coverage; and an employer who opposes traditional medicine for religious reasons could deny any service or item beyond prayer therapy. The consequences reach even beyond medical situations, too. For example, a religious group opposed to "equal pay" requirements could quote (or in my view, misconstrue) Christian scripture to justify paying men more than women.

b. Non-Profit Entities

Some employers at non-profit religious organizations are arguing for a slightly different, yet equally unprecedented view of "religious freedom." As explained above, non-profit religious organizations do not have to contract, pay, refer, or arrange for coverage of contraceptives at all. All the religious organization must do is condemn the usage of contraceptives by signing a 635-word form and dropping it in a mailbox. It is difficult to imagine that these groups could argue that such an arrangement burdens their religion. Nonetheless, such groups have filed numerous lawsuits claiming that "religious freedom" means that the government cannot even require them to fill out a form indicating their refusal to provide contraception, and admittedly have obtained preliminary injunctions in some cases.

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[56] *University of Notre Dame v. Sebelius,* 743 F. 3d 547, 548 (7th Cir. 2014).

[57] Rae Ellen Bichell, *Taking More Time Between Babies Reduces Risk of Premature Birth,* NPR (June 5, 2014), http://www.npr.org/blogs/health/2014/06/05/319067247/taking-more-time-between-babies-reduces-risk-of-premature-birth.

[58] Alice Park, *Which Birth Control Works Best? (Hint: It's Not the Pill),* TIME (May 24, 2012), http://www.nytimes.com/health/guides/specialtopic/birth-control-and-family-planning/intrauterine-devices-(iuds).html.

Judge Richard Posner, in *University of Notre Dame v. Sebelius*,[59] (the only case heard to date in which actual women are directly represented, in this case by Americans United) however, took issue with this redefinition of a religious burden:

> The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis. United States law and public policy have a history of accommodating religious beliefs, as by allowing conscientious objection to the military draft—and now exempting churches and religious institutions from the Affordable Care Act's requirements of coverage of contraceptive services. What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.

The process, however, is not costly, difficult or time consuming. To the contrary, "the process of claiming one's exemption from the duty to provide contraceptive coverage is the opposite of cumbersome. It amounts to signing one's name and mailing the signed form . . . ."[60] Additionally, the argument is simply illogical: The government surely cannot grant an accommodation if the organization refuses to invoke it.

This claim of "religious freedom" is particularly frustrating when you consider its consequences. The relief sought by groups like Notre Dame is a full exemption, meaning that its employers and students would no longer have contraception coverage from a third party. The lifting of this inconsequential burden on these groups would impose a huge burden on the women they teach and employ—these women would lose needed medical coverage. This is fundamentally unfair and surely not "religious freedom."

2. Using Religion to Justify *LGBT Discrimination*

As members of the LGBT community are making strides in the movement towards equality, opponents of equality are trying to strip away these rights in the name of religion.

In New Mexico, a photographer refused service to a gay couple in violation of the New Mexico public accommodations law.[61] The photographer invoked the state's RFRA to argue that she could discriminate against the couple if motivated by her religion.[62] In Colorado, a cake shop refused to bake a cake for a couple for use at a party celebrating their wedding ceremony, which would have taken place in Massachusetts several days

[59] 743 F. 3d 547, 557 (7th Cir. 2014).
[60] *Id.* at 558.
[61] *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) *cert. denied*, 134 S. Ct. 1787 (Apr. 7, 2014).
[62] *Id.*

earlier.[63] Again, the shop owner argued that he could violate the rights of the couple because he did so in the name of religion.[64] RFRA, however, wasn't intended to—and doesn't—provide religious adherents a trump card over any law to which an individual disapproves. Nor was it intended to—nor does it—shift burdens onto third parties. Yet, these businesses owners feel entitled to deny others their rights in the name of religion.

But this debate isn't just about cakes and photography. It is about the logical extension of those cases. It is about the right of LBGTQ citizens to be served at the lunch counter, the pharmacy, the hospital, the police department, and the courthouse just like everyone else. Instead of recognizing the significant harm that would be caused to those who are LGBT under such an interpretation of RFRA, supporters define the matter as discrimination against the shop owner. It is difficult, however, to understand how the requirement that a coffee shop owner serve a cup of coffee to a gay patron in the same way he would serve a straight patron is a religious burden, let alone a burden that is greater than the harm to the opportunities and dignity caused to the gay customer who is denied service.

So far attempts to use RFRA to deny others their rights under public accommodations laws have failed. But this has not dissuaded others from trying to use RFRA in that same way. This distorted view of RFRA has led some states to try to adopt one of their own.[65] It has led others to try to pass more extreme renditions of RFRA.[66] And, it has led still others to try to pass bills that explicitly permit discrimination in the name of religion.[67]

A Kansas bill, for example, sought to allow individuals, religious entities, government employees, and even privately held businesses to use religion to justify denying any man or woman of Kansas "services, accommodations, advantages, facilities, goods, or privileges" or even "social services."[68] The bill, supported by the Kansas Catholic Conference and the conservative Kansas Family Policy Council,[69] would have allowed even state government employees to refuse gay couples services they are entitled to by law, in the name of religious freedom.

The good news, however, is that strong opposition is brewing in response to these bills as well. Arizona's SB 1062, for example, prompted opposition from a range of politicians and businesses: including, Senator Jeff Flake, the Arizona Chamber of Commerce and Industry, the Arizona Tech Council, AT&T, PetSmart, American Airlines, Delta Airlines,

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[63] *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm'n June 2, 2014) (final agency order) *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_--_commissions_final_order.pdf.
[64] *Id.*
[65] Sarah Posner, *Wave of New State Bills: Religious Freedom or License to Discriminate*, ALJAZEERA AMERICA (Feb. 7, 2014), http://america.aljazeera.com/articles/2014/2/7/wave-of-new-statebillsreligiousfreedomorlicensetodiscriminate.html.
[66] *Id.*
[67] *Id.*
[68] HB 2453 Section 1(a).
[69] The Associated Press, *Kansas House Committee Approves Gay Marriage* Response, LAWRENCE J.-WORLD (Feb, 6, 2014), http://www2.ljworld.com/news/2014/feb/06/kansas-house-committee-approves-gay-marriage-respo/.

Apple, the Arizona Super Bowl Host Committee, and the Arizona Cardinals. The political fate of this one piece of legislation is indicative of the growing sense of fundamental fairness in America: a rejection of old prejudices even if those discriminatory attitudes are the result of organized or idiosyncratic religious beliefs.

B. *The Use of Religion to Change School Curriculum*

Another venue in which we see attempts to redefine religious freedom is in public school classrooms. Proponents of one variation of the "academic freedom" movement maintain that public school teachers have the right to disregard standard curriculum where they believe that curriculum would violate their religious freedom. Public school teachers, however, do not have the right to develop or disregard classroom curriculum for secular reasons, let alone the right to preach their religious beliefs in the classroom. We also see students and their parents insisting that they have the right to dictate academic standards and curriculum in ways that support their own religious beliefs.

The Ohio Supreme Court addressed this issue last year, when it ruled that a public school science teacher was not entitled to his alleged "academic freedom" right to teach evolution "from a Christian perspective."[70] Parents of students in Mr. John Freshwater's class had begun to complain to the school that he was encouraging students to study a religiously-based creationism, rather than evolution. According to the court, Mr. Freshwater had routinely distributed pamphlets to students from "All About God Ministries" including one pamphlet entitled "Answers in Genesis", which urged students to attend a free meeting on why the Genesis story of the Bible was factually correct, and how "'important issues in our troubled society (the breakdown of the family, abortion, lawlessness, etc.) are related to evolution!'"[71] The school eventually terminated Mr. Freshwater because he "injected his personal religious beliefs into his plan and pattern of instructing his students."[72] But, Mr. Freshwater still maintains "he was exercising his academic freedom to explore controversial ideas."[73]

Certainly teachers are entitled to hold whatever beliefs they wish. The problem is that incorporating those beliefs into curriculum conveys a message to students that "'that religion or a particular religious belief is favored or preferred.'"[74] Teachers have no right to use their position as a teacher to proselytize their own personal beliefs.

We see similar arguments from students and parent groups. Recently, a group called Citizens for Objective Public Education filed a lawsuit claiming that the religious

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[70] *Freshwater v. Mt. Vernon City School Dist. Bd. of Educ.*, 1 N.E.3d 335, 338 (Ohio 2013).
[71] *Id.* at 340.
[72] *Id.* at 346.
[73] Julie Carr Smyth and Andrew Welsh-Huggins, *Creationism Case Gets Day in Court,* PITTSBURGH POST-GAZETTE (Mar. 4, 2013), http://www.post-gazette.com/business/legal/2013/03/04/Creationism-case-gets-day-in-court/stories/201303040230#ixzz340P2QGXU.
[74] *Freshwater*, 1 N.E.3d at 354 (*quoting Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)).

neutrality to which public schools adhere violates the religion of their members.[75] They argue that "Kansas public schools [have] establish[ed] and endorse [ed] a non-theistic religious worldview (the "Worldview") in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment, and the Equal Protection Clauses of the 14th Amendment."[76] In particular, the plaintiffs challenge the teaching of evolution.[77] Their vision of religious freedom is that the public school curriculum cannot teach science at all if it conflicts with the religious beliefs of some. This approach clearly flips academic standards and First Amendment jurisprudence on their head. Courts have repeatedly held that public schools may not teach creationism in the classroom because it is a religious theory, rather than a scientific one.[78] Requiring public schools to neither indoctrinate students nor refuse to teach science because some believe it conflicts with their religious beliefs is not a denial of religious freedom, but rather a means to ensure that students have the right to attend public schools free from religious coercion or indoctrination.

Similarly, college students are trying to circumvent established curriculum and professional standards by claiming burdens on their religious beliefs. Recently, an Augusta State University student declared that she would not counsel gay and lesbian clients because she would not "condone the propriety of homosexual relations or a homosexual identify in a counseling situation."[79] But such a position conflicts with the American Counseling Association's Code of ethics."[80] Although counselors are encouraged to be aware of their own values, attitudes, and beliefs, they are prohibited from imposing them on their clients.[81] Therefore, the Code states: "counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law."[82] These rules exist for the health and benefit of the clients. A counselor's refusal to serve a client can have a negative impact on the mental health of that client and could exacerbate the very issue for which he or she was seeking counseling.

The student challenged the University's position that she must adhere to professional standards, arguing that "religious freedom" allowed her to ignore these standards and the harm that doing so might have on her clients. Such an interpretation of religious

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[75] *COPE v. Kan. State Bd. of Educ.,* No. 13-4119 (D. Kan. filed Sept. 26, 2013) *available at* http://www.copeinc.org/docs/legal-complaint.pdf.
[76] *Id.*
[77] Brian Tashman, *Kansas Group Tries to Remove Evolution from Schools by Claiming Science Is a Religion*, RIGHT WING WATCH (Sept. 27, 2013), http://www.rightwingwatch.org/content/kansas-group-tries-remove-evolution-schools-claiming-science-religion.
[78] *See, e.g.*, *Edwards,* 482 U.S. at 578; *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 736 (M.D. Pa. 2005); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).
[79] *Keeton v. Anderson*-Wiley, No. 110-099 (S.D. Ga. June 22, 2012) (order granting motion to dismiss), *available at* http://www.splc.org/pdf/keeton_district.pdf.
[80] *Keeton v. Anderson*-Wiley, 664 F. 3d 865 at 874 (11th Cir. 2011).
[81] *Id.*
[82] *Id.* at 869.

freedom, of course, is outrageous but, unfortunately, no longer unusual. Fortunately, the Eleventh Circuit ruled against her, finding that she did not have a First Amendment right to violate American Counseling Association standards and the school curriculum requirements.[83] The district court explained that the case was rooted in the plaintiff's "conflation of personal and professional values, or at least her difficulty in discerning the difference."[84] And, further ruled:

> The policies which govern the ethical conduct of counselors, however, with their focus on client welfare and self-determination, make clear that the counselor's professional environs are not intended to be a crucible for counselors to test metaphysical or moral propositions. Plato's Academy or a seminary the Counselor Program is not; that Keeton's opinions were couched in absolute or ontological terms does not give her constitutional license to make it otherwise.[85]

C. *Attempts to Upset the Balance of Religious Liberty in the Military*

The Armed Services have long had policies governing accommodations for the religious activities, expression, and practices of service members. These policies have generally been effective at balancing service members' right to exercise their religion or be free from exercising religion; the requirements of military readiness, military cohesion, and good order and discipline; and the right of service members to be free from the government endorsement of religion. They have allowed service members of different religious beliefs, and none at all, to serve together with respect and dignity.
These policies also recognize the unique atmosphere of the military. The military teaches soldiers to respect their leaders and discourages challenging their orders.[86] By necessity, dissent and debate have a limited role in the military.[87] This atmosphere "presents particular dangers of coerced religious activities and the perception of religious endorsement."[88]

Nonetheless, there are currently several calls to change these military policies. Many of the recent high profile reports used to justify these changes, however, are factually inaccurate or exaggerated. They range from debunked claims that the military plans to court martial service members who exercise their religion[89] to false claims that service

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[83] *Id.* at 865.
[84] *Keeton,* No. 110-099 at 47.
[85] *Id.*
[86] William J Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplin-Led Prayers at Mandatory Army Events,* 2006 Wis. L. Rev. 1493, 1525.
[87] *Id.*
[88] *Id.* at 1527-28.
[89] *Bloggers Say Pentagon May Court-Martial Christian Soldiers: Mostly False,* POLITIFACT.COM (May 6, 2013), *http://www.politifact.com/truth-o-meter/article/2013/may/06/pentagon-court-martialing-christian-soliders/; Court-Martialed for Sharing Religious Faith?,* FACTCHECK.COM (May 10, 2013), http://www.factcheck.org/2013/05/court-martialed-for-sharing-religious-faith/.

members have been penalized for their views on marriage.[90] These false allegations are nothing more than political posturing and are both a disservice to the men and women who serve this country and a trivialization of their right to real religious accommodations. Indeed, Mark Welsh, the Air Force Chief of Staff, testified before Congress: "The single biggest frustration I've had in this job is the perception that somehow there is religious persecution inside the United States Air Force. It is not true. We have incidents like everybody has incidents."[91]

These false accusations, however, are being used to try to redefine the notion of religious liberty in the military. Rather than protect services members from being subjected to coercive practices, advocates of these changes want to empower commanding officers and those in authority to have more opportunities to proselytize and pressure subordinates into engaging in religious activities.

Similarly, rather that celebrate that military chaplains for serving a religiously diverse military and faithfully facilitating the soldier's voluntary and desired religious practices; there are efforts to change the role of the chaplain. Some seek to allow chaplains to refuse to serve service members of other faiths and to engage in sectarian prayers at official military events and ceremonies. But chaplains are there to serve service members, not for opportunities to proselytize and coerce others into practicing their own faith. Shifting the balance in this way transforms the purpose of chaplains and violates the constitutional rights of the service members who have the right to be free from unwanted proselytizing and coerced religious practices.

Conclusion

When it comes to debates about the meaning of religious freedom, it will be apparent today, as it is every week on cable television shows and internet blogs, that there are two dramatically differing worldviews about the topic. I believe that the position I articulated today is the one most consistent with both the historical intent and the future aspiration of most Americans. My view is not one of any demonstrated hostility to religion; it is a recognition of the value of the strictest government neutrality on religious matters. It grants no imprimatur on some or all religion over non-belief. It also requires the ministries and missions of all religious institutions to exist on the subsidies of believers in those programs and not in the largesse of taxpayers.

Thank you again for the opportunity to present this testimony.

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[90] Oriana Pawlyk, *AF: Religious Intolerance Claim Unsubstantiated,* MILITARY TIMES (Oct. 11, 2013), http://www.militarytimes.com/article/20131011/NEWS/310110013/AF-Religious-intolerance-claim-unsubstantiated.
[91] Fiscal Year 2015 National Defense Authorization Budget Request from the Department of the Air Force: Hearing on H.R. 4435 Before the H. Armed Serv.s Comm., 113th Cong. (2014) (statement of Gen. Mark A. Welsh III, Chief of Staff, U.S. Air Force).

Mr. FRANKS. Thank you, sir.

And I would now recognize our fourth and final witness, Mr. Baylor.

TESTIMONY OF GREGORY S. BAYLOR, SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

Mr. BAYLOR. Thank you, Mr. Franks.

My name is Gregory Baylor, and I serve as senior counsel with Alliance Defending Freedom, a non profit legal organization that advocates for religious liberty, the sanctity of life, and marriage and the family through strategy, training, funding, and litigation. I appreciate the opportunity to testify today regarding the state of religious liberty in the United States.

Americans of all faiths have reason to be concerned about the current administration's religious liberty record. All too often it has taken unnecessarily extreme positions designed to dramatically decrease religious freedom. I'll mention three examples. First, the promulgation and legal defense of the HHS contraceptive mandate. Second, the unsuccessful attempt to eliminate the Religion Clauses ministerial exception. And third, the NLRB's intrusion into the internal affairs of our Nation's religious colleges and universities.

Regarding the HHS mandate, the administration didn't have to require employers to pay for contraception and abortifacients. Nothing in the Affordable Care Act required it to do so. But it went ahead anyway, despite well-known religious concerns that many Americans have about contraception and abortion.

Second, the administration adopted a remarkably narrow religious exemption from the mandate. HHS could have exempted all conscientious objectors. It could have even exempted all religious employers. But again, HHS made a choice, a choice that damaged religious liberty. It adopted a religious exemption so narrow that even Jesus and Mother Teresa would not qualify. The exemption excluded and continues to exclude to this day the vast majority of religious educational institutions, social service agencies, and other nonchurch religious organizations, many of which have just as strong views on these issues as churches do.

Third, they went ahead with its sham accommodation of nonexempt religious employers from the mandate, even though the vast majority of objecting organizations informed the administration during the comment period that the so-called accommodation did not satisfy their moral concerns.

Now, the administration's conduct in the defense of the civil rights lawsuits challenging the mandate has been no better. First, it has argued that businesses and their family owners cannot exercise religion in the marketplace. Second, it has shown a disturbing willingness to second guess and even discredit the religiously based moral assessments of individuals and organizations that cannot, in good conscience, comply with the mandate. Third, in an effort to distort and dilute the Religious Freedom Restoration Act, the administration has essentially argued that religious claimants may not prevail whenever the interests of third parties are somehow implicated. Fourth, the government has more recently remarkably argued that the imposition of massive financial penalties does not

count as a substantial burden under the Religious Freedom Restoration Act.

The administration also took an extreme and potentially damaging position in the 2012 Hosanna-Tabor case, which has been mentioned previously. It argued that religious entities, churches, have no right under the Religion Clauses to choose their own ministers without governmental interference. Now, the lower Federal courts have for decades acknowledged that both the Free Exercise and Establishment Clauses of the First Amendment keep the government out of a church's relationship with its ministers. The EEOC itself had accepted the existence of this ministerial exception in its compliance manual and in previous lawsuits.

Now, to be sure, reasonable minds can disagree about who counts as a minister for purposes of the doctrine, and that's what the Hosanna-Tabor case was about until the Obama administration filed its brief at the Supreme Court. Instead of continuing to argue more conventionally that the plaintiff in question was not a minister, it instead attacked the very existence of the ministerial exception. Demonstrating the extreme nature of this position, a unanimous Supreme Court reaffirmed the doctrine and protected the church from unwanted governmental intrusion.

Finally, the National Labor Relations Board continues its quest to assert jurisdiction over religious institutions of higher education. It does so despite the clear teachings of the Supreme Court in the 1979 case *NLRB v. Catholic Bishop*. It has arrogated to itself the power to examine and assess how religious a school is, denying constitutional protection to those schools that are not religious enough for its taste. The board has ignored multiple D.C. Circuit opinions instructing it to respect religious liberty in administering the National Labor Relations Act.

In conclusion, all Americans who love our first freedom ought to be alarmed at the administration's willingness to undermine that fundamental right.

Thank you again for the opportunity to testify, and I look forward to addressing any questions that Committee Members might have.

[The prepared statement of Mr. Baylor follows:]

TESTIMONY

BEFORE THE SUBCOMMITTEE ON

THE CONSTITUTION AND CIVIL JUSTICE

OF THE

HOUSE COMMITTEE ON

THE JUDICIARY

ON

THE STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

BY

GREGORY S. BAYLOR

SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

JUNE 10, 2014

My name is Gregory Baylor, and I serve as Senior Counsel with Alliance Defending Freedom, a non-profit legal organization that advocates for religious liberty, the sanctity of life, and marriage and the family through strategy, funding, training, and litigation. I appreciate the opportunity to testify today regarding the state of religious liberty in the United States.

Americans of all faiths have reason to be concerned about the current Administration's religious liberty record. No Administration, of course, has had a perfect record on religious freedom. Whatever the president's party, the Executive branch is inclined to protect its own prerogatives, defending its power to pursue policy objectives in the manner it sees fit. Moreover, reasonable people can sometimes disagree about how certain religious liberty controversies ought to be resolved, particularly where the applicable legal rules require government to balance competing interests in a case-specific, fact-dependent manner.[1] And the Administration has, on a number of occasions, embraced a proper understanding of religious liberty and church-state relations.[2]

Nonetheless, the current Administration has all too often taken what can only be characterized as extreme positions designed to dramatically decrease religious freedom. My testimony will focus on three examples: (1) the promulgation and legal defense of the HHS contraceptive mandate; (2) the unsuccessful attempt to eliminate the Religion Clauses'

[1] *See, e.g.*, 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act).

[2] For example, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the United States urged the Supreme Court to reject an Establishment Clause challenge to town's practice of opening town board meetings with prayer. *See* 2013 WL 3990880 (U.S. Aug. 2, 2013) (Brief of the United States as Amicus Curiae Supporting Petitioner). In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), the United States filed a friend of the court brief with the Supreme Court arguing that taxpayers lacked standing to challenge a state statute that provided tax credits for voluntary contributions to organizations that award scholarships to children attending private schools, including religious schools. The Solicitor General's brief also argued that the statute did not violate the Establishment Clause. *See* 2010 WL 3066230 (U.S. Aug. 6, 2010) (Brief of the United States as Amicus Curiae Supporting Petitioners). In addition, the Department of Justice Civil Rights Division has frequently acted to vindicate rights protected by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (RLUIPA).

ministerial exception; and (3) the NLRB's ongoing effort to intrude into the internal affairs of our nation's religious colleges and universities.

The Patient Protection and Affordable Care Act requires non-grandfathered group health plans to include insurance coverage for women's "preventive care and screenings" without cost sharing.[3] Congress delegated to the Department of Health and Human Services (HHS) the power to determine exactly what preventive care and screenings must be covered. Going beyond non-controversial care and screenings whose health benefits are clear, HHS elected to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient protection and counseling for all women with reproductive capacity."[4] The category of FDA-approved contraceptive methods and sterilization procedures, in turn, includes intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. HHS has asserted that mandatory coverage of "contraceptives," including drugs and devices that sometimes function abortifaciently, will reduce the rate of unintended pregnancies and the adverse health events allegedly associated therewith. HHS's assertion simply does not bear scrutiny, rendering the Administration's imposition on religious exercise all the more indefensible.[5]

HHS had at least some understanding that forcing employers to facilitate access to contraceptives and abortifacients would violate certain employers' deeply held religious convictions. HHS could have exempted all sincere conscientious objectors. It could even have exempted all religious employers.[6] Virtually all state contraceptive coverage mandates include

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[3] 42 U.S.C. § 300gg-13(a)(4).

[4] *See* Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 3, 2014).

[5] *See* Helen Alvaré, "No Compelling Interest: The 'Birth Control' Mandate and Religious Freedom," 58 Vill. L. Rev. 379 (2013).

[6] As an illustration, HHS could easily have imported the religious exemptions from the ban on religious discrimination in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1(a); *id.* § 2000e-2(e)(2). Although

comparatively broad religious exemptions.[7] However, HHS chose to adopt an extraordinarily narrow religious exemption from the Mandate. In its original form, the exemption was limited to employers that (1) have the inculcation of religious values as their purpose; (2) primarily employ persons who share their religious tenets; (3) primarily serve persons who share their religious tenets; and (4) are churches, their integrated auxiliaries, and conventions or associations of churches.[8] Many observers accurately remarked that neither Jesus nor Mother Teresa would qualify for this shockingly narrow religious exemption. The exemption excluded—and continues to exclude—the vast majority of religious educational institutions, social service agencies, health care providers, publishers, advocacy organizations, and other non-church religious entities.

It is reasonably clear that HHS—in crafting the contraceptive Mandate and its narrow religious exemption—failed even to contemplate seriously its duties under the Religious Freedom Restoration Act (RFRA). In April 2012 testimony before the House Education and Workforce Committee, HHS Secretary Kathleen Sebelius revealed that the agency did not procure a written legal opinion assessing the compatibility of the Mandate with RFRA.[9]

The Administration rejected countless calls to expand the religious exemption. A large number of prominent religious organizations explained their faith-based objections to the

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this would not have protected all conscientiously objecting employers, it would have been markedly better than what the agency adopted.

[7] *See* National Conference of State Legislatures, "Insurance Coverage for Contraception Laws," available at http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Jun. 9, 2014). It bears noting that group health plans may avoid these state mandates by self-insuring. In some states, the mandate applies only if the employer elects to cover prescription drugs; accordingly, a conscientiously objecting employer could avoid covering morally unacceptable drugs and devices by excluding prescription drugs from its plan. Neither response is available under the Affordable Care Act and its implementing regulations.

[8] 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The Administration later slightly expanded the exemption by eliminating the first three requirements.

[9] *See* http://www.youtube.com/watch?v=eU6ShTWOaWw (last visited Jun. 9, 2014).

Mandate in comments submitted to HHS in response to its proposed rulemaking.[10] Commenters also explained that the so-called "accommodation" for non-exempt religious employers failed to satisfy their sincere moral concerns. Either ignoring or rejecting those expressions of concern, the Administration moved forward with this inadequate "accommodation."

Given the Administration's failure to respect religious liberty in the regulatory process, an unprecedented number of individuals and organizations found it necessary to seek judicial vindication of their fundamental right to religious freedom. To date, 100 cases involving over 300 plaintiffs have been filed.[11] In defending these lawsuits, the Administration has made a number of remarkable arguments which, if accepted, will dramatically decrease the legal protections of religious freedom.

First, the government defendants have argued that for-profit businesses and their family owners cannot ever exercise religion in the marketplace.[12] This legal argument reflects a fundamental error about how many Americans live out their religious convictions. For many, religious exercise is not confined to a weekly worship service in a church, temple, or mosque. Instead, religion affects every aspect of their existence, including their behavior in the workplace and the broader marketplace. To categorically withhold legal protection of religious exercise in this realm of life is no small thing. Yet this is precisely what the government advocates.

Second, the Administration has shown a disturbing willingness to second-guess and even discredit the religiously-based moral assessments of individuals and organizations that cannot, in good conscience, comply with the Mandate. The government has essentially argued that those

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[10] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops on Interim Final Rules on Preventive Services (Aug. 31, 2011), available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf (last visited Jun. 9, 2014).

[11] *See* The Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited Jun. 9, 2014).

[12] *See, e.g.*, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S.), and *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.), argued Mar. 25, 2014.

objecting to the Mandate are simply *wrong* to conclude that their degree of complicity in immoral conduct is ethically unacceptable. It has argued that entities eligible for the so-called "accommodation" have no right to complain, since completing the self-certification form that triggers objectionable coverage can be done "in a matter of minutes." Under this logic, the government could force an Orthodox Jew to flip a light switch on the Sabbath on the ground that doing so takes little time or effort.

Third, the government is attempting to distort and dilute the Religious Freedom Restoration Act, urging courts essentially to re-write the statute to protect government power to a much greater extent than Congress ever intended. Specifically, the government defendants are arguing in pending cases that religious claimants may not prevail whenever the interests of third parties are somehow implicated. Congress, of course, explicitly contemplated that courts would consider the interests of third parties, requiring governments that substantially burden religious exercise to prove that challenged regulations advance compelling governmental interests. But Congress plainly did not declare that RFRA claimants automatically lose whenever third party interests are implicated.

Fourth, the government has remarkably argued that the imposition of massive financial penalties is not a "substantial burden" under the Religious Freedom Restoration Act. There is a principle of Free Exercise Clause jurisprudence under which government action is not impermissible simply because it makes religious exercise more expensive. In defending the HHS Mandate, the government has distorted this principle beyond recognition, arguing that it permits the government to impose crippling fines upon non-compliant employers with impunity. Under this logic, legal protections of religious liberty like RFRA would not forbid a government from imposing a fine for attendance at worship services.

Unfortunately, the HHS Mandate is not the only context in which the Administration has taken extreme positions designed to dramatically undermine religious freedom. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), it argued that religious entities have no right under the Religion Clauses to choose their own ministers without governmental interference.

After a private Lutheran school terminated a teacher designated as a minister for failing to follow religiously prescribed grievance procedures, the Equal Employment Opportunity Commission (EEOC) brought an action against the school, claiming that the teacher had been fired in retaliation for threatening to file a lawsuit under the Americans with Disabilities Act (ADA).[13] The school invoked the "ministerial exception," a doctrine uniformly adopted by the federal Courts of Appeals, which precludes application of employment discrimination legislation to claims involving the relationship between a religious entity and its ministers.[14] But the EEOC argued that such an exception did not exist, and that the Religion Clauses of the First Amendment gave no greater protection to religious entities in this context than non-religious entities under the general right to free association.[15] The Supreme Court found this position "untenable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[16] The Court could not accept the "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[17]

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[13] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct.694 (2012).
[14] *Id.* at 701, 705.
[15] *Id.* at 706.
[16] *Id.* at 707.
[17] *Id.*

EEOC and DOJ lawyers went a step further and additionally argued that the Supreme Court's decision *Employment Division v. Smith*[18] actually precluded the recognition of an exception protecting the most basic right of religious entities to designate their own ministers.[19] The *Smith* case involved two members of the Native American Church who were denied unemployment benefits because they had ingested peyote, a hallucinogen used in sacramental ceremonies by the Church, in violation of Oregon law. It held that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[20] Thus, according to the EEOC, because the ADA and other employment discrimination laws are neutral and generally applicable to religious and non-religious entities alike, religious entities were still obligated to comply with them, even when making decisions involving the designation of their own ministers. Thankfully, the Court rejected this argument as well, pointing out that the *Smith* case involved a regulation on physical conduct only, so it did not follow that it should have any applicability to a case involving "government interference with an internal church decision that affects the faith and mission of the church itself."[21]

To say the least, it is disturbing that the current Administration would advocate a view so contrary to the principles of religious freedom enshrined in our Constitution. The framers of the Constitution had firsthand experience with the negative effects of government involvement in the

[18] *See Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 972 (1990).
[19] *Hosanna-Tabor*, at 707.
[20] *Smith*, at 879.
[21] *Hosanna-Tabor*, 132 S. Ct. at 707.

church; the idea that the First Amendment permits the government to meddle with a church's designation of its ministers would be unfathomable to them.[22]

Finally, the National Labor Relations Board (NLRB), without due regard for federal court precedent, has vigorously sought to assert jurisdiction over religious institutions of higher education. A regional NLRB office recently ruled in favor of unionization of adjunct faculty at two private religious universities; at least one of those cases is currently on appeal to the Board.[23]

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[22] In *Hosanna-Tabor*, the Supreme Court referenced two documents written by James Madison, the principal author of the Bill of Rights, to support this understanding of the law:

> This understanding of the Religion Clauses was reflected in two events involving James Madison, " 'the leading architect of the religion clauses of the First Amendment.' " *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. ——, ——, 131 S. Ct. 1436, 1446, 179 L.Ed.2d 523 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103, 88 S. Ct. 1942, 20 L.Ed.2d 947 (1968)). The first occurred in 1806, when John Carroll, the first Catholic bishop in the United States, solicited the Executive's opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church "functionaries" was an "entirely ecclesiastical" matter left to the Church's own judgment. Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909). The "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," Madison explained, prevented the Government from rendering an opinion on the "selection of ecclesiastical individuals." *Id.*, at 63–64.
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> The second episode occurred in 1811, when Madison was President. Congress had passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. Madison vetoed the bill, on the ground that it "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" 22 Annals of Cong. 982–983 (1811). Madison explained:
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>> "The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same* ; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises." *Id.*, at 983 (emphasis added).

Id. at 703-04.

[23] In 2013, the NLRB Regional Director in Seattle decided to exercise jurisdiction over Pacific Lutheran University, a private Lutheran university, and allow for unionization of adjunct faculty. This decision is currently on appeal. *Pacific Lutheran University v. SEIU 925*, No. 19-RC-102521. On April 23, 2014, the NLRB Regional Director in Seattle decided to exercise jurisdiction over Seattle University, a private Jesuit Catholic university, allowing unionization of adjunct faculty there as well. Katherine Long, Labor Board: Seattle University Adjuncts Can Vote to Unionize, http://blogs.seattletimes.com/today/2014/04/labor-board-seattle-university-adjuncts-can-vote-to-unionize (Apr. 23, 2014).

But application of the National Labor Relations Act to religious schools is unconstitutional, as the Supreme Court previously indicated in *NLRB v. Catholic Bishop of Chicago*.[24] In *Catholic Bishop*, the Board had decided to exercise jurisdiction over several schools operated by the Roman Catholic Church, finding that the schools had engaged in unfair labor practices under the National Labor Relations Act by refusing to engage in collective bargaining with employee unions. The Board's rationale was that the schools were not "completely religious" because they offered instruction in secular subjects as well as religious training, and its policy was to refrain from exercising jurisdiction only in cases where an educational institution was "completely religious" rather than just "religiously associated."[25]

Rather than declaring outright that the Board's exercise of jurisdiction violated the Constitution, the Court instead stated only that serious questions had been raised that it did.[26] In that situation, the Court was obligated to first see if there was another plausible construction before interpreting the Act in a way that would violate the Constitution.[27] The Court did that, holding that there was no evidence of congressional intent to make religious schools subject to the Board's jurisdiction when it enacted the NLRA and subsequent amendments.[28] The issue of religious schools simply did not appear to be contemplated by Congress in considering whether to pass the Act or later amendments, but, as the Court noted, "[i]t is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations not covered by the Act."[29]

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[24] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).
[25] *Id.* at 493.
[26] *Id.* at 501.
[27] *Id.* at 504.
[28] *Id.* at 504-07.
[29] *Id.* at 504-05 (citations omitted).

Absent a clear intent to create the constitutional conflict the Court identified, the Court declined to reach the constitutional question and instead held that the NLRA does not authorize the Board to exercise jurisdiction over religious schools. Even though the Court stopped short of making the conclusion, the Court's decision in *Catholic Bishop* makes clear that it would likely find that NLRB jurisdiction over religious schools violates the First Amendment, due to excessive entanglement and interference with religious autonomy.[30]

The NLRB subsequently began deciding what schools were "religious enough" to warrant protection under *Catholic Bishop*. It embraced a "substantial religious character" test, exercising jurisdiction over those schools it concluded lacked such a character.[31] In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the D.C. Circuit, noting the substantial risk of excessive entanglement and interference with religious autonomy, deemed it inappropriate for the NLRB to inquire into a university's "substantial religious character."[32] It declared that the proper test was whether the university held itself out to the public as a religious institution, was nonprofit, and was religiously affiliated.[33] The court observed that its test "does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs."[34] The D.C. Circuit reaffirmed this approach in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

Despite these judicial precedents, the NLRB continues to assert its jurisdiction over religious schools, thereby raising all the constitutional concerns described by the Supreme Court and lower federal courts. In addition to Pacific Lutheran University and Seattle University

[30] *See id.* at 502-03; *Hosanna-Tabor*, 132 S. Ct. at 702, 706; *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (The Constitution guarantees religious organizations "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.")
[31] *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1339 (D.C. Cir. 2002).
[32] *Id.* at 1342-43.
[33] *Id.* at 1343-45.
[34] *Id.* at 1344.

(mentioned above), it has claimed jurisdiction over Manhattan College,[35] St. Xavier University,[36] and Duquesne University of the Holy Spirit.[37]

In conclusion, the Administration's approach to these three areas—the HHS Mandate, the ministerial exception, and NLRB jurisdiction—poses serious threats to a proper understanding of religious freedom. In each case, the Administration has taken an extreme position, one that, if accepted, would dramatically decrease the legal protections of religious liberty. All Americans who love our "First Freedom" ought to be alarmed at the Administration's willingness to undermine that fundamental right.

[35] Case No. 2-RC-23543.
[36] Case No. 13-RC-22025.
[37] Case No. 6-RC-08933.

Mr. FRANKS. I would like to thank all of the witnesses for their testimony. And we will now proceed under the 5-minute rule with questions. I will begin by recognizing myself for 5 minutes.

And, Dean Staver, I'll begin with you, sir. Regarding the HHS mandate under Obamacare, the main focus here has been on the employer mandate, but you also referenced a similar threat to religious freedom under the individual mandate, and I wonder if you could further address that and clarify that for us.

Mr. STAVER. Yes, Mr. Chairman. It doesn't get a lot of attention in the media. The employer mandate is the primary one that's being discussed. But section 1303 actually sets up the individual mandate with regards to abortion and the abortion funding. It has become known as the so-called Nelson compromise because it arose out of Senator Ben Nelson's attempt to find language that would make it clear that there would be no government Federal funding with regards to abortion.

Section 1303 specifically says that in plans where elective abortion are offered anywhere within that network, whether it's in your own or if you're finding it in an exchange, you have to pay a separate fee, in addition to your premium. That fee is paid monthly, and it goes into a segregated fund, and that fund is used only for one purpose, and that's to fund elective abortions for anyone within that coverage. No matter your age, your sex, or your religious objection to the contrary, you still have to pay for that particular coverage.

And the even more egregious thing with it is you can't find out if your plan covers abortion because of the so-called secrecy clause that was put into the Obamacare law so that you wouldn't be able to find out whether your plan covered abortion. Any other area where you want to find insurance, whether it's car insurance or health insurance, before you decide to take a particular plan and pay the premium, you have the right to be able to get a list of what that plan covers.

But here you're not allowed to do so. In fact, under the Obamacare law, insurance companies are prohibited from providing any information with regards to that coverage, and therefore it is essentially Russian roulette. You don't know until you actually pay the premium. Once you pay the premium, you're locked in for a year. After you pay the premium, you get to know what's in that plan, and if that plan covers abortion, you're forced, in addition to your premiums, to pay an additional monthly fee, and that fee goes directly to fund abortion.

That was Senator Nelson's way to get around having Federal funds do that, but now the Federal law provides and coerces individuals to do that very thing. So that breaks with consistent Federal policy under the Hyde Amendment and others about not having coerced Federal funds from taxpayers to pay for abortion.

This is a direct assault. Regardless of what the Supreme Court does this month with regards to the Hobby Lobby case and the Conestoga Wood case relating to the employer mandate, this is still in existence and it still affects every single person around the country. So this is a direct assault. It needs to be addressed by Congress. Something needs to be done to exempt those with sincerely held religious beliefs from that provision because never before have

we been able to trace a dollar from your purse or pocketbook directly from you to one source to fund abortion. It's not a general funding of medical procedures, one of which might be a knee replacement and another might be abortion. This fund goes directly from the person and it has its only objective to fund the taking of innocent human life.

Mr. FRANKS. Thank you, sir.

Ms. Colby, I know that much has already been mentioned today about the Tabor case, but I wonder, if you would, just for those of us that are not as erudite as you are, could you break that down for us a little bit. Tell us what the administration, the Obama administration actually argued, and how, if they had been successful, that would have affected churches and other religious institutions.

Ms. COLBY. Certainly. I think, as Greg already mentioned, the Obama administration took an extreme position in the Supreme Court that was unnecessary. I was actually part of a group of about 15 people from the religious liberty community, from Jewish groups, Catholic groups, Christian groups, Protestant groups, who met with the Solicitor General's office beforehand to try to say we understand you have to defend the EEOC, but please do it with the least amount of damage possible to religious liberty.

And so we were shocked, we were stunned, all of us, when we saw what the administration ended up filing. It was a brief that said that the Free Exercise Clause and the Establishment Clauses have nothing to do with the church's right to decide who its minister should be, that there was no protection under either of those clauses for a church or any other religious congregation to decide who its leaders would be.

Mr. FRANKS. So a Jewish synagogue would not have the right to hire a Jewish rabbi.

Ms. COLBY. No. Well, they could hire him——

Mr. FRANKS. Couldn't discriminate against Baptists or others.

Ms. COLBY [continuing]. But if there were a lawsuit, the government could interfere, right.

Mr. FRANKS. I understand. All right. Well, I wish I had more time, but I don't, so I will now yield to the Ranking Member for 5 minutes for questions.

Mr. COHEN. Thank you, Mr. Chair.

Ms. Colby, I would like to ask you a question. I saw in your biography that you were particularly interested in slavery history there. When you studied slavery, did you see a whole bunch of people that supported slavery on the theory that it was a Christian thing to do, that a lot of people back at that time used the Bible, unfortunately, as a basis to defend slavery?

Ms. COLBY. Actually, I've heard that argument made a lot, and it's something that I am trying to look into on my own. But I've been interested in reading—I believe her name is Annette Gordon-Reed, She's a professor at Harvard Law School, and she wrote about the Sally Hemmings-Jefferson relationship. And just in passing, I think it's called "The Hemmings of Monticello." She just in passing says around page 98 or something, that one would not have expected Jefferson to have emancipated his slaves because he was not a Trinitarian Christian, he was not a believing Christian, he was a deist. And she just says in passing that the only owners

that were doing that were essentially evangelical Christians. Now, I certainly am not saying that all evangelical Christians——

Mr. COHEN. You're not saying Robert E. Lee wasn't a Christian, are you? You're not suggesting that Stonewall Jackson wasn't a Christian, are you?

Ms. COLBY. I am not suggesting that, but what I am suggesting——

Mr. COHEN. They were fine Christian men, and they had their slaves.

Ms. COLBY. What I am suggesting is that the whole abolition movement originated in first the Quakers and then the evangelical Christians.

Mr. COHEN. But there were lots of people who defended slavery on the basis that that was—just like they defended the miscegenation laws. Do you believe that people of different—African Americans and caucasians should be able to intermarry?

Ms. COLBY. Of course.

Mr. COHEN. Okay, good.

Dean Staver, how about you, do you believe in that?

Mr. STAVER. Yes.

Mr. COHEN. You do. So all those ministers that said that that was against Christianity and for years that was the basis of the defense before *Loving v. Virginia*, they used the Bible, unfortunately, and besmirched it.

Mr. STAVER. Well, some may try to use the Bible for that, but if you look at the abolition movement, it was really a movement that rose out of Christian beliefs and Judeo-Christian values, not only here in the United States, but also William Wilberforce. It was something that was grounded in Judeo-Christian values

Mr. COHEN. Let me ask you this. There are certain anti-gay laws that they have in Russia. You, I believe, have advocated for something similar to that, have you not? Do you support the Russian anti-gay laws?

Mr. STAVER. The Russian anti-gay laws?

Mr. COHEN. The laws in Russia that make it illegal to be gay and to have certain activities restricted for people who are gay.

Mr. STAVER. What I am concerned about is having people of Christian, Judeo-Christian beliefs be forced to participate in a ceremony or an event that celebrates something that is contrary to their religious belief.

Mr. COHEN. Okay. So you are not in favor of the anti-gay Russian laws. What I read was wrong.

Mr. STAVER. I don't know what you read.

Mr. COHEN. Fine.

Mr. STAVER. I haven't spoken on the Russian law anywhere.

Mr. COHEN. Okay. Thank you. I am happy to see that.

You wrote a book called "Take America Back," or an article.

Mr. STAVER. Yes.

Mr. COHEN. Is it a book or an article?

Mr. STAVER. It's a book.

Mr. COHEN. What are we taking America back from? And who is we?

Mr. STAVER. The point of it was to go back to a constitutional roots of the Constitution and the rights that are guaranteed in our

Constitution, that the Founders guaranteed the right to freedom of speech, freedom of free exercise of religion, those kinds of rights that are declared not only in the Constitution, but that are set forth in the Declaration of Independence, that we have certainly unalienable rights that come from our creator, among which are life, liberty, and the pursuit of happiness.

Mr. COHEN. Right. And do you believe that the Interstate Commerce Clause was sufficient to allow for the Civil Rights Act to be constitutional?

Mr. STAVER. I have never argued to the contrary, so I don't know if you've read anything to that effect. I've never argued anything to the contrary.

Mr. COHEN. So you support the constitutionality of the Civil Rights Act?

Mr. STAVER. I am certainly an advocate of civil rights.

Mr. COHEN. Do you support the constitutionality of the united Civil Rights Act of 1964?

Mr. STAVER. Yes.

Mr. COHEN. Good. Good, good, good, good.

You referred to Obamacare. Just for the record, it's the Affordable Care Act and Patient Protection Act. That's the real name of it. We're talking about contraception. The Founding Fathers, what was contraception when the Founding Fathers were around? Do you think they envisioned pills and surgical procedures, or would they have some other form of contraception?

Mr. STAVER. I don't think they envisioned the kind of contraception or abortifacients we have today. However, abortion was something that was known, and it's even in the Hippocratic Oath, long through the centuries that that was an issue.

Mr. COHEN. But birth control like we have today wasn't known then, right?

Mr. STAVER. No

Mr. COHEN. So we have to kind of flow with the times and learn?

Mr. STAVER. Well, we have to also understand that there are certain fundamental values. Life is a critical value. Without the right to life, you have no other rights. Rights to freedom of speech or freedom of religion is meaningless to a corpse.

Mr. COHEN. Do you believe any abortion, even in the first couple or 3 weeks of conception, is constitutional or legal?

Mr. STAVER. I believe that life comes from our creator, and that life biologically begins at the moment of conception, and the taking of innocent human life is tantamount to murder.

Mr. FRANKS. The gentleman's time has expired

Mr. COHEN. Thank you, sir. I yield back the balance of the time that I don't have.

Mr. FRANKS. And I would now recognize the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

I know there was a lot said in the opening statements each made. For example, my friend from Tennessee was quoting from Thomas Jefferson. I think it is good to also—and, actually, I know, Reverend Lynn, you had said, "I think the Founders would be appalled," were your words. I think, personally, for me, the Founders

would be appalled at the things that have appalled you, rather amazingly.

The quote about Jefferson, from Jefferson, he also in the Jefferson Memorial, he said, "God, who gave us life, gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God? Indeed, I tremble for my country when I reflect that God is just, that His justice cannot sleep forever."

And I know, it was even mentioned, that—of Jefferson being a deist. You know, we know that he cut out miracles from his version of the Bible, but my understanding of a deist is that a deist does not believe that whatever God or deity, whatever it was that created things ever interferes with the natural course of things. And yet here you have Jefferson being very concerned that God's justice would not sleep forever.

I also note, this was a gift from my aunt from my uncle's—what my uncle was given going into World War II. And here it says "the White House," "Washington," "As Commander in Chief, I take pleasure in commending the reading of the Bible to all who serve in the Armed Forces of the United States. Throughout the centuries, men of many faiths and diverse origins have found in the Sacred Book words of wisdom, counsel, and inspiration. It is a fountain of strength and now, as always, an aid in attaining the highest aspirations of the human soul." Signed, "Franklin D. Roosevelt."

Reverend Lynn, are you offended by that, that the President, with the stamp of the White House, would allow that to be in Bibles that were given out to soldiers?

Rev. LYNN. I am not offended by that, but one of the reasons I am not offended by it is because I suspect I shared a lot of the particular religious beliefs of Franklin Roosevelt.

A few years ago, I was honored to receive from the Franklin and Eleanor Roosevelt Institute a medal of freedom—a medal of freedom for the freedom to worship. And I think that——

Mr. GOHMERT. That wasn't awarded by Roosevelt himself.

Rev. LYNN. No, it was not. By the——

Mr. GOHMERT. Yeah. And you are familiar with the prayer that he prayed on D Day——

Rev. LYNN. I am very familiar with the prayer.

Mr. GOHMERT [continuing]. Right? You are familiar with that prayer he prayed on D Day, correct?

Rev. LYNN. I am familiar with the prayer——

Mr. GOHMERT. Where he asked that God help against these unholy forces.

But you mention, you know, at numerous times you are a Christian. And, of course, that, like the term "deist," can have different meanings to different people. And I think about the episode of "Seinfeld" where Elaine finds out her boyfriend is a Christian and he has never mentioned it to her and she is offended. "So you are a Christian?", she asks basically. "Don't you believe if you are not a Christian you go to hell?" "Well, yeah." "Then why haven't you said anything to me if you care about me?"

I am curious, in your Christian beliefs, do you believe in sharing the good news that will keep people from going to hell, consistent with the Christian beliefs?

Rev. LYNN. Yeah, I wouldn't agree with your construction of what hell is like or why one gets there. But the broader question is, yes, I am happy to. When I speak to——

Mr. GOHMERT. Okay. So you don't believe somebody would go to hell if they do not believe Jesus is the way, the truth, the life?

Rev. LYNN. I personally do not believe people go to hell because they don't believe in a specific set of ideas in Christianity. I have never——

Mr. GOHMERT. No, no, no, not a set of ideas. Either you believe as a Christian that Jesus is the way, the truth, the life, or you don't. And there is nothing wrong in our country with that. There is no crime, there is no shame. It should never be a law against those beliefs, because God gave us the chance to elect to either believe or disbelieve. And that is what we want to maintain, is people's chance to elect yes or no, the chance that we were given.

So do you believe——

Rev. LYNN. Congressman, what I believe is not necessarily what I think ought to justify the creation of public policy for everybody, for the 2,000 different religions that exist in this country, the 25 million nonbelievers.

I have never been offended; I have never been afraid to share my belief. When I spoke recently at an American Atheists conference, it was clear from the very beginning in the first sentence that I was a Christian minister. I was there to talk to them about the preservation of the Constitution. And, in fact, I said, you know, we can debate the issue of the existence of God for another 2,000 years; I want to preserve the Constitution and its effect on all people, believers and not-believers, in the next 5 years. That is what I talk about——

Mr. GOHMERT. So the Christian belief, as you see it, is whatever you choose to think about Christ, whether or not you believe those words he said, that nobody, basically, goes to heaven except through me.

Rev. LYNN. We could have a very interesting discussion sometime, probably not in a congressional hearing, about——

Mr. GOHMERT. Well, I was just trying to figure out, when you said "Christian"——

Rev. LYNN [continuing]. Scriptural passages.

Mr. GOHMERT. There is no judgmental—that is not my job. God judges people's heart, in my opinion. But just to try to figure out what we meant by "Christian." So I appreciate your indulgence.

Thank you.

Mr. FRANKS. I thank the gentleman.

And I now recognize Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you very much.

Mr. Staver, you said it is an imposition—let me start out by saying I was one of the sponsors of the Religious Freedom Restoration Act. And, along with Charles Canady, a former Republican Member from Florida, I was the author of the Religious Land Use and Institutionalized Persons Act. But we always conceived of these as

shields of religious freedom, not as swords with which to impose religious beliefs on other people.

Let me ask you a few questions. You said it is wrong, an imposition on religious belief for government to insist that the wedding photographer not be able to say I won't go to the gay marriage; is that correct?

Mr. STAVER. Correct.

Mr. NADLER. Would it be an equal limitation of his religious belief if he said I don't want to go to a wedding of black people, I want to discriminate against black people? Would the government saying you can't do that be a violation of his religious freedom?

Mr. STAVER. I think that is fundamentally different.

Mr. NADLER. Why?

Mr. STAVER. She is not saying she doesn't want to photograph a wedding where there is people who are gay and lesbian. She is saying she doesn't want to photograph a celebration of same-sex unions.

Mr. NADLER. And if her religious beliefs said I don't want to celebrate a celebration of black unions because I think black people shouldn't get married, that is my religion, I mean, is it an imposition on her religious freedom for government to say you can't do that?

Mr. STAVER. I think it is fundamentally different, and I don't think that is what the issue is in that case. And I don't——

Mr. NADLER. That is exactly what the issue is.

Mr. STAVER. No, they——

Mr. NADLER. She has a religious belief that she shouldn't participate or be forced to participate in a celebration which goes against her religious belief. And let's assume her religious belief is that she shouldn't photograph a Jewish wedding. Would that be discrimination that the civil rights law can proscribe or not? And if not, why not?

Mr. STAVER. I think it would be something that she wouldn't object to, first of all; secondly——

Mr. NADLER. Somebody with some religious belief might object. I am not saying your client or your friend or whoever she is. Let's assume that someone had such a religious belief, that it is a violation of her religious belief to be forced professionally, because she is a photographer, to photograph a Jewish wedding or a Muslim wedding or whatever, and the government says, that is discrimination, you can't do that. Is the government being improper by limiting her religious freedom in that case?

Mr. STAVER. Well, first of all, there is a legal question of whether it is a public accommodation, but assuming that it is——

Mr. NADLER. Assuming that it is.

Mr. STAVER.—I think that she would have an issue there, a violation potentially. But I think what——

Mr. NADLER. She would have a violation. Okay.

Mr. STAVER. But that issue is fundamentally different. She specifically stated in that case that she doesn't discriminate against——

Mr. NADLER. Excuse me, it is my time. I don't see any difference at all. You can try to see it.

Now, if the owner of a public accommodation, a restaurant, said, I don't want—well, I am holding out myself in commerce—my religious belief is I don't want black people or Jewish people or whoever, or gay people, in my restaurant, and certainly not a gay couple holding hands, and the Federal Government says that is discrimination, is that a violation of the freedom of religion?

Mr. STAVER. No. And I don't think that is what the issues are that we are——

Mr. NADLER. I don't see how it is distinguishable.

Let me ask you a different question. The Affordable Care Act says you have to have certain basic services covered by the insurance policy. You object because it violates the religious beliefs of some people to have contraception covered.

Let's assume that it covered blood transfusions. Some religious groups are opposed to blood transfusions. What is the difference?

Mr. STAVER. Well, I think if it was someone like a Jehovah's Witness or some other kind of religion, then that is a fundamentally different situation.

Mr. NADLER. Why?

Mr. STAVER. Because that does conflict with their sincerely held——

Mr. NADLER. Oh, so you are saying it would be the same situation. In other words, we shouldn't be allowed to say that insurance companies have to cover blood transfusions because there are people, Jehovah's Witnesses or whoever, who——

Mr. STAVER. No, no. I am referring to an individual who is being forced to have a blood transfusion.

Mr. NADLER. No, no, no, we are not talking about being forced to have a blood transfusion, because we are not talking about someone being forced to have an abortion.

The objection is to mandating that the insurance policy cover abortions for those who want them. The objection here would be requiring the insurance policy to cover blood transfusions for those who want them and who need them.

What is the difference?

Mr. STAVER. I think there is a significant difference.

Mr. NADLER. To wit?

Mr. STAVER. Because one is the taking of innocent human life.

Mr. NADLER. Excuse me. That is a value judgment. And you may——

Mr. STAVER. That is not a value judgment. That is a—that is so fundamental——

Mr. NADLER. Wait a minute. That is a religious conviction.

Mr. STAVER. That is so fundamental to your Christian belief that you cannot violate that.

Mr. NADLER. Fine. To some Christian beliefs and not to others and not to some other beliefs. And I am not going debate that, nor am I debating the validity of someone objecting on a religious basis to blood transfusions or to a lot of other things. There are equally valid beliefs, from a government point of view. Any religious belief is equally valid from a government point of view, can't distinguish.

Mr. STAVER. But the taking——

Mr. NADLER. So my question is——

Mr. STAVER [continuing]. Of innocent human life——

Mr. NADLER. The taking of innocent human life——

Mr. STAVER [continuing]. Is fundamentally different. The destruction of another human being is fundamentally different.

Mr. NADLER. All right. Let's assume we aren't talking about abortifacients, we are only talking about—or what are characterized abortifacients—contraception. That aside, is not the taking of innocent human life.

Mr. STAVER. Well, the FDA classifies Ella and Plan B as abortifacients.

Mr. NADLER. Put that aside. Let's assume that you weren't talking about——

Mr. FRANKS. The gentleman's time has expired.

Mr. NADLER. We are talking only about contraception. Would that be different from the blood transfusion case?

Mr. STAVER. I am sorry, I didn't——

Mr. NADLER. Would that be—if the requirement says the insurance company must cover contraception, not including what you would consider abortions, would that be different and of greater or lesser validity as an invasion of religious liberty than the requirement that the insurance policy cover blood transfusions, which other people object to on religious grounds also?

Mr. STAVER. It could be similar, but I think it is also fundamentally different, particularly for those of Roman——

Mr. NADLER. It does.

Mr. STAVER.—Catholic beliefs, because it deals with the creation or the destruction of innocent human life.

Mr. NADLER. We are not talking about abortions. We are the talking——

Mr. STAVER. I know——

Mr. FRANKS. The gentleman's time has expired.

Mr. STAVER. But we are talking about contraception, not the abortifacients. That is what we are talking about.

Mr. NADLER. Right. Yes.

Mr. STAVER. For those of Roman Catholic belief, that deals with the very beginning of human life. The——

Mr. NADLER. And for those of other beliefs, transfusions are equally objectionable. What is the difference?

Mr. STAVER. I think it is fundamentally different when you are talking about the creation or destruction of innocent human life.

Mr. FRANKS. The gentleman's time has expired.

And we now recognize Mr. King for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

And I thank the witnesses for your testimony.

Sometimes I have a little trouble attaching all the dialogue if I can't take it back and anchor it to something that is the basis for our discussion here, and I think that would be the First Amendment. And I don't believe I heard anybody actually address the text of the First Amendment.

So I would turn to Dean Staver and ask—I want to go to this wall-of-separation discussion. So could you explain that to me, how we got to that?

Mr. STAVER. The wall of separation?

Mr. KING. Yes.

Mr. STAVER. Well, the First Amendment clearly says that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. So it is a protection of a barrier against government intrusion on religious freedom. That is what the essence of the First Amendment is.

Thomas Jefferson's letter to the Danbury Baptists was a letter of congratulations by the Danbury Baptists, and he used the opportunity, as he often did, to write a letter to give certain kinds of statements. And in that statement, he was justifying, especially in the earlier drafts that are clearly available now for review and research, why he didn't, like his previous predecessors, Washington and Adams, engage in national days of prayer. And he indicated that the Federal Government was not allowed to establish a religion and, therefore, not allowed to require a national prayer, and so, therefore, as the Executive, he was not allowed to carry out what the Federal Government was not allowed to do.

He never used the word "separation of church and state" before that letter. And if it was so important to him, he never used it again after the letter. He never used it at all.

And, in fact, in another letter, he refers to the First Amendment with regards to religion and the 10th Amendment as saying essentially the same thing: The Federal Government should have the hands off of religion because that is a matter reserved for the States.

Mr. KING. But if Thomas Jefferson for a moment, maybe in a fit of anger or frustration, for a moment wrote a letter to the Danbury Baptists and for that moment he had changed his mind on his longstanding support for the First Amendment and then never revisited it again, is there any legal basis whatsoever for an opinion that came out so many years later?

Mr. STAVER. No. In fact, the Supreme Court that first really relied upon that said that Thomas Jefferson, as we know, basically was influential in the drafting and adoption of the First Amendment. And, of course, Justice Rehnquist was the first Justice who later, in a dissent or a concurring opinion later, literally demolished that. No historian now will support what that opinion says, because Thomas Jefferson had nothing whatsoever to do with drafting the First Amendment.

Mr. KING. So from a First Amendment standpoint, we are back to "Congress shall make no law."

Mr. STAVER. Yes.

Mr. KING. And that stands today, and it has not been redefined by any succeeding precedent case——

Mr. STAVER. Correct.

Mr. KING [continuing]. In your judgment.

Would you agree, Mr. Baylor?

Mr. BAYLOR. Well, your question is about whether the Establishment Clause applies to local and State government, as well, beyond Congress. Is that—am I understanding correctly?

Mr. KING. Well, I didn't ask you the question, but it is one we should get answered here, so I would ask your opinion on that.

Mr. BAYLOR. Yeah. You know, that is not a question that is presently being debated very much among the courts. I think it is well-

accepted that it ought to be applied and it ought to be applicable to the State and local governments, as well.

But the question is, what does the thing mean? And when the phrase "separation of church and state" was initially used by the Supreme Court, it was to protect the church from the state, not to be a device under which the government discriminates against religion.

And from 1947 forward, when the Supreme Court invoked that phrase and misinterpreted and misapplied it, all too many organizations and Justices were using this phrase as meaning, "We must exclude Christian speakers or religious speakers from public settings; we must deny them equal access to funding." So the key issue is the meaning of the Establishment Clause.

Mr. KING. Is there any scholarship that there was ever an effort to actually insert those words into the Constitution, by amendment or in the original draft?

Mr. BAYLOR. Well, the Blaine amendment that was proposed after the Civil War was designed to deny equal educational funding to religious schools, and that effort failed. And I think it is quite ironic that the Establishment Clause was subsequently interpreted by the court to hold precisely that. Now, thankfully——

Mr. KING. Was there ever an effort——

Mr. BAYLOR [continuing]. The court changed its mind about that.

Mr. KING. Was there ever an effort to amend the Constitution, ever a proposal or an actual constitutional amendment that would have inserted language, "a wall of separation," or similar language that you know of?

Mr. BAYLOR. Not to my knowledge, no, sir.

Mr. KING. Reverend Lynn, are you aware of any?

Rev. LYNN. No. I think it is right, because I think that it was commonly understood after the passage of the 14th Amendment that one of the purposes of the 14th Amendment, as articulated by the Republican sponsors of the 14th Amendment, was to apply the Bill of Rights to the States and, therefore, to guarantee this same what Jefferson called a "wall of separation" to State activity.

Mr. KING. Do you know anything about a report that I have that the Ku Klux Klan had actually made an effort to introduce that language in as an amendment to the Constitution, "separation of church and state," and that it originated as an anti-Catholic bias from the Klan?

Rev. LYNN. There was certainly anti-Catholic bias on the part of the Ku Klux Klan. They hated pretty much everyone who was not themselves.

Mr. KING. Does anyone on the panel——

Rev. LYNN. But this is not——

Mr. KING [continuing]. Have any knowledge of that?

Rev. LYNN. What?

Mr. KING. Does anyone on the panel have any knowledge of what I just brought up?

Rev. LYNN. No.

Mr. KING. Hearing none—Dean Staver, I see you leaning forward.

Mr. STAVER. Well, I think, as Mr. Baylor said, that there was an effort with the Blaine amendment to specifically discriminate

against, particularly, Catholic Church and Catholic schools. There were two attempts to amend the First Amendment to replace the words "Congress shall make no law respecting" to "no State shall make no law." Both of those failed.

Mr. KING. I understand. And I appreciate all the witnesses' testimony.

And I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And I now recognize the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Reverend Lynn, the school-prayer issue has been bandied back and forth. Can you tell me the implications of the Establishment Clause and the Free Exercise Clause in that issue?

Rev. LYNN. I think it is a perfect example of where those two clauses have an independent and important meeting.

The nonestablishment principle means, as the Supreme Court rightly said in the early 1960's, local governments cannot write a prayer, the so-called regent's prayer. No bureaucrat should write a prayer that every student should articulate. And then, just a year later, in another Supreme Court decision, the majority of the Court said it is also true that local governments cannot choose a prayer, even the Lord's Prayer, or select what holy scripture—in the case of Maryland and Pennsylvania, the Holy Bible of Christianity—and require it to be articulated in the schools. That is what the establishment principle means.

What the free-exercise principle means is that if I want to have my child say a prayer, as she frequently did, in elementary school over her lunch, she was not barred from doing that. That was truly her independent decision, because that is something she learned in her family. That is free exercise of religion.

Establishment is when the government decides the time, the place, the manner, or the content of prayer. That is properly forbidden and, I think, a long-established principle, which is why we don't have constitutional amendments on this matter coming up every year before the United States House and Senate as we did 20 years ago.

Mr. SCOTT. Thank you.

A lot has been said about the government picking a religious leader. Is there any question that a church, a synagogue, can discriminate based on religion in selecting their leadership with their congregational money?

Rev. LYNN. We took a position in the Hosanna-Tabor case that was somewhat different than the Obama administration, concerned that that could be read too far, to act as if, if you were trying to hire a new rabbi, you had to make sure that you also went and considered Buddhist priests or a Wiccan priestess for the same position.

We took the position that the issue is what can be defined as a minister and that a minister simply can't be defined by act of the congregation determining that a whole class of people happen to be ministers.

So we have now been approached, for example, by African-Americans who work for churches who have been defined as ministers

now, even though they might not have been a minister before the Hosanna-Tabor case, who say, we think race played a role in our dismissal. But thanks to the Hosanna-Tabor's broad language, that individual cannot go to the EEOC and say, "Look, this is a fraud. It wasn't about religion. They fired me because of race." He or she cannot get into the EEOC's door, which means he or she cannot have access to Federal courts.

That is a terrible decision. It went too far. I don't know why the administration took quite the broad position it did. We took a much narrower one. And I wish that that had been the majority opinion in that case instead of a nine-to-zero decision that opens the gates to widespread discrimination without any access to claim that gender or disability or even race was the true justification for a firing.

Mr. SCOTT. Is there a difference in using Federal money rather than congregational money when you are talking about discrimination?

Rev. LYNN. Oh, I think so. I mean, I think it is absolutely clear that the Federal Government continues to allow funding through grants and contracts to organizations that discriminate on the basis of religion.

This is something the President said when he was a candidate for the Presidency in 2008 that he would change. Unfortunately, he has not done that, and it remains a persistent problem for civil rights in this country.

To allow a group to get a government contract and not to be in a position to hire the best qualified person, to be allowed to hire on the basis of religious preference or their comfort level with hiring people of their same faith background, I think is a disgrace in the 21st century for anyone and certainly for this administration to continue to pursue.

Mr. SCOTT. We are in the 51st anniversary of the signing by President Kennedy of the Equal Pay Act. If people have religious objections to equal pay, what happens? And is there any caselaw on that?

Rev. LYNN. There is one case that I am aware of in the Fourth Circuit. It arose in a facility in the State of Virginia. The idea was that the school in Virginia would not pay men and women equally; they paid men more. They cited the Christian doctrine that as Christ is head of the church, so the husband is head of the family, and therefore justified giving husbands, mainly men, more money.

This was litigated. That position lost in the First Circuit. It was not appealed to the United States Supreme Court. But it is another example of how if you say these laws can be selectively enforced, if I have a religious objection, it doesn't apply to me, it applies to not just birth control, it applies to all kinds of other medical procedures, it applies to the civil rights rubric of our country, it applies to the Equal Pay Act. As Justice Scalia once mentioned, it is a principle that courts anarchy.

I think this is the first time I have ever quoted Justice Scalia in testimony before this or any Committee.

Mr. FRANKS. The gentleman's time has expired.

And I now recognize the gentleman from Virginia, Mr. Forbes, for 5 minutes.

Mr. FORBES. Chairman, thank you.

And, gentlemen, thank you, and ladies, for being here today.

And, Mr. Lynn, I just heard the last part of your questioning from my good friend from Virginia, Mr. Scott, but I read your testimony, and the part where it said that there was a radical redefinition of religious liberty that is under way.

Are you the one attempting that radical redefinition, or are you suggesting that the people sitting at the table with you are?

Rev. LYNN. Well, I think that the—my suggestion is that the three people around me, all of whom I have known for many decades, are unfortunately radically trying to rewrite and turn this into——

Mr. FORBES. Let me ask you this question then. Are you suggesting that the test that you put forward is the current test that the courts have established for religious freedom and religious liberty?

Rev. LYNN. I would say that it depends which courts you are talking about. The United States Supreme Court has made a series of decisions——

Mr. FORBES. Let me ask you on the United States Supreme Court where they said——

Rev. LYNN. Yep.

Mr. FORBES. Because here is basically what you say. You say that religious accommodations and exemptions should only be granted when, one, there is a genuine and substantial burden on First Amendment right, and, two, that they not impinge on the interest of others. Is that the Supreme Court test?

Rev. LYNN. That is not the Supreme Court test.

Mr. FORBES. So, then, the test that you set forward would really be a radical redefinition of religious liberty, I think.

And let me ask you this question. Based on the definition that you put forward, do I have a right not to be offended? And if so, is there ever a time when your right to practice your religion should be subordinated to my right not to be offended?

Rev. LYNN. No, I don't like that phrase of "take offense" or "be offended." I don't think Americans have a right not to be offended. I do think they have the right, though, not to be asked to subsidize someone else's religion with——

Mr. FORBES. Yeah, but that is not my question.

Rev. LYNN [continuing]. Which they disagree.

Mr. FORBES. So you agree with me that they don't have a right not to be offended?

Rev. LYNN. I am offended 100 times a day by something.

Mr. FORBES. Good. If I own a convenience store in Virginia that sells gas and my religious beliefs require me not to open on Sunday, is there ever a time when your interest to get gas while traveling through the State should cause my religious beliefs to be subordinated to your need for gas and I should be forced to open on Sunday?

Rev. LYNN. No, I think that in that example you have a good, colorable claim that your right not to open—it is your position, it is not the State law, it is your position—does put some people in an area of inconvenience but does not in any way insult the integrity or the dignity as if you were to say to a gay couple walking

into your restaurant, "You know, folks, I am not going to serve you. You have to go elsewhere."

Mr. FORBES. If I did open on Sunday but my religious beliefs required me not to sell alcohol or tobacco products on Sunday, is there ever a time when your interest to buy such products should cause my religious beliefs to be subordinate to your interest to buy such products and when I would be forced to sell them to you?

Rev. LYNN. Depending on the State. If you are a State whose sales on Sunday of things like alcohol and tobacco are regulated by State law, I am afraid that if you want the license to sell, you probably under those circumstances need to also adopt the requirement of State law, if it is so, that you sell those products on Sunday.

Rev. LYNN. I don't think there is any State that would require me to sell alcohol and tobacco.

Rev. LYNN. I don't think there is either.

Mr. FORBES. So, then, give me the State where the law would be as you just pointed out.

Rev. LYNN. I don't know that there is a State. Mine was a hypothetical, that if you seek a license from the State and then you say, well, I want some of the privileges of it, like the ability to sell alcohol, but I don't want to abide by all of the other regulations——

Mr. FORBES. Well, there is no regulation that says I have to sell it. So what you are saying is that the State just says I can sell alcohol and tobacco. You are saying then I have to sell it 7 days a week, regardless of my religious beliefs?

Rev. LYNN. No. I am just saying that it depends on what else you adopt——

Mr. FORBES. Well, Mr. Lynn, let me ask you this.

Rev. LYNN [continuing]. When you adopt——

Mr. FORBES. Who draws these lines?

Rev. LYNN. The courts.

Mr. FORBES. Does the President—the courts do it? So then that means that the only way I know if I have a protected right under the First Amendment is for the court to tell me, which I think in and of itself can be a rather chilling impact on my First Amendment right.

But, based on where the court currently is, their standard is that the State has to have a compelling State interest and that they have to impose that with the least restrictive means possible. Would you agree that is the current standard?

Rev. LYNN. That is a part of the test. You do have to look at whether there is a burden on religion to begin with, which is in my example——

Mr. FORBES. I agree, you have to some burden, but I don't think the court always says it has to be the substantial burden, because it protects First Amendment rights.

But you would agree that that is the current court test, that it has to be a compelling State interest and the least restrictive means possible?

Rev. LYNN. In application of the Religious Freedom Restoration Act, absolutely, that is the standard.

Mr. FORBES. And since——

Rev. LYNN. Unfortunately, all those terms are now at issue before courts——

Mr. FORBES. And since——

Rev. LYNN [continuing]. Because, Congressman——

Mr. FORBES [continuing]. My time has expired, my red light is on, I would just conclude by saying, I think to change that standard would be the radical redefinition of religious liberty.

And, with that, Mr. Chairman, I yield back.

Mr. FRANKS. I thank the gentleman. I wish we had more Forbes around.

I would now yield to Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Dean Staver, are you the same Mathew D. Staver as is Mathew D. Staver, PA?

Mr. STAVER. I had a commercial law firm that was Mathew D. Staver, PA.

Mr. JOHNSON. Was that you, or was that a separate person?

Mr. STAVER. In Florida, if you name your law firm after your—in a situation like that, it was me, but it was also other attorneys in my law firm that I hired. We had up to 40 employees and 10 attorneys. That was back in the 1990's.

Mr. JOHNSON. Did you give birth to that entity, to that person, Mathew D. Staver, P.A.? Did you give birth to it?

Mr. STAVER. I incorporated it under the laws of the State of Florida.

Mr. JOHNSON. So a corporation is not the product of a union between a man and a woman?

Mr. STAVER. Not the last time I checked.

Mr. JOHNSON. And a corporation has no ability to join a church, does it?

Mr. STAVER. No ability to join a church?

Mr. JOHNSON. Uh-huh.

Mr. STAVER. A corporation could be an integrated auxiliary of a church and be part of a church.

Mr. JOHNSON. Well, I mean, a person joining a church gets baptized. You have never heard of a corporation being baptized, have you?

Mr. STAVER. I have not, but if I were Mathew D. Staver, P.A., and I got baptized, I would be Mathew D. Staver being baptized.

Mr. JOHNSON. You would be a natural person born to a man and a woman who decided to go to church and be baptized, right?

Mr. STAVER. Yes, operating as Mathew D. Staver, P.A.

Mr. JOHNSON. But, now, Mathew D. Staver, P.A., does not have that ability, does it?

Mr. STAVER. Well, we never tried it, that is for sure.

Mr. JOHNSON. Well, I have never heard of it being done, myself.

In fact, an entity such as Mathew D. Staver, P.A., which was created 25 years ago, is actually dead, is it not?

Mr. STAVER. That is correct. It has been dissolved and has passed on to another world.

Mr. JOHNSON. But it has not passed on to heaven, however.

Mr. STAVER. I don't know where it is, actually.

Mr. JOHNSON. It did not pass to——

Mr. STAVER. I didn't have that conversation before we dissolved it.

Mr. JOHNSON. It did not pass through the pearly gates and enter the kingdom of heaven, did it?

Mr. STAVER. No, but its creator certainly——

Mr. JOHNSON. Well, I am not talking about Mathew D. Staver. I am talking about Mathew D. Staver, P.A., your baby. And that baby is dead. But you could always bring it back to life if you paid the fees down there in Florida and had it reborn, because it——

Mr. STAVER. You could potentially resurrect it, yes.

Mr. JOHNSON. Yeah. Yeah. And that would be something that you as a person can do.

Mr. STAVER. I could do that.

Mr. JOHNSON. And, now, Mathew D. Staver has no conscience.

Mr. STAVER. Mathew D. Staver has no conscience? Or Mathew D. Staver, P.A.?

Mr. JOHNSON. Mathew D. Staver, P.A., has no conscience. Mathew D. Staver, P.A.

Mr. STAVER. Mathew—yeah. Mathew D. Staver, just for the record, since we are on the record——

Mr. JOHNSON. Does have a conscience?

Mr. STAVER [continuing]. Does have a conscience. But Mathew D. Staver, P.A., reflects the values of the incorporator or the creator, which was me.

Mr. JOHNSON. But it doesn't have a soul, though, does it? Mathew D. Staver, P.A., it doesn't have a soul, does it?

Mr. STAVER. No, not that I am aware of.

Mr. JOHNSON. Well, not that I am aware of either. Now——

Mr. FRANKS. Do any lawyers have souls? Just for clarification.

Mr. STAVER. Yeah. And since we are on the record, definitely, they do have souls. So——

Mr. JOHNSON. Well, would you contend that a corporation that can't go to heaven, it can be reborn in perpetuity if you pay money, it is not born to the union between a man and a woman, it doesn't have a soul, it doesn't have a heart, doesn't attend church, doesn't get baptized, can't pay tithes and offerings, do you contend that a corporation has a First Amendment right upon which it can refuse to provide insurance coverage for specific medical treatments to an employee legally entitled to the coverage because it asserts a First Amendment right to freedom of religion?

Mr. STAVER. Yes, I do. And I know a lot of people who have not been baptized, don't pay tithes, don't go to church, don't have a heart, and I don't know whether they have a soul of whatever, but——

Mr. JOHNSON. Well, you know they——

Mr. STAVER.—I know that they can go through plastic surgery and medical treatment to stay alive, that they still have rights as a person.

Mr. JOHNSON. Pastor Staver, you know that every human being has a soul.

Mr. STAVER. Oh, sure.

Mr. JOHNSON. You know that.

Mr. STAVER. Yeah.

Mr. JOHNSON. But you also know that no corporation is equal to a person and no corporation has a soul. You know that.

Mr. STAVER. There are actually corporations, not to be technical, that are called "corporations sole," but that doesn't mean you have a soul. However——

Mr. JOHNSON. I mean in the way that——

Mr. STAVER.—I believe that corporations, especially those that are closely held corporations, as in the case of Hobby Lobby, reflect the values of the creator, as Mathew D. Staver reflected my values. Mathew D. Staver, P.A., was a reflection and an extension of Mathew D. Staver.

Mr. JOHNSON. But it did not have its own First Amendment right to freedom of speech and——

Mr. STAVER. Yes, it——

Mr. JOHNSON [continuing]. Freedom of religion, did it?

Mr. STAVER. Yes, I believe it does.

Mr. JOHNSON. All right.

Mr. STAVER. Of course, the issue of freedom of religion is before the court, but free speech has already been decided.

Mr. JOHNSON. Free speech has already been decided, and that is what really scares me about a freedom-of-religion issue being before the U.S. Supreme Court at this particular time. It scares me.

And, with that, I will yield back.

Mr. FRANKS. I thank the gentleman.

Well, while we have debated whether corporations have hearts and souls, sometimes we—there are those of us that believe that the unborn do, in fact, have hearts and souls and that when they are aborted it assaults their integrity and dignity and that some Christians would rather not subsidize that and feel like that under the Constitution we should have that right.

So I have just tried to pull together a few pieces of the testimony here. I appreciate all of you for being here. And I hope all of us consider the importance of religious freedom. This has been a very lively debate, and if there really is a God, it might be relevant.

So, with that, all Members have—let's see. Again, thank you all for attending, and this concludes today's hearing.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And I thank the witnesses, and I thank the members of the audience.

And this meeting is adjourned.

[Whereupon, at 4:48 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

Religious freedom is a fundamental pillar of American life. Whatever one's religious beliefs, our Constitution enshrines the notion that the government remain neutral with respect to religious belief, neither favoring one religion over others, nor favoring religious belief over non-belief.

Our Constitution and statutes also require that the government not substantially burden the free exercise of religion absent a compelling interest and a less burdensome means of meeting that interest.

In expounding upon the meaning of these Constitutional provisions, Thomas Jefferson wrote in a letter to the Danbury Baptist Association in 1802: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."

It is because religious freedom is so fundamental that it is protected in the very first Amendment in the Bill of Rights.

It is also why I was the sponsor of Tennessee's Religious Freedom Restoration Act back in January 1998, when I was a member of the Tennessee Senate.

Like the federal RFRA, the Tennessee RFRA protects religious liberty by ensuring that any governmental action that substantially burdens the free exercise of religion is prohibited unless there is a compelling state interest.

Tennessee's RFRA, like the federal RFRA, seeks to strike a balance between the fundamental right to practice one's religion free from government interference and the ability of the government to perform its basic duties, including the protection of public health and safety and fighting discrimination.

Any discussion of religious liberty must also include a discussion of the threats—both governmental and non-governmental—to members of minority religions.

For example, as Reverend Barry Lynn, one of our witnesses, notes in his written testimony, a Muslim congregation in Murfreesboro, Tennessee faced intimidation and threats of violence from the local community when it attempted to construct a new mosque. While the mosque ultimately was built, the legal fight over its construction ended only recently, at great cost to the congregation for a fight that it should never have had to fight.

This example, which, unfortunately, is only one of many, reminds us that the Bill of Rights' fundamental purpose is to protect the minority, the unpopular, and the non-mainstream from majority tyranny.

Where one's right to free exercise of religion ends and majority tyranny begins will be the crux of our discussion today.

Seven years ago, this Committee heard from Monica Goodling, who at that time had just resigned as a Justice Department official, concerning hiring practices at the Department during the Bush Administration.

Ms. Goodling was a graduate of Regent University Law School, which, according to its website, seeks to provide legal training with "the added benefit of a Christian perspective through which to view the law."

There was evidence at the time that Ms. Goodling and others screened job candidates for career positions at the Justice Department based on their partisan affiliations. Although she denied it when I asked her, it stands to reason that religious belief could have also played a role in hiring decisions.

A religious litmus test for public office or for career public service positions has no place in a society that values religious liberty.

More broadly, attempts to re-make our Nation's longstanding political and legal culture so as to give already-dominant religious groups more of the coercive power of government must be confronted, for if such attempts are successful, the outcome would represent a threat to a free society.

I look forward to a vibrant discussion.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Religious freedom was one of the core principles upon which our Nation was founded.

The First Amendment protects this fundamental freedom through two prohibitions. The Establishment Clause prohibits the federal government from issuing a law respecting the establishment of religion and the Free Exercise Clause prohibits the government from affecting the free exercise thereof.

When discussing the government's compliance with these prohibitions, we should keep in mind several points.

To begin with, the real threat to religious liberty is continuing religious bias or intolerance against members of minority religions.

For example, American Muslim communities across the United States since September 11, 2001 have been targets of often hostile communities and sometimes even government actions.

There have been numerous well-founded complaints of religious profiling by federal, state, and local law enforcement agencies. In fact, bills have been introduced in Congress as well in various state legislatures targeting Islam.

It was recently reported that the Transportation Security Agency is using a "behavioral detection program" that appears to focus on the race, ethnicity and religion of passengers.

As many of you may know, I represent Michigan's 13th District, which is home to one of America's largest Muslim communities. So, I am particularly disheartened by the overt challenges these communities face.

Targeting American Muslims for scrutiny based on their religion violates the core principles of religious freedom and equal protection under the law. All Americans—regardless of their religious beliefs—should know that their government will lead the effort in fostering an open climate of understanding and cooperation.

Yet in the name of religious freedom we cannot undermine the government's fundamental role with respect to protecting public health and ensuring equal treatment under the law.

Currently pending before the United States Supreme Court are two cases—*Sebelius v. Hobby Lobby Stores* and *Consestoga Wood Specialities v. Sebelius*—that will hopefully clarify this issue.

The issue in those cases is whether the government can require can require for-profit corporations that provide group health plans for their employees to provide female employees with plans that cover birth control and other contraceptive services as required by the Affordable Care Act, notwithstanding the religious objections of the corporations' owners to contraceptives.

I along with 90 of my colleagues in the House filed an amicus brief in those cases disputing that the claim that corporate plaintiffs are "persons" for the purposes of the Free Exercise Clause.

And, even if they are capable of having religious beliefs, those corporations are not entitled to relief under the Religious Freedom Restoration Act.

Moreover, the Affordable Care Act's mandate, we argue, serves two compelling governmental interests—namely, the protection of public health and welfare and the promotion of gender equality—that outweigh whatever attenuated burden the mandate might place on the corporations' free exercise rights.

Finally, as even some of the Majority witnesses acknowledge, the Obama Administration's enforcement efforts with regard to protecting religious freedom—in the workplace and elsewhere—are to be commended.

On various fronts, the Administration has striven to take a balanced approach to this issue. For example, it added a religious employer exemption to the HHS contraceptive mandate in response to objections from religious employers.

These efforts ensure that America continues to foster a safe and welcoming environment for all religious practices and communities without sacrificing our other freedoms and needs.

Material from the Anti-Defamation League (ADL) submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

Officers of the National Commission

Standing Committee Chairs

Division Directors

ADL
Anti-Defamation League®

June 17, 2014

The Honorable Trent Franks
Chair
House Judiciary Subcommittee on the
Constitution and Civil Justice
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerold Nadler
Ranking Member
House Judiciary Subcommittee on the
Constitution and Civil Justice
U.S. House of Representatives
Washington, D.C. 20515

We write to provide the views of the Anti-Defamation League (ADL) for the June 10 House Judiciary Subcommittee on the Constitution and Civil Justice hearings on "The State of Religious Liberty in the United States," and ask that this statement and the enclosed documents be included as part of the official hearings record.

The Anti-Defamation League

For more than a century, the Anti-Defamation League has been an active advocate for religious freedom for all Americans – whether in the majority or minority. The League has been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

To this end, ADL has filed an *amicus* brief in nearly every major religious freedom case before the U.S. Supreme Court since 1947, as well as numerous briefs in lower appellate and trial courts. In Congress, we have played a lead role in working to enact significant religious freedom protection legislation, such as the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). ADL is also one of the leading providers of anti-bias education in the United States, having impacted approximately 58 million students and educators, teaching them to respect – not just tolerate – differences.

Religion in the Public Schools

A core ADL concern is the appropriate role of religion in our nation's public schools. This concern is based on a number of considerations unique to the public schools: the specific sensitivities and impressionability of school-age children; the fact that public schools are government institutions where attendance is mandatory; and the profound influence of school officials and teachers over students. These factors create a significant danger when religion is introduced into the public schools in circumstances evincing the apparent endorsement of school administrators or teachers.

In recent years, ADL's advocacy in this area has focused on the state level, where we have opposed backdoor efforts to reintroduce school-sponsored prayer, including so-called "Religious Viewpoints Anti-Discrimination Acts" and "Student Religious Liberties Acts,"[1] as well as creationism or intelligent design into the public school science curriculum.[2]

Public Funding of Houses of Worship and Other Faith-Based Institutions

For over a decade, ADL has raised deep concerns about federal and state efforts to directly and indirectly fund houses of worship and other sectarian institutions to perform social and other services. ADL supports government partnerships with religious-affiliated groups such as Catholic Charities, Jewish Federations, and Lutheran Social Services – partnerships which, due to strong constitutional safeguards, have for decades successfully operated without issues of taxpayer-funded proselytizing or discrimination. Many new faith-based initiatives, however, do not include such safeguards. As a result, they open the door to proselytizing of beneficiaries with billions of dollars in government funds, and in many circumstances, explicitly allow religious discrimination in hiring and firing within taxpayer-funded programs.[3]

ADL's concern also includes federal and state school vouchers and neo-vouchers programs, including the District of Columbia's voucher program, which primarily fund religious schools that engage in religious indoctrination, and often discriminate in admissions on the basis of religion, sexual orientation, gender identity, disability, discipline history, and/or academic history.[4] These programs subvert the constitutional principle of separation of church and state, and threaten to undermine our system of public education.[5]

Religious Accommodation and Coercion in the Military

Over the last decade, ADL also has raised concerns and advocated on issues of religious accommodation and coercion in the military.[6] Members of the U.S. Armed Services must not be discriminated against on the basis of their religion. And our nation's honored military training universities – the U.S. Air Force Academy (USAFA), West Point, and the Naval Academy – bear a special responsibility to avoid religious coercion and to respect the rights of religious minorities guaranteed by the Constitution. Further, our military academies have an

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[1] See enclosed ADL letters to Governors Jay Nixon, Bill Haslam and Terry McAuliffe in opposition to Missouri House Bill 1303, "Missouri Student Religious Liberties Act," Tennessee House Bill 1547, "Religious Viewpoints Anti-Discrimination Act," and Virginia Senate Bill 236, a bill "relating to student religious viewpoint expression," respectively.

[2] See attached ADL letter to Governor Terry McAuliffe in opposition to Virginia House Bill 207, a bill relating to "relating to instruction in science."

[3] See June 10 Coalition Letter to Attorney General Holder on government-funded religious discrimination with VAWA funds.

[4] See attached ADL letter in opposition to Florida Senate Bill 850, "An act relating to Education."

[5] See *Center on Education Policy, Keeping Informed about School Vouchers A Review of Major Developments and Research*, July 2011, at 3.

[6] See ADL Statement, dated January 27, 2014, to the House Military Personnel Subcommittee on hearings regarding "Religious Accommodations in the Armed Services."

important opportunity and responsibility to instill in our service personnel core democratic values, including those embodied in the First Amendment's religious freedom clauses.

Starting in 2005, ADL responded to serious allegations of religious harassment, proselytizing, and insensitivity at USAFA. Congress held hearings, and other organizations threatened to sue. While ADL expressed its concern to USAFA and in testimony to a House Armed Services Subcommittee, it also offered to assist USAFA with ADL's unique expertise in education and dealing with church-state and religious liberty issues. ADL's offer of assistance was accepted by the then-Superintendent of USAFA and each successive Superintendent has expressed a commitment to improve the religious climate for cadets and permanent party members.

In recent years, the issue of permissible prayer by military chaplains has become, needlessly, a highly partisan and divisive issue. Over the past two years, legislative proposals by some members of Congress were prompted by disputed assertions about the effect the repeal of the military's ill-conceived and discriminatory "Don't Ask, Don't Tell" (DADT) policy would have on service members and chaplains with dissenting religious views. We have also witnessed efforts by some Members to enact legislative language to promote and facilitate explicitly sectarian prayer by chaplains at official military ceremonies and events, including those at which attendance is mandatory. Such efforts show a lack of respect for the diversity of religious beliefs in our military and threaten to erode unit cohesion.

On January 22, 2014, the Department of Defense published updated and revised Instructions on "Accommodation of Religious Practices Within the Military Services." The new guidance describes policy, procedures, and responsibilities for the accommodation of religious practices in the Armed Forces. The promulgation of this guidance provides an important opportunity for the Department of Defense and all the service branches to make their religious accommodation guidance uniform. The guidance appropriately provides broad protection for an individual's religious speech and expression, and it properly states that a request for religious accommodation should promptly be granted if it will not affect mission accomplishment.

While we appreciate the attempt, the guidance is disappointing and we urge that it be amended. It falls short in providing workable mechanisms for soldiers to obtain and maintain religious accommodations. In early April, an unusually-broad interfaith coalition of twenty-one national religious liberty organizations wrote to urge the Pentagon to provide more accommodation for fundamental aspects of minority religious practices of some aspiring soldiers, including observant Jews and Sikhs:

> As currently drafted, section 4(g) of the revised Instruction would require religiously observant service members and prospective service members to remove their head coverings, cut their hair, or shave their beards – a violation of their religious obligations – while their request to accommodate these same religious practices is pending. This is so, even if they are otherwise qualified to serve and an accommodation is unlikely to undermine safety or other necessary objectives. We urge you to reconsider this

provision, which has the effect of forcing some religiously observant service members to make an impossible choice between their faith and their chosen profession.

The coalition letter urged revisions to the religious accommodation Instruction to avoid "an unwelcome and unnecessary chilling effect on religious liberty" which would "limit opportunities for talented individuals of faith to serve in our nation's military." [7]

Sectarian Prayers before Local Legislative Bodies

ADL has long opposed sectarian and non-sectarian prayers in legislatures, although the Supreme Court authorized certain legislative prayers in *Marsh v. Chambers* in 1983. Even non-sectarian prayers have the potential to divide communities along religious lines as they can exclude community members from polytheistic faiths or no faith tradition.

The Supreme Court's recent closely-divided *Greece v. Galloway* town council prayer decision is deeply disturbing. It effectively permits overtly-sectarian opening prayers in one faith tradition before local legislative bodies where ordinary community members seek redress from public officials. Indeed, there already have been news reports about municipal or county board members expressing intentions to have invocations in only one faith tradition at public meetings.[8]

In our pluralistic society, prayers at meetings of local legislative bodies – particularly sectarian ones – inevitably cause some community members to feel isolated or excluded, and divide communities along religious lines. Although the *Greece* decision generally permits sectarian legislative prayers, it does not mandate them. ADL firmly believes that invocations before public meetings of local legislative bodies are coercive and bad public policy. The League strongly discourages local public officials from instituting prayers – sectarian or non-sectarian – at public meetings. To the extent that some communities feel a need to open their meetings with some sort of solemnizing moment, the most appropriate and inclusive alternative would be a moment of silence.

ADL recently issued new guidance for local governments, as well as an online FAQ explaining the overly-permissive nature of the *Greece* decision and why refraining from sectarian and non-sectarian opening prayer practices is the best approach – promoting and preserving the religious liberty of all community members.[9]

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[7] http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/religionmilitary/religious-accommodation-military-letter-2014-04-02.pdf

[8] See attached ADL letter, dated May 29, 2014, to Roanoke County, VA County Board of Supervisors.

[9] See ADL publication entitled, "Opening Prayers at Public Meetings of Local Town Councils, Questions & Answers About the Greece v. Galloway Decision" - (web-page last visited June 6, 2014).

Anti-Muslim Discrimination

ADL has been very concerned about efforts to infringe on the religious freedom rights of Muslim Americans. To counter these infringements on religious liberty, ADL established the Interfaith Coalition on Mosques (ICOM) in 2010, which was created to assist Muslim congregations seeking to expand or build mosques who face discriminatory treatment by a local government.[10] ICOM has written multiple *amicus* briefs and letters promoting the rights of Muslim congregations under RLUIPA.

In addition, ADL has played a leadership role in opposing so-called "application of foreign law" bills in many state legislatures. These proposals seek to address the fictional threat of Islamic law infiltrating the American legal system.[11] They reflect nothing more than confusion, misunderstanding, or camouflaged bigotry, and detrimentally impact the religious freedom of observant Jews, Muslims, and others. However, dozens of these bills have been filed and eight states have enacted them.

Discrimination in the Guise of Religious Freedom

ADL firmly believes that the "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. In a pluralistic society, religious accommodation cannot be used to trample the rights of others.[12 13]

Over the last two years, ADL has joined *amicus* briefs opposing secular businesses from refusing to comply with the Affordable Care Act's contraception mandate based on religious objections, including joining a brief to the U.S. Supreme Court in *Sebelius, et al. v. Hobby Lobby Stores, Inc., et al.*, and other cases against refusals to abide by public accommodations laws based on religious objections to same-sex marriage. ADL has opposed overly-broad religious exceptions to anti-bullying laws relating to sexual orientation and gender identity. And ADL has taken issue with post-secondary students in secular counseling, social worker, and psychology programs seeking to opt out of curriculum requirements relating to LGBT clients or issues on religious grounds.

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[10] See http://archive.adl.org/icom/ (web-page last visited June 6, 2014).

[11] See attached ADL letters in opposition to Florida Senate Bill 386, "An act relating to application of foreign law in certain cases" and Georgia House Bill 895, "an act "relating to the effect and enforcement of foreign laws."

[12] See attached ADL letters in opposition to Arizona Senate Bill 1062, "An act relating to free exercise of religion" and Georgia House Bill 1023, "Preservation of Religious Freedom Act."

[13] See ADL Press Release, entitled "ADL: Impact of New Mississippi Religious Freedom Bill 'A License to Discriminate'" (web-page last visited June 6, 2014).

Conclusion

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country "all possess alike liberty of conscience." He concluded: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."

We appreciate the opportunity to provide our views on this issue of high priority to our organization. Please do not hesitate to contact us if we can provide additional information or if we can be of assistance to you in any way.

Sincerely,

Deborah M. Lauter

Deborah M. Lauter
Director, Civil Rights

Christopher Wolf
Chair, National Civil Rights Committee

David Barkey

David Barkey
Southeastern Area & National Religious Freedom Counsel

Elizabeth Price

Elizabeth A. Price
Chair, National Religious Freedom Task Force

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A WORLD OF DIFFERENCE® INSTITUTE
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BONNIE VICKAR
CYNTHIA WALLACH
*Past Board Chairs

ADL 100

Imagine a World Without Hate™

Missouri/Southern Illinois Region

May 8, 2014

By Email and Fax

Honorable Jay Nixon
Governor
State of Missouri
Capitol Building Room 216
Jefferson City, MO 65201

Dear Governor Nixon,

On behalf of the Anti-Defamation League (ADL), we urge you to veto HB 1303, the "Missouri Student Religious Liberties Act".

You know well that ADL is a strongly pro-religion, national human relations and civil rights organization. For a century, we have been an ardent advocate for religious freedom for all Americans – whether in the majority or minority.

HB 1303 appears to have the bona fide intent of protecting religious freedom rights of public schools students. Certainly, it codifies existing Missouri Constitution, First Amendment and federal Equal Access Act rights of public school students to voluntarily pray and express religious viewpoints within the school setting. However, HB 1303 also contains language which would likely result in religious coercion of some students – violating their right to religious freedom within in the public schools.

Student Free Speech Rights

Public Students do not shed their rights to freedom of speech or expression at the schoolhouse gate.[1] But those rights are not without limit.[2] Public schools must allow students to engage in certain forms of private, voluntary, and personal expression. However, public schools also have a concomitant obligation to maintain control of student expression in curricular activities and indeed in certain circumstances are required to prohibit certain student expression, including religious expression.[3 4 5 6]

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[1] See *Tinker v. Des Moines Indep. Cmty. Sch. Dist*, 393 U.S. 503 (1969).
[2] See Id.
[3] See Id.
[4] See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988).
[5] See *Bethel School District v. Fraiser*, 478 U.S. 675 (1986).
[6] See *Walz v. Egg Harbor Twp. Bd. of Educ.* 342 F.3d 271, 279–81 (3d Cir. 2003); *see also Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).

Anti-Defamation League, 34 North Brentwood Boulevard, Suite 2, St. Louis, MO 63105, T 314.721.1270 F 314.721.0718 www.adl.org

The Operation of Compulsory Public School Attendance Laws Would Result in Religious Coercion

The federal and Missouri Constitutions guarantee that the government may not coerce anyone, including public school students to support or participate in religion or its exercise.[7] However, HB 1303 effectively authorizes prayers, invocations, proselytizing, or conversely anti-religious speech to take place within the classroom or at school-sponsored activities such as football games, assemblies, or graduation ceremonies. Students are a captive audience in the classroom and at such school-sponsored activities, and should religious or anti-religious speech result from HB 1303 students would be coerced to observe or participate in religious or anti-religious exercise, in violation of Article 1, section 5 and the First Amendment to the Constitution.[8]

Section 2 of HB 1303 states,

> *An school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the school district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.*

This language covers certain student expression already protected by the Missouri Constitution and First Amendment. But particularly in light of HB 1303's specific provisions concerning school-day opening announcements, school events and graduation ceremonies, it also would permit student recital of prayers or Bible verses during homeroom morning announcements, student prayers or other religious expression made over a loudspeaker at football games, or a student giving a proselytizing graduation speech all of which are unconstitutional.[9]

Furthermore, Section 3 of the bill states,

> *Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Homework and classroom assignments shall be judged by ordinary academic standards of substance and relevance and against other legitimate pedological concerns identified by the school district. Students may not be penalized or rewarded on account of the religious content of their work.*

There is a constitutional difference between a persuasive speech in response to an oral assignment on the merits of energy conservation verses a persuasive speech in response to an oral assignment urging classmates to accept a certain faith as a way to achieve salvation. Again,

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[7] See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

[8] See *Lee*, 505 U.S. 577

[9] See *Santa Fe*, 530 U.S. 290; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).

given the mandatory nature of public school and classroom attendance, the later would constitute unconstitutional religious coercion.[10]

HB 1303's Identical Treatment of
Elementary and Secondary Students Could Result in Constitutional Violations

H1303 takes a one-size-fits-all approach to K-12 public school students. However, it is much more difficult for elementary-school students to distinguish "... the line between school-endorsed [religious] speech and mere allowable speech ..." because they are so "young and impressionable."[11] And indeed, federal courts have recognized that "[i]n elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children."[12]

Under HB 1303, for example, it would be permissible in response to a first-grade assignment asking students to share stories about why their family is special and unique for a student to explain that the Bible, Torah or Q'uran are just a stories and Jesus, Moses or Muhammad, like Santa Clause are not real. Such a situation could be particularly devastating to particular classmates especially if they believe that statement is the viewpoint or perspective of the school or teacher. As high-school students have an understanding about cultural myths and out nation's religious diversity such a situation would obviously be less harmful.

Private, Voluntary Religious Exercise in the Public Schools Should Be Protected

ADL supports the right of students to voluntarily express their religious beliefs. And it is clear that public school students have the constitutional right to engage in voluntary, student-initiated prayer and other religious activities that are not coercive or do not disrupt the school's educational mission and activities. However, HB 1303 does not differentiate between such constitutionally protected expression and impermissible expression.

"Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family," and therefore, courts are "particularly vigilant in monitoring" whether religious beliefs are taught in public school.[13] HB 1303 would likely harm students' right to be free of religious coercion in the public schools. It will also likely lead to the unnecessary waste of taxpayer dollars in the form of lawsuits filed against the state or individual school districts.

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[10] The U.S. Supreme Court has found that in secondary schools such clubs are constitutionally permissible. However, it has not addressed the issue in elementary schools. Due to the impressionability of elementary school students and their difficulty in distinguishing between private and official speech, the Court may find such elementary school clubs unconstitutional.

[11] See *Wolz*, 342 F.3d 271

[12] See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n.* (4th Cir. 1998); See also *Busch v. Marple Newtown Sch. Dist.*, 967 F.3d 89; *Barger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170 (7th Cir. 1993).

[13] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

In light of these serious legal and policy issues, we urge you to veto HB 1303

Sincerely,

Karen J. Aroesty
Regional Director

cc: David Hoffman Esq., Chair, Regional Civil Rights Committee
Robbye Frank, Chair, Regional Advisory Board

Imagine a World Without Hate®

Atlanta (Southeast)

BY E-MAIL & U.S. MAIL

March 26, 2014

Honorable Bill Haslam
Office of the Governor
1st Floor, State Capitol
Nashville, TN 37243

Dear Governor Haslam:

On behalf of the Anti-Defamation League (ADL), we urge you to veto House Bill 1547, "Religious Viewpoints Anti-Discrimination Act" (HB 1547).

ADL is a strongly pro-religion, national human relations and civil rights organization. For a century, we have been an ardent advocate for religious freedom for all Americans – whether in the majority or minority.

HB 1547 appears to have the bona fide intent of protecting religious freedom rights of public schools students. Certainly, it codifies existing Art. I, Sec. 19 of the Tennessee Constitution, First Amendment and federal Equal Access Act rights of public school students to voluntarily pray and express religious viewpoints within the school setting. However, HB 1547 also contains language which would likely result in religious coercion of some students – violating their right to religious freedom within in the public schools.

Student Free Speech Rights

Public Students do not shed their rights to freedom of speech or expression at the schoolhouse gate.[1] But those rights are not without limit.[2] Public schools must allow students to engage in certain forms of private, voluntary, and personal expression. However, public schools also have a concomitant obligation to maintain control of student expression in curricular activities and indeed in certain circumstances are required to prohibit certain student expression, including religious expression.[3 4 5 6]

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[1] See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[2] See Id.
[3] See Id.
[4] See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).
[5] See *Bethel School District v. Fraiser*, 478 U.S. 675 (1986).
[6] See *Walz v. Egg Harbor Twp. Bd. of Educ.* 342 F.3d 271, 279–81 (3d Cir. 2003); *see also Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).

Anti-Defamation League, One Securities Centre, 3490 Piedmont Road NE, Suite 810, Atlanta, GA 30305, T 404.262.3470 F 404.262.9548 www.adl.org

The Operation of Compulsory Public School Attendance
Laws in Conjunction with HB 1547 Would Result in Religious Coercion

The federal and Tennessee Constitutions guarantee that the government may not coerce anyone, including public school students to support or participate in religion or its exercise.[7] However, HB 1547 effectively authorizes prayers, invocations, proselytizing, or conversely anti-religious speech to take place within the classroom or at school-sponsored activities such as football games, assemblies, or graduation ceremonies. Students are a captive audience in the classroom and at such school-sponsored activities, and should religious or anti-religious speech result from HB 1547, students would be coerced to observe or participate in religious or anti-religious exercise, which violates Art. I, Sec.19 of the Tennessee Constitution and the First Amendment.[8][9]

Section 2 of HB 1547 states,

> *An LEA shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the LEA treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.*

This language covers certain student expression already protected by the Tennessee Constitution and First Amendment. But particularly in light of HB 1547's specific provisions concerning school-day opening announcements, school events and graduation ceremonies, it also would permit student recital of prayers or Bible verses during homeroom morning announcements, student prayers or other religious expression made over a loudspeaker at football games, or a student giving a proselytizing graduation speech, all of which are unconstitutional.[10]

Furthermore, Section 2 of the bill also states,

> *Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Homework and classroom assignments shall be judged by ordinary academic standards of substance and relevance and against other legitimate academic concerns identified by the LEA. Students may not be penalized or rewarded on account of the religious content of their work.*

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[7] See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).
[8] See *Santa Fe*, 530 U.S. 290.
[9] See *Lee*, 505 U.S. 577.
[10] See *Santa Fe*, 530 U.S. 290; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).

There is a constitutional difference between a persuasive speech in response to an oral assignment on the merits of energy conservation versus a persuasive speech in response to an oral assignment urging classmates to accept a certain faith as a way to achieve salvation. Again, given the mandatory nature of public school and classroom attendance, the latter would constitute unconstitutional religious coercion.[11]

HB 1547's Identical Treatment of
Elementary and Secondary Students Could Result in Constitutional Violations

HB 1547 takes a one-size-fits-all approach to K-12 public school students. However, it is much more difficult for elementary-school students to distinguish "... the line between school-endorsed [religious] speech and mere allowable speech ..." because they are so "young and impressionable."[12] And indeed, federal courts have recognized that "[i]n elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children."[13]

Under HB 1547, for example, it would be permissible in response to a first-grade assignment asking students to share stories about why their family is special and unique for a student to explain that the Bible, Torah or Koran are just stories and Jesus, Moses or Muhammad, like Santa Claus are not real. Such a situation could be devastating to particular classmates especially if they believe that statement is the viewpoint or perspective of the school or teacher. As high-school students have an understanding about cultural myths and our nation's religious diversity such a situation would obviously be less harmful.

Private, Voluntary Religious Exercise in the Public Schools Should Be Protected

ADL supports the right of students to voluntarily express their religious beliefs. And it is clear that public school students have the constitutional right to engage in voluntary, student-initiated prayer and other religious activities that are not coercive or do not disrupt the school's educational mission and activities. However, HB 1547 does not differentiate between such constitutionally protected expression and impermissible expression.

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[11] We note that Section 2(c) also authorizes elementary school students to form and participate in non-curricular religious clubs during school hours. The U.S. Supreme Court has found that in secondary schools such clubs are constitutionally permissible. However, it has not addressed the issue in elementary schools. Due to the impressionability of elementary school students and their difficulty in distinguishing between private and official speech, the Court may find such elementary school clubs unconstitutional.

[12] See *Walz*, 342 F.3d 271.

[13] See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n.* (4th Cir. 1998); See also *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89; *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170 (7th Cir. 1993).

"Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family," and therefore, courts are "particularly vigilant in monitoring" whether religious beliefs are taught in public school.[14] HB 1547 would likely harm students' right to be free of religious coercion in the public schools. It will also likely lead to the unnecessary waste of taxpayer dollars in the form of lawsuits filed against the state or individual school districts.

In light of these serious legal and policy issues, we urge you to veto HB 1547.

Sincerely,

Shelley Rose
Interim Regional Director
srose@adl.org

[14] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Anti-Defamation League

January 22, 2014

Honorable Terry McAuliffe
1111 East Broad Street
Richmond, VA 23219

Dear Governor McAuliff,

On behalf of the Anti-Defamation League ("ADL"), we write to express our concerns and opposition to several bills that are under consideration by the Virginia legislature: Senate Bill 236, a bill relating to "relating to student religious viewpoint expression" ("SB 236"); House Bill 493, a bill relating to "religious viewpoint expression at school events," ("HB 493"); and House Bill 207, a bill relating to "relating to instruction in science" ("HB 207"). All three bills relate to religion and religious expression in the public schools. Should the legislature adopt any of these measures, we urge your veto.

ADL is a strongly pro-religion, national human relations and civil rights organization. For a century, we have been an ardent advocate for religious freedom for all Americans- whether in the majority or minority. ADL believes that the best way to safeguard religious freedom is through the separation of church and state embodied in Article I §16 of the Virginia Constitution and the First Amendment's Establishment Clause, which allows all Virginians to practice their various faiths freely and boldly without government interference, endorsement or support.

The First Amendment and Article I §16 of the Virginia Constitution provide K-12 public school students with the right to privately pray in groups or alone during non-curricular time, say a silent prayer before a test, and participate in after-school religious clubs run by private groups using school facilities on the same terms and conditions as secular groups. Furthermore, the Federal Equal Access Act provides secondary public school students with the right to form and participate in student-led, lunch-time religious clubs. SB 236 and HB 493 codify these existing constitutional and statutory rights. However, the legislation, as well as HB 207, significantly exceed these rights with overbroad and ambiguous language that would likely result in unconstitutional religious coercion and advancement within Virginia public schools.

SB 236 & HB 493, Student religious viewpoint expression

The federal and Virginia Constitutions guarantee that the government may not coerce anyone to support of participate in religion or its exercise.[1] SB 236 and HB 493 would run afoul of these provisions by authorizing prayers, invocations, proselytizing, or conversely anti-religious speech within the classroom or at school-sponsored activities such as football games, assemblies, or

[1] See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

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graduation ceremonies where captive student audiences would be coerced to participate in religious or anti-religious exercise.[2,3]

Specifically, SB236 and HB493 state:

> *Each school district shall adopt a policy that: (1) Creates a limited public forum at any school event at which a student is permitted to publicly speak, including graduation ceremonies; (2) Provides the limited public forum in a manner that does not discriminate against a student's voluntary expression of a religious viewpoint ...*

This language covers certain student expression already protected by the Virginia Constitution and First Amendment. But it also would apparently permit student prayers or other religious expression made over a loudspeaker at football games, student recital of prayers or Bible verses during homeroom morning announcements, or a student giving a proselytizing graduation speech all of which are unconstitutional.[4]

Furthermore, the bills states that"[s]tudents may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions." There is a constitutional difference between a persuasive speech in response to an oral assignment on the merits of energy conservation verses a persuasive speech in response to an oral assignment urging classmates to accept a certain faith as a way to achieve salvation. Again, given the mandatory nature of public school and classroom attendance, the latter would constitute unconstitutional religious coercion.

The Bill's Identical Treatment of Elementary and Secondary Students Could Result in Constitutional Violations

SB 236 and HB 493 take a one-size-fits-all approach to K-12 public school students. However, it is much more difficult for elementary-school students to distinguish "... the line between school-endorsed [religious] speech and mere allowable speech ..." because they are so "young" and impressionable."[5] And indeed, federal courts, including the U.S. Court of Appeals for the Fourth Circuit, have recognized that "[i]n elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children."[6]

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[2] See *Santa Fe*, 530 U.S. 290.
[3] See *Lee*, 505 U.S. 577.
[4] See *Santa Fe*, 530 U.S. 290; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Lassonde v Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).
[5] See *Walz*, 342 F.3d 271.
[6] See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n.* (4th Cir. 1998); See also *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89; *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170 (7th Cir. 1993).

Under both bills, for example, it would be permissible in response to a first-grade assignment asking students to share stories about why their family is special and unique for a student to explain that the Bible is just a story and Jesus, like Santa Clause is not real. Such a situation could be particularly devastating to particular classmates especially if they believe that statement is the viewpoint or perspective of the school or teacher. As high-schools students have an understanding about cultural myths and our nation's religious diversity such a situation would obviously be less harmful.

Consequently, these bills should distinguish between elementary and secondary schools providing clarification and guidance to teachers and administrators about permissible and impermissible prohibited student religious expression in regard to elementary, middle and high school students.

Private, Voluntary Religious Exercise in the Public Schools Should Be Protected

ADL supports the right of students to voluntarily express their religious beliefs. And it is clear that public school students have the constitutional right to engage in voluntary, student-initiated prayer and other religious activities that are not coercive or do not disrupt the school's educational mission and activities. However, SB 236 and HB 493 do not clearly differentiate between such constitutionally protected expression and impermissible expression.

"Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family," and therefore, courts are "particularly vigilant in monitoring" whether religious beliefs are taught in public school.[7] Both SB 236 and HB 493 could harm students' right to be free of religious coercion in the public schools. It also could lead to the unnecessary waste of taxpayer dollars in the form of lawsuits filed against the state or individual school districts.

We further note that in 2007 Texas enacted similar legislation entitled, the Religious Viewpoints Antidiscrimination Act (RVAA). The law requires all school districts in Texas to "treat a student's voluntary expression of a religious viewpoint…on an otherwise permissible subject in the same manner [as] a student's voluntary expression of a secular or other viewpoint." The RVAA also similarly requires schools to establish a limited public forum for student speakers to conduct religiously themed public speech. Although the bill appears to have the same purpose as the Virginia legislation, the effects of the Texas law since its enactment have been troubling. Schools have misused the statute to favor certain religious messages, impeding religious liberty and resulting in costly litigation.[8] [9]

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[7] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

[8] *Faith Meets Football and a Dispute Ensues in East Texas*, Texas Tribune, October 14, 2012 - http://www.texastribune.org/2012/10/14/battle-over-religion-schools-returns-east-texas/ (Site last visited on Jan. 21, 2014).

[9] *Student Religious Expression, Texas Administrator Guide*, Page 7, Texas Association of School Boards

HB207, Instruction in science

HB 207 does not specifically reference the terms intelligent design, creationism or creation science. However, by encouraging students "to explore scientific questions, learn about scientific evidence, develop critical thinking skills, and respond appropriately and respectfully to differences of opinion about scientific controversies in science classes" and allowing public school teachers to introduce their own theories in analyzing, critiquing, and reviewing "the scientific strengths and scientific weaknesses of existing scientific theories covered in science classes ...," the bill is clearly designed to introduce these religious explanations for life on earth into the public school science classroom.

Religious explanations for origins for humankind and the universe are academically inappropriate for the public school science classroom, as well as unconstitutional. *See Aguillard v. Edwards*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Kitzmiller v. Dover Area School Dist.*, 400 F.Supp.2d 707 (M.D. Pa. 2005). Science is limited to explanations that can only be inferred from confirmable data resulting from observations and experiments that can be substantiated by other scientists. Explanations that cannot be based on empirical evidence resulting from observation and experiment are not a part of science.

Teaching religion as science also confuses and misinforms students about the scientific method. In the science classroom, teachers must present the best scientific scholarship to ensure that they can succeed in advanced science classes, at university and medical school, and in all science based careers. By including vague and overbroad language that could allow the teaching of religious beliefs as science or scientific theory, this bill would ill-serve our schools and students.

To date, only Louisiana and Tennessee have passed similar legislation despite objections from state and national organizations of scientists and of science teachers. A call for the repeal of Louisiana's law has been supported by over seventy Nobel laureates.

In light of these serous issues, we urge you to veto SB 236, HB 493, and HB 207 should any of these bills reach your desk.

Sincerely,

David C. Friedman
Washington DC Regional Director

Legal Services -
http://www.tash.org/services/legal/esource/students/documents/rel_sturelexp_txdydm.pdf (Site last visited Jan. 21, 2014)

REQUEST FOR REVIEW AND WITHDRAWAL OF
JUNE 29, 2007 OFFICE OF LEGAL COUNSEL MEMORANDUM RE: RFRA

June 10, 2014

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The 90 undersigned religious, education, civil rights, labor, LGBT, women's, and health organizations write today to request that you direct the Office of Legal Counsel (OLC) to review and withdraw its June 29, 2007 Memorandum (OLC Memo).[1] The OLC Memo's interpretation that the Religious Freedom Restoration Act of 1993[2] (RFRA) provides for a blanket override of statutory non-discrimination provisions is erroneous and threatens core civil rights and religious freedom protections. Indeed, the Department of Justice recently issued an FAQ indicating that the OLC Memo will be used to undermine the plain language of the non-discrimination provision in the Violence Against Women Act (VAWA), which Congress passed just last year.[3]

The passage of VAWA included real deliberation over its non-discrimination provision. After significant debate, Congress passed a bill that barred organizations from engaging in employment discrimination with VAWA funds. But, because the OLC Memo remains administration policy, the explicit intent of Congress is being ignored, and the administration is granting exemptions from this non-discrimination provision to religious organizations that wish to use religion as a criterion when hiring employees using taxpayer dollars.

Some of us were leaders in the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact remedial legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Div. v. Smith* in 1990.[4] This effort culminated in 1993, when then-President William J. Clinton signed RFRA into law. In essence, RFRA was intended to provide protection of free exercise rights, restoring the pre-*Smith* standard of strict scrutiny to federal laws that substantially burden religion. It was not intended to create blanket exemptions to non-discrimination laws.

Yet, the OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal non-discrimination provision tied to a grant program. Although the OLC Memo's conclusion is focused on one Justice Department program, its overly-broad and erroneous interpretation of RFRA has been cited by other federal agencies and extended to other programs and grants, including, most recently, VAWA. The guidance in the OLC Memo is not justified under applicable legal standards and threatens to tilt policy toward an unwarranted end that damages civil rights and religious liberty.

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[1] Memorandum for the General Counsel,. Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: 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).
[2] 42 U.S.C. § 2000bb et seq.(2000).
[3] U.S. Department of Justice, *Frequently Asked Questions: April 9, 2014: Nondiscrimination Grant Condition in the Violence Against Women Act of 2013*, http://ojp.gov/about/ocr/pdfs/vawafaqs.pdf.
[4] 494 U.S. 872 (1990).

When President Barack Obama issued Executive Order 13498, amending former President George W. Bush's Executive Order 13199 (Establishment of White House Office of Faith-Based and Community Initiatives), he underlined the importance of ensuring that partnerships between government and faith-based institutions can be created and maintained effectively while "preserving our fundamental constitutional commitments." The OLC Memo, however, stands as one of the most notable examples of the Bush Administration's attempt to impose a constitutionally erroneous and deeply harmful policy—RFRA should not be interpreted or employed as a tool for broadly overriding statutory protections against religious discrimination or to create a broad free exercise right to receive government grants without complying with applicable regulations that protect taxpayers.

The use of the OLC Memo to trump the recently adopted non-discrimination provision in VAWA demonstrates that its harm is more than speculative. We accordingly request that the administration publicly announce its intention to review the OLC Memo and, at the end of that review, withdraw the OLC Memo and expressly disavow its erroneous interpretation of RFRA.

Thank you in advance for your consideration of our views.

Respectfully,

9to5
African American Ministers In Action
American-Arab Anti-Discrimination Committee (ADC)
American Association of University Women (AAUW)
American Baptist Home Mission Societies
American Civil Liberties Union
American Federation of State, County and Municipal Employees, AFL-CIO
American Humanist Association
American Jewish Committee (AJC)
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Asian Americans Advancing Justice (AAJC)
B'nai B'rith International
Baptist Joint Committee for Religious Liberty
Bend the Arc: A Jewish Partnership for Justice
Catholics for Choice
Center for Inquiry
Central Conference of American Rabbis
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Family Equality Council
Feminist Majority
Friends Committee on National Legislation
Gay & Lesbian Advocates & Defenders
Gay, Lesbian & Straight Education Network
GLBTQ Domestic Violence Project

Hadassah, The Women's Zionist Organization of America, Inc.
Hindu American Foundation
Human Rights Campaign
Institute for Science and Human Values, Inc.
Interfaith Alliance
Japanese American Citizens League
Jewish Council for Public Affairs
Jewish Women International
Keshet
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
League of United Latin American Citizens
Legal Momentum
Marriage Equality USA
Methodist Federation for Social Action
Military Association of Atheists & Freethinkers
Muslim Advocates
NA'AMAT USA
NAACP
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women (NCJW)
National Education Association
National Gay and Lesbian Task Force
National Coalition Against Domestic Violence
National Congress of Black Women
National Employment Lawyers Association (NELA)
National Latina Institute for Reproductive Health
National Network to End Domestic Violence
National Organization for Women
National Partnership for Women & Families
National Resource Center on Domestic Violence
National Women's Health Network
Parents, Families and Friends of Lesbians and Gays (PFLAG) National
People For the American Way
Rainbow Push Coalition
Religious Coalition for Reproductive Choice
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Council on Religion and Education (SCORE)
Society for Humanistic Judaism
South Asian Americans Leading Together (SAALT)
Southern Poverty Law Center
Texas Faith Network
Texas Freedom Network

The Leadership Conference on Civil and Human Rights
The Rabbinical Assembly
The Solomon Project
The Trevor Project
Transgender Law Center
True Colors Fund
UltraViolet
Union for Reform Judaism
Unitarian Universalist Association
United Church of Christ Justice & Witness Ministries
United Methodist Church, General Board of Church and Society
V-Day
Women of Reform Judaism
Women's Alliance for Theology, Ethics and Ritual (WATER)
YWCA USA

Florida

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NATIONAL CHAIR

ABRAHAM H. FOXMAN
NATIONAL DIRECTOR

BY ELECTRONIC MAIL AND FACSIMILE

May 6, 2014

Governor Rick Scott
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399-0001

Dear Governor Scott,

On behalf of the Anti-Defamation League (ADL), we urge to veto CS-CS SB 850 First Engrossed, "An act relating to education" ("SB 850 1st Engrossed").

Founded a century ago "to stop the defamation of the Jewish people and to secure justice and fair treatment to all," ADL is a national agency which fights anti-Semitism and all forms of bigotry, and defends democratic ideals and civil rights for all.

ADL opposes SB 850 1st Engrossed because it expands what is effectively a school vouchers program which (1) permits participating schools to discriminate on the basis of immutable personal characteristics, as well as academic and disciplinary record, (2) does not necessarily assist the neediest families, and (3) does not improve educational outcomes.

SB 850 1st Engrossed Expansion of the Florida
Tax Credit Scholarship Program Would Not Save Taxpayer Dollars

SB 850 1st Engrossed would expand the Tax Credit Scholarship Program ("TCSP") in three ways. First, it would raise the household income caps for scholarship eligibility to include households beyond Florida's median income. Second, it allows students to participate in the program without ever attending public school. Third, it allows a tax credit to "be conveyed, transferred, or assigned between members of an affiliated group of corporations."

A March 2010 OPPAGA report claims that taxpayers saved $36.2 million under the TCSP, and proponents of this legislation claim that increasing the tax credit cap would save state revenue. However, the 2010 OPPAGA report figure is based in part on the statistic that 95% of children who participate in TCSP would have attended a Florida public school. However, under SB 850 1st Engrossed children need not attend public school to participate in the program. Furthermore, a tuition-tax-credit expert, who reviewed a similar claim about taxpayer savings in a 2008 OPPAGA report, explained that "the argument . . . is grounded in guesswork, not fact."[1] Thus, claims that the program saves money are unreliable.

[1] Kevin G. Welner, Op-Ed., "Legislature's Vouchers Report Is Based on Smoke and Mirrors,"

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Rev. 032714

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Furthermore, programs like the TCSP do not decrease the cost of public education. Indeed, a 1999 study of Cleveland's vouchers program showed that public schools from where students left to attend private schools were spread throughout the district. Therefore, the reduction in students attending individual public schools was negligible. As a result, public schools were unable to reduce administrative costs or eliminate teaching positions even when they lost vouchers students. Rather, the public school district lost state funding without being able to cut overall operating costs.[2]

The TCSP Permits Discrimination in School Admissions

The TCSP requires participating schools and scholarship-funding organizations to comply with 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color and national origin. Consequently, it appears that the TCSP permits participating schools or scholarship-funding organizations to discriminate on the basis of religion, gender, gender identity, sexual orientation, academic history, or disciplinary history with regard to admission or other terms and conditions. Furthermore, as reflected in the February 2014 quarterly report on the TCSP, 71.3% of children participating in the program attend private religious schools.[3] Such schools are exempt from the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act. Therefore, at the vast majority of the participating schools, the TCSP permits discrimination on the basis of disability, as well.

We firmly believe that it is patently unfair and against the notions of equality in Florida to expand a state program that diverts tax dollars to schools and organizations which could engage in such discrimination. An otherwise eligible student should be considered by a participating school or scholarship-funding organization without regard to his or her immutable or personal characteristics.

SB 850 1st Engrossed Would Create a Tax Subsidy for Middle Income Families and Not Necessarily Assist the Neediest Families

SB 850 1st Engrossed would create a significant change to the caps on household income for scholarship eligibility. Starting in 2016, the legislation would allow a family earning up to 260% above the federal poverty level to receive a 50% scholarship for each participating child. As a result, families of four, five and six with annual incomes of $62,010, $72,566, and $83,122 would be eligible for the TCSP. Keep in mind that median household income in Florida for the period 2008-12 was $47,309. Therefore, SB 850 1st Engrossed creates a tax subsidy for middle income families earning above Florida median income.

Orlando Sentinel, Dec. 24, 2008, at A11.
[2] KPMG, LLP, *Cleveland Scholarship and Tutoring Program: Final Management Study* (Sept. 1999).
[3] Fla. Dep't of Ed., Corporate *Tax Credit Scholarship Program February Quarterly Report 2015*, http://www.floridaschoolchoice.org/Information/CTC/quarterly_reports/fic_report_feb2014.pdf

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Rev. 032714

Furthermore, the TCSP does not assist those students whose families cannot pay the difference between the bill's scholarship amount and private-school tuition charges. Many private schools charge tuition in excess of $10,000 per year. However, in fiscal 2012-2013, the TCSP provided a scholarship amount of $4,335. As a result, the TCSP likely deters private schools charging higher tuition amounts from participating in the program. And in regard to those participating private schools which charge tuition is in excess of the scholarship amount, the poorest families eligible under the TCSP likely do not have the financial resources to pay the difference.

Furthermore, as private schools run by churches, synagogues or mosques typically charge lower tuition the neediest eligible students will be limited to attending a religious school. Indeed, as outlined above 71.3% of participating students attend religious schools. However, not all students benefit from a religious school atmosphere — even where the religion being taught is their own. Furthermore, in areas where the only participating schools are religious, families may feel compelled to send their children to religious schools.

Moreover, as outlined above SB 850 1st Engrossed will further reduce the amount of state funds available to our financially strapped public schools, as well as for other government services. Consequently, the legislation's expansion of the TCSP will result in the public schools being left with significantly fewer dollars to teach students (1) whose parents cannot pay the difference between the scholarship amount and regular tuition, (2) whose parents are uncomfortable with sending their child to a religious school whether or not the religion being taught is their own, or (3) who, for one reason or another, are not private school material.

Expansion of the TCSP Would Not Improve Education Outcomes

The 2011-12 analysis of the TCSP found slight decreases in national percentile ranking points for participating students, stating:

> *The typical student in the program scored at the 46th national percentile in reading and the 45th percentile in mathematics, about the same as in the last several years. The distribution of test scores is similar whether one considers the entire program population or only those who took the Stanford Achievement Test in the spring of 2010. The Stanford Achievement Test is the most commonly administered test and is the test most directly comparable to the FCAT.*
>
> *The mean gain for program participants is -0.2 national percentile ranking points in reading and -2.4 national percentile ranking points in mathematics. These mean gains are indistinguishable from zero, though the average math gain is lower than in prior years. …*

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Florida

The finding of the Florida study is similar to multiple studies of other vouchers programs across the country. The most recent research on school voucher programs reflects that they "do not have a strong effect on students' academic achievement."[4] According to U.S. Department of Education studies of the District of Columbia vouchers program and multiple studies of the Milwaukee and Cleveland schools programs, students participating in these programs did not perform significantly better in reading and math than students in public schools.[5][6][7] Additionally, the Department of Education studies of the D.C. program found that the students participating in the program did not believe that their private school was better or safer than the public school they left.

The 2009 Department of Education study also showed that there was no statistically significant difference among students who participated in vouchers programs and those who did not in regard to their aspirations for future schooling; engagement in extracurricular activities; frequency of doing homework; attendance at school; or tardiness rates. In addition, there was no statistically significant impact on student-teacher ratio or the availability of before- and after-school programs for students who participated in a vouchers program.

In light of these considerations, we urge you to veto SB 850 1st Engrossed.

Sincerely,

Hava Holzhauer
Florida Regional Director

David Barkey
Religious Freedom Counsel

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[4] *Center on Education Policy, Keeping Informed About School Vouchers A Review of Major Development and Research*, July 2011, at 3.

[5] U.S. Dep't of Ed. *Evaluation of the D.C. Scholarship Program: Impact After 3 Years* (Apr. 2009) (The 2009 study showed a marginal gain for some students in reading, but notably, not for the program's targeted group: students from schools in need of improvement.); U.S. Dep't of Ed., *Evaluation of the D.C. Scholarship Program: Impact After 2 Years* (June 2008); U.S. Dep't of Ed., *Evaluation of the D.C. Scholarship Program: Impact After 1 Year* (June 2007).

[6] Witte, Wolf, et al., *MPCP Longitudinal Educational Growth Study Second Year Report* (Mar. 2009); Witte, Wolf, et al., *MPCP Longitudinal Education Growth Study Baseline Report* (Feb. 2008); Witte, *Achievement Effects of Milwaukee Voucher Program* (Feb. 1997); Witte, Stern, & Thorn, *Fifth Year Report Milwaukee Parental Choice Program* (Dec. 1995).

[7] Plucker, Muller, et al., *Evaluation of the Cleveland Scholarship and Tutoring Program, Summary Report 1998-2004* (Feb. 2006); *Evaluation of the Cleveland Scholarship and Tutoring Program, Executive Report 1998-2002* (Feb. 2006).

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ADL 100

Imagine a World Without Hate

January 27, 2014

The Honorable Joe Wilson
Chair
Military Personnel Subcommittee
House Armed Services Committee
US House of Representatives
Washington, D.C. 20515

The Honorable Susan A. Davis
Ranking Member
Military Personnel Subcommittee
House Armed Services Committee
US House of Representatives
Washington, DC 20515

Dear Chairman Wilson and Ranking Member Davis:

In advance of the January 29 House Military Personnel Subcommittee hearings on "Religious Accommodations in the Armed Services," we write to provide the views of the Anti-Defamation League (ADL) on this important issue. We would ask that this statement be included as part of the official hearings record.

The Anti-Defamation League

For more than a century, the Anti-Defamation League has been an active advocate for religious freedom for all Americans – whether in the majority or minority. The League has been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and Free Exercise Clause of the First Amendment. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

To this end, ADL has filed an *amicus* brief in every major religious freedom case before the U.S. Supreme Court since 1947, as well as numerous briefs in lower appellate and trial courts. In Congress, we have played a lead role in working to enact significant religious freedom protection legislation, such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. ADL is also one of the leading providers of diversity education in the United States, having impacted approximately 58 million students and educators, teaching them to respect – not just tolerate – differences.

Religious Freedom in the Armed Forces

The First Amendment guarantees every American the right to practice his or her religion freely without government interference. As one of the essential institutions in American society, it is critically important that America's military be especially attentive to ensuring the religious freedom of its servicemen and women. Our military is a prime example of how Americans of many faiths can come together to serve and protect America, regardless of their differences. One dramatic illustration of the extraordinary religious diversity in the military is the listing of more than 50 "Available Emblems of Beliefs for Placement on Government Headstones and Markers" (included at the end of this statement) available to the families and friends of fallen soldiers at the Web site of the Arlington National Cemetery.[1] During their years of military service, therefore, we certainly should be equally committed to honoring the religious beliefs and practices of our soldiers, sailors, and airmen.

1 http://www.cem.va.gov/cem/docs/emblems.pdf

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Members of the US Armed Services must not be discriminated against on the basis of their religion. And our nation's honored military training universities – the US Air Force Academy, West Point, and the Naval Academy – bear a special responsibility to avoid religious coercion and to respect the rights of religious minorities guaranteed by the Constitution. Further, our military academies have an important opportunity and responsibility to instill in our service personnel core democratic values, including those embodied in the First Amendment's religious freedom clauses.

Charges of religious harassment and unwelcome proselytizing are especially disturbing in the context of the command structure within the military and our nation's service academies. Instructors, officers, and upper class cadets have virtually absolute command authority over their students and subordinates, creating a unique potential for undue pressure on an individual to conform in order not to jeopardize his or her military career. Officers must find a way to reconcile their personal religious views with their leadership responsibilities. They should not abuse their command positions to advance or favor their own religious views or religion generally. Americans who choose military service should have the freedom to practice their religion – or no religion – without pressure to conform to the belief system of their commanding officers in order to gain acceptance or promotions up the ranks.

In recent years, there have been periodic problems with proselytizing and the appearance of official government sponsorship of one particular religious perspective by military officials. One egregious example occurred in 2007 when a promotional video produced by the Washington-based evangelical organization Christian Embassy came to light. The video featured effusive endorsements of the evangelizing work of the Christian Embassy staff by a number of high-ranking military officials who appeared on camera in their uniforms – some apparently in their Pentagon offices. This promotional video gave the appearance of government endorsement of these evangelical Christian views and suggested, at least, Pentagon cooperation with Christian Embassy evangelizing work.

A July 20 2007 report by the Department of Defense Inspector General **[2]** found that seven military officers violated various military regulations in connection with their appearance in the video:

> The seven officers participated in interviews with Christian Embassy, excerpts of which were also included in the promotional video. The officers were filmed during the duty day, in uniform with rank clearly displayed, in official and often identifiable Pentagon locations. Their remarks conferred approval of and support to Christian Embassy, and the remarks of some officers implied they spoke for a group of senior military leaders rather than just for themselves. None of the officers sought or received approval to participate in the interview in an official capacity or in uniform. The overall circumstances of the interviews emphasized the speakers' military status and affiliation and implied they were acting within the scope of their official positions as DoD spokespersons. Based on these circumstances, we concluded the officers violated JER Sections 2635.702(b), "Appearance of governmental sanction," and 3-300.a. on personal participation in non-Federal entities; DoD Directive (DoDD) 1334.1, "Wearing of the Uniform", and Army and Air Force uniform standards.

Military Chaplains

Over the past decade, the issue of permissible prayer by military chaplains has become, needlessly, a highly partisan and divisive issue. In the past two years, legislative proposals by some Members were prompted by disputed assertions about the effect the repeal of the military's ill-conceived and discriminatory "Don't Ask, Don't Tell (DADT)" policy would have on service members and chaplains with dissenting religious views.

We have also witnessed efforts by some Members to enact legislative language to promote and facilitate explicitly sectarian prayer by chaplains at official military ceremonies and events, including those at which attendance is mandatory. Such efforts show a lack of respect for the diversity of religious beliefs in our military and threaten to erode unit cohesion. As Holly Hollman, General Counsel for the Baptist Joint Committee for Religious Liberty, has written, "... an important corollary of the military's duty to

2 http://www.dodig.mil/FOIA/ERR/Xtian_Embassy_072707.pdf

accommodate service members' rights to exercise religion is its obligation to protect members from religious coercion."[3] Members of Congress should not seek to encourage military chaplains to disregard First Amendment protections guaranteed by the Constitution.

Military chaplains most often minister to those of their own faith, but they are also called upon to the support the activities of service members and their families who come from other faith traditions, beliefs, and backgrounds. Under current law and regulations, military chaplains are already absolutely permitted to pray in whatever manner they choose privately or while performing the divine worship services they lead for their own faith adherents where attendance is voluntary. There are also, properly, no restrictions whatsoever on chaplains offering their personal faith to service members who come to them, seeking their support, guidance, and counsel. On rare occasions when a chaplain is called upon to solemnize a large-group setting or "command ceremony" where attendance by military personnel of many different faiths – or no faith – may not be voluntary however, chaplains should pray in a more inclusive manner. If an individual chaplain does not feel comfortable offering a non-sectarian, inclusive prayer in such a setting, he or she should have the right to refuse to participate without negative consequences.

Although there have been periodic problems, the vast majority of chaplains clearly recognize that it is common courtesy to pray in as inclusive a manner as one's faith tradition permits when praying during a non-religious multi-faith gathering, particularly when attendance is compulsory.

Legislation approved by Congress earlier this year appears to strike the right balance. The 2014 Department of Defense Authorization measure [4] updates and strengthens current law on conscience rights for military personnel.

Section 532 of the new law, "Enhancement of Protection of Rights of Conscience of Members of the Armed Forces and Chaplains of Such Members," sets out an appropriately-balanced religious accommodation standard:

> Unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Armed Forces shall accommodate individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such expressions of belief as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

The new law also includes a welcome provision, Section 533, requiring the Department of Defense Inspector General to investigate and report on adverse personnel action based on conscience, moral principles, or religious beliefs. In the midst of conflicting assertions on the nature and magnitude of alleged restrictions of this kind, this report should be helpful. Another clarifying provision in the new law, Section 534, requires the Secretary of Defense to conduct a survey of a statistically valid sample of military chaplains to assess whether the reasonable restrictions placed on sectarian prayers offered by chaplains for public or non-religious ceremonies or events have prevented them from exercising the tenets of their faith.

Support for Progress Towards Full Equality for LGBT Servicemen and Women.
We welcome the very significant progress the military has made toward full LGBT equality following the repeal of the detrimental and exclusionary "Don't Ask, Don't Tell" (DADT) policy against gay and lesbian Americans.

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3 Hollman Report, Report from the Capital: July/August 2013 Vol. 68 No. 7
http://www.bjconline.org/index.php?option=com_docman&task=cat_view&gid=32&dir=DESC&order=date&Itemid=76&limit=5&limitstart=0

4 http://www.gpo.gov/fdsys/pkg/BILLS-113hr3304enr/pdf/BILLS-113hr3304enr.pdf

Despite oft-repeated, dire claims that repeal would dramatically impact recruitment, retention, mission readiness, and religious freedom in the military, the most in-depth and authoritative scholarly study **[5]** of the fist year after repeal documents that the repeal of DADT "...has had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale..... in fact, greater openness and honesty resulting from repeal seem to have promoted increased understanding, respect and acceptance."

Secretary of Defense Chuck Hagel deserves praise for his leadership in this transition time. ADL was especially pleased that Secretary Hagel announced his directive to ensure that same-sex spouses at National Guard facilities would be extended the same benefits as other married military families at ADL's annual meeting and Centennial celebration on October 31, 2013 in New York City. **[6]** Responding to efforts by several states to refuse to issue Department of Defense ID cards, and the benefits that come with them, to same-sex spouses at National Guard facilities in violation of those states' obligations under federal law, Secretary Hagel directed the chief of the National Guard Bureau to take immediate action and meet with Adjutants General from those states where benefits are being denied to ensure that all comply with the new policy.

Spotlight on a Case: Religious Coercion and Harassment at the US Air Force Academy (USAFA)
The Anti-Defamation League has been most active in investigating and responding to what was described as a climate of religious intolerance for members of minority religions at USAFA which came to light in 2004 and 2005. The Air Force opened an investigation and its June 22, 2005 "Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy" **[7]** confirmed many of ADL's concerns and those raised by cadets, staff chaplains, civilian observers, and military personnel – finding that a persistent pattern of religious intolerance existed at the Academy, and that change was necessary. The Review Group report clearly recognized that a "religious climate" and "perception of religious intolerance" existed at the Academy, and that that climate has festered as a result of a "lack of awareness over where the line is drawn between permissible and impermissible expression of beliefs."

Importantly, beyond identifying then-existing problems at the Academy, the report offered substantive recommendations for reform, including the establishment of clear policy guidelines for commanders and supervisors regarding inappropriate religious expression, a plan to promote increased awareness of and respect for cultural and religious differences, and internal controls and corrective actions to ensure that the Air Force provides a climate of religious tolerance for all staff and cadets. The report and recommendations were not limited to USAFA, but were applicable to the entire Air Force

The House Armed Services Subcommittee on Military Personnel held hearings on the religious climate at the U.S. Air Force Academy on June 28, 2005, **[8]** and the League submitted a statement for the record, raising concerns about instances of inappropriate proselytizing at USAFA and making several recommendations that USAFA, other military service academies, the U.S. Air Force, and all branches of the military should take to address these issues.

Our statement described the fact that ADL's own research into the climate at the USAFA over many months revealed complaints of a pervasive presence of undue proselytizing and religious harassment, endorsed or at least tolerated by the members of the USAFA administration and command structure. We had received strong evidence of an ongoing problem of inappropriate evangelizing and entanglement of

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5 One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness, Palm Center, September 20, 2012 http://www.palmcenter.org/files/One%20Year%20Out_0.pdf

6 http://www.adl.org/press-center/c/remarks-by-secretary-of-defense-hagel.html#.UnPSg_msISo

7 http://www.foxnews.com/projects/pdf/HQ_Review_Group_Report.pdf

8 http://commdocs.house.gov/committees/security/has179020.000/has179020_0.htm

religion and training at the Academy. In addition, we described complaints our office had received about insensitivity to Jewish dietary observances and religious holidays, and instances of religious slurs and anti-Semitism directed to Jewish cadets.

And our statement clearly indicated what was at stake:

> Today's cadets are America's officers of tomorrow, who will be commanding troops from a variety of religious backgrounds. US military officers are representatives of our nation, and it is vital that they understand that our country does not promote any particular religion. As American officers, they must model our nation's respect for minority faiths and beliefs and uphold the Constitution's protection for freedom of religion.

Finally, we offered our assistance to USAFA to provide our unique expertise in anti-bias education and training and in addressing church-state separation and religious liberty issues as it implemented programs to help ensure a respectful and inclusive environment on campus. We stated that, if implemented effectively, the USAFA programs promoting religious respect and appreciation for religious diversity among all cadets and staff members could provide a model for the entire U.S. military.

And that is exactly what has happened.

The League's concerns led to meetings with then-Superintendent Lt. Gen. John W. Rosa Jr. at the Academy and top Air Force and Department of Defense officials in Washington. When Lt. General Rosa addressed ADL's National Executive Committee in Denver in June 2005, he acknowledged that a problem of religious intolerance existed and pledged that the Academy was working toward a "culture change" through education and training. **[9]**

Our offer of assistance was accepted by then-Superintendent Rosa – and each successive Superintendent has demonstrated a commitment to improve the religious climate for cadets and permanent staff at USAFA. ADL's partnership work with USAFA has been based on the belief that the best way to address many of the religious respect issues is through education and training. To that end, ADL has worked with chaplains and Judge Advocates General at USAFA to develop and deliver training and resources to cadets to help promote understanding about their rights and responsibilities related to religious freedom and on ways to avoid future problems. ADL and the chaplain's office continue to work on developing other sessions on different aspects of religious respect for cadets in each year of their education at USAFA.

While there is still work to be done, with the assistance of ADL and others, we believe the religious climate at USAFA has greatly improved. Since 2005, the Academy has taken a number of positive, productive steps to address the religious climate, including:

- developing a campus-wide calendar listing religious holidays and explaining what accommodations may be needed for cadets and staff members who observe those holidays;
- convening conferences on religious respect, as a way of receiving input from non-military representatives of a variety of religious groups;
- creating a Commander's Tool Kit to address issues of religious respect and accommodation that may arise in their unique command setting; and
- working with ADL and other organizations to develop and implement religious respect training, with a focus on recognizing First Amendment rights and the need for religious accommodation, which is delivered to all cadets during each of their four years at USAFA.

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9 http://www.adl.org/misc/gen_speech.asp

Importantly, in the years since the original proselytizing and religious coercion allegations at USAFA, Air Force officials have, understandably, paid considerable attention to crafting clear guidance on these issues for Airmen. In August 2012, the Secretary of the Air Force incorporated thoughtful and comprehensive guidance into a directive, Air Force Instructions 1-1, **[10]** highlighting Air Force core values, culture, and policy regarding the "professionalism and standards expected of all Airmen."

> 2.11. Government Neutrality Regarding Religion. Leaders at all levels must balance constitutional protections for an individual's free exercise of religion or other personal beliefs and the constitutional prohibition against governmental establishment of religion. For example, they must avoid the actual or apparent use of their position to promote their personal religious beliefs to their subordinates or to extend preferential treatment for any religion. Commanders or supervisors who engage in such behavior may cause members to doubt their impartiality and objectivity. The potential result is a degradation of the unit's morale, good order, and discipline. Airmen, especially commanders and supervisors, must ensure that in exercising their right of religious free expression, they do not degrade morale, good order, and discipline in the Air Force or degrade the trust and confidence that the public has in the United States Air Force.
>
> 2.12. Free Exercise of Religion and Religious Accommodation. Supporting the right of free exercise of religion relates directly to the Air Force core values and the ability to maintain an effective team.
>
> > 2.12.1. All Airmen are able to choose to practice their particular religion, or subscribe to no religious belief at all. You should confidently practice your own beliefs while respecting others whose viewpoints differ from your own.
> >
> > 2.12.2. Your right to practice your religious beliefs does not excuse you from complying with directives, instructions, and lawful orders; however, you may request religious accommodation. Requests can be denied based on military necessity. Commanders and supervisors at all levels are expected to ensure that requests for religious accommodation are dealt with fairly.

All service branches should adopt strong guidance on government neutrality towards religion and religious accommodation.

New Department of Defense Instruction on Religious Accommodation

On January 22, 2014, the Department of Defense published updated and revised Instructions on "Accommodation of Religious Practices Within the Military Services." **[11]** The new guidance describes policy, procedures, and responsibilities for the accommodation of religious practices in the Armed Forces, stating:

> The DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions or to observe no religion at all.

The guidance appropriately provides broad protection for an individual's religious speech and expression:

> In so far as practicable, a Service member's expression of sincerely held beliefs (conscience, moral principles, or religious beliefs) may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

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10 https://app.box.com/s/if5l2wnjafp9hbf0uig8

11 http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf

And the guidance properly states that a request for religious accommodation should promptly be granted if it will not affect mission accomplishment:

> Requests for religious accommodation will be resolved in a timely manner and will be approved when accommodation would not adversely affect mission accomplishment, including military readiness, unit cohesion, good order, discipline, health and safety, or any other military requirement.

While we appreciate the attempt, the guidance is disappointing and we urge that it be amended. It falls short in not providing a sufficient accommodation for some fundamental aspects of minority religious practice of some aspiring soldiers, including observant Jews and Sikhs. For example, the guidance lays out a formal process so that Jewish and Sikh soldiers, for example, may request an accommodation for their required head coverings – a kippah or a turban – and incorporates grooming standards that provide a path for approval of their beards. However, each soldier must still request an individual, case-by-case accommodation under the guidance – a daunting prospect for some, with an uncertain outcome. In the name of "...maintaining uniform military grooming and appearance standards," the effect is to exclude some who would otherwise welcome the opportunity to serve their country in the military. These observant individuals do not have the option to " refrain...from beginning unauthorized grooming and appearance practices, [or] wearing unauthorized apparel" during the pendency of the authorization approval process.

Further, the guidance requires a repeat of the accommodation request for every "new assignment, transfer of duty stations, or other significant change in circumstances." While we appreciate the fact that the Jewish yarmulke is explicitly used as an example of apparel that "may be worn with the uniform whenever a military cap, hat, or other headgear is not prescribed," it would be better to presumptively permit these grooming and garb accommodations, or to substantially streamline the approval process, with decisions *not* to accommodate being the exception.

This presumptive approval process is much more in line with the requirements of Section 508 of Public Law 100-180, "Wearing of Religious Apparel by Members of the Armed Forces While in Uniform," which presumptively permits "neat and conservative" items of religious apparel unless the wearing of the item "would interfere with the performance of the member's military duties."

The promulgation of this guidance does provide an important opportunity for the Department of Defense and all the service branches to make their religious accommodation guidance uniform.

Conclusion

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country "all possess alike liberty of conscience." He concluded: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."

The same command structure that provides unique pressure to conform within the military – and potential for inappropriate proselytizing and religious coercion – also makes the direct involvement of the Pentagon's leadership in promoting effective, uniform guidance and solutions to this problem critically important.

Thank you for conducting these important hearings and for your consideration of the views of the Anti-Defamation League. We welcome the opportunity to provide further information and resources on this issue of high priority to our organization.

Sincerely,

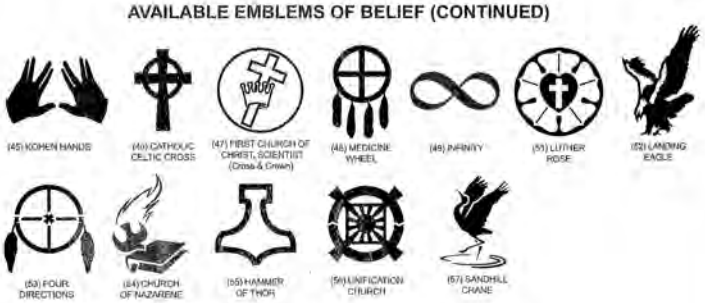
Deborah M. Lauter
Director, Civil Rights

Michael Lieberman
Washington Counsel

AVAILABLE EMBLEMS OF BELIEF FOR PLACEMENT ON GOVERNMENT HEADSTONES AND MARKERS

Page 1 of 2

AVAILABLE EMBLEMS OF BELIEF (CONTINUED)



Emblem (58) MUSLIM (Islamic 5-Pointed Star) is not shown due to copyright.

July 2013

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May 29, 2014

Chairman Joseph P. McNamara
Chairman P. Jason Peters
Roanoke County Board of Supervisors
5204 Bernard Dr.
Fourth Floor
Roanoke, VA 24018-0798

Dear Chairman McNamara and Chairman Peters,

On behalf of the Anti-Defamation League ("ADL"), we write to express our deep concern about a proposal by Supervisor Al Bedrosian that would halt the county's nonsectarian prayer policy and allow only Christian prayers at Board of Supervisors' meetings.

For over a century, the Anti-Defamation League (ADL) has been an ardent advocate for religious freedom of all Americans – whether in the majority or minority. ADL firmly believes that our nation's religious diversity has flourished because of the separation of church and state mandated by both the Establishment and Free Exercises Clauses of the First Amendment. As such, government should neither promote nor be hostile to religion.

This position is not one of hostility towards religion. Rather, it reflects a profound respect for religious freedom and recognition of the extraordinary diversity of religions represented by the citizens of Roanoke County. Based on this respect for religious freedom and diversity, we respectfully request that you reject Supervisor Bedrosian's exclusionary proposal, which would clearly discriminate against non-Christians.

When Bedrosian was recently asked whether non-Christians would be invited to prayer under the new prayer policy, he replied by stating that "the freedom of religion doesn't mean every religion has to be heard." If the County Board of Supervisors conforms to this imprudent and erroneous perspective on religious freedom in implementing the County's prayer policy, it would most likely violate the standards set forth in the U.S. Supreme Court's recent decision in *Greece v. Galloway*.

Although this decision permits sectarian invocations at meetings of local legislative bodies, opening prayer practices are not without limitation. Indeed, the Court required that a legislative body must implement a non-discrimination policy with respect to prayer givers. This means that the person who gives an invocation or prayer - whether a public official, member of the clergy, or an ordinary citizen - cannot be

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denied the prayer opportunity based on his or her faith, including a minority religion or atheism. Furthermore, the Court ruled that a legislative body's prayer practice cannot result in a "pattern of prayers that over time denigrate, proselytize, or betray impermissible government purpose."

Limiting County Board meeting opening prayers to the Christian faith would likely run afoul of the both *Galloway* requirements and violate the Constitution.

We also stress that the *Galloway* decision in no way requires legislative bodies to open meetings with prayers, whether sectarian or non-sectarian. If the County Board continues its practice of opening meetings with prayer, we firmly believe that invocations or prayers should respect the community's diversity by being inclusive of all faith traditions. Inclusivity and respect for diversity also will help ensure compliance with constitutional requirements. We, therefore, urge you to reject Supervisor Bedrosian's proposal and adhere to the following guidelines:

- A prayer or invocation should contain no reference to a particular deity, sect or denomination, or to any of the central religious figures associated with any particular religious belief.

- The words chosen for the invocation or prayer should consist of a general appeal to divine guidance, which would be in harmony with the tenets of some or all religions. The prayer should not be expressed in terms specifically associated with any particular faith, denomination, sect or creed.

- If clergy from the community are asked to offer the invocation or prayer, they should be advised and asked to abide by these principles. Furthermore, in order to promote community harmony and diversity, any invitation to clergy should be extended to clergy of all faiths represented in the community on a non-discriminatory, rotating basis - not just those faiths within the Judeo-Christian tradition.

Please know that we provide this letter and these guidelines based on our century-old perspective of religious freedom for all Americans. Thank you for your attention to this matter. We look forward to your response.

Sincerely,

David C. Friedman
Washington, DC Regional Director

Cc: Supervisor Al Bedrosian
Supervisor Joseph B. "Butch" Church
Supervisor Charlotte A. Moore
Roanoke County Administrator, B. Clayton Goodman III

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BY ELECTRONIC MAIL & FACSIMILE

April 4, 2014

Senator John Thrasher
Chair
Committee on Rules
400 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Senator Thrasher:

Senate Bill 386 "An act relating to application of foreign law in certain cases" ("SB 386"), would detrimentally impact Florida's Jewish community, including the large Israeli community living in our state.

As outlined in detail below, SB 386 would prohibit the State of Florida from recognizing Israeli divorces of Jews, as well as related matters such as custody, alimony, and maintenance.

This unnecessary legislation would undoubtedly send the message to Israeli executives, investors, businesses and other immigrants that they are unwelcome in Florida. **We therefore urge the Committee on Rules to oppose SB 386 when the Committee hears the bill on April 9th.**

Founded over a century ago, ADL is the nation's leading civil rights and human relations organization, combating anti-Semitism and all forms of bigotry, as well as promoting understanding and diversity throughout the United States and abroad.

SB 386 applies to Florida Statutes Chapters 61 ("Dissolution of Marriage; Support; Time Sharing") and 88 ("Uniform Interstate Family Support Act"). Its prohibits "[a]ny court, [arbiter], tribunal, or administrative agency" in Florida from issuing a ruling or decision based in "whole or in part on any foreign law, legal code, or system that does not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution." (Emphasis added).

As a result, even where a discrete law or ruling from another country does not run afoul of constitutional protections, but the legal system on which it is based does not provide the same rights as the U.S. and Florida Constitutions, Florida cannot consider that law or abide by the ruling. Keep in mind that America's constitutional protections are essentially unique. Virtually no other nation, including the Western democracies, grants the same rights as the U.S. or Florida Constitutions.

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ABRAHAM H. FOXMAN
NATIONAL DIRECTOR

If enacted, SB 386 would prohibit the State of Florida from recognizing divorces, as well related matters such as custody, alimony or maintenance, granted in the State of Israel to Jewish couples.

Israel is a vibrant democracy, but its laws are not identical to those of the United States. Unlike the United States and Florida, there is limited separation of government and religion in Israel. There, rabbinical courts have sole jurisdiction over divorce of Jews.[1] And the Israeli government only recognizes divorces of Jews issued by such courts.

In the Jewish faith, only a man has the right to obtain a divorce, called a "Get," and give it to his wife. Of course this religious law runs afoul of Florida and U.S. constitutional equal protection principles. As a result, SB 386 would prohibit a Florida court, arbiter, tribunal, or administrative agency from recognizing a divorce or related matters, premised on a divorce, granted in Israel to a Jewish couple whether they are Israeli nationals living in Florida, Floridians with dual citizenship, or Jewish Americans living in Florida who divorced in Israel. For such persons, SB 386 would be a serious obstacle to remarriage or revision of alimony, custody or maintenance agreements or orders in Florida.

Although the detrimental impact of SB 386 is clear, the need for this legislation most certainly is not. There simply is no documentation of unjust application of foreign law in our judicial system. Indeed, at the House Civil Justice Subcommittee hearing on the identical House companion bill (HB 903), the bill sponsor could not point to one Florida legal decision demonstrating the need for this legislation. The reason for the absence of such case law is that there is long-standing Florida legal precedent against enforcing foreign laws that are odious to public policy and our state and federal constitutions already prohibit unconstitutional application of religious laws.

Consequently, SB 386 is redundant and unnecessary. This position corresponds with the position of Dr. Joel C. Hunter, Senior Pastor Northland Church. In opposing the 2013 Application of Foreign Law bill (SB 58), he stated:

> *To my state senators: As a pastor of one of the largest churches in Florida I believe Senate Bill 58 will do more harm than good if enacted. Its effect will be to increase bias rather than protection. It seems to me to be a cure without a disease. Existing law and judicial precedent have proved sufficient to deal with any concerns addressed by this proposed law. Having confidence in both our constitution and the character of our judicial process I agree with the America Bar Association, the Anti-Defamation League and*

[1] In Israel, the legislature (the Knesset) has specifically designated the "law of Torah" (Jewish written law) to apply to all marriages and divorces. "[T]he religious court system was established mainly by the Palestine Order-in-Council 1922-1947, sections 47, 51-56. The religious court system is financed by the State and is generally restricted to matters of marriage and divorce." *See* Ruth Levush, A Guide to the Israeli Legal System (Jan. 15, 2001) *available at http://www.llrx.com/features/israel.htm#Religious* (Last visited March 26, 2014).

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the American Civil Liberties Union that this law and House Bill 351 will be detrimental rather than the good intended. As a conservative evangelical Christian it is unusual for me to side with the ACLU but I think objecting to unnecessary law is a conservative principle as well as a libertarian one. In deed not making laws unless they are absolutely necessary is at the core of our character as a country. Thank you for considering my views.[2]

SB 386 is wholly unnecessary, and it would harm Jewish Floridians and citizens of Israel, one of our nation's closest allies, living in Florida. We therefore urge the Committee to oppose this legislation.

Sincerely,

David Barkey
National Religious Freedom Counsel

cc: Senate Committee on Rules

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[2] See http://docstalk.blogspot.com/2013/03/florida-mega-church-pastor-partners.html (Last visited March 26, 2014)

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Dear Chairman Willard & the House Judiciary Committee:

House Bill 895, "relating to the effect and enforcement of foreign laws" (HB 895), would detrimentally impact Georgia's Jewish community as well as other religious groups. On behalf of the Anti-Defamation League (ADL), we urge the Fleming Subcommittee of the Judiciary Committee to oppose HB 895 when it is heard on Wednesday.

Founded a century ago, ADL is the nation's leading civil rights and human relations organization, combating anti-Semitism and all forms of bigotry, as well as promoting understanding and diversity throughout the United States and abroad.

HB 895 voids the ruling of any Georgia "court, administrative agency, tribunal, arbitrator, or arbitration panel" that "bases its ruling in whole or in part on any foreign law that would deny the parties the rights and privileges granted under the United States Constitution or the Georgia Constitution."

The measure defines "foreign law" as:

> *... any law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals, and applied by such jurisdiction's courts, administrative bodies, or other formal or informal tribunals.* (Emphasis added).

HB 895's broad definition of foreign law would certainly include religious law, including the laws of Judaism, the Catholic Church, and other Christian groups in Georgia. Furthermore, the bill's prohibitions would detrimentally impact Georgia's Jewish community and similarly could have a detrimental impact or interfere with other faith groups.

For instance, the bill would most likely prohibit an observant Jewish couple in Georgia from using a Jewish rabbinical court, called a Bet Din tribunal, from legally dissolving their marriage or prohibit a civil court from basing divorces on such arbitrations. It also would most likely prohibit Georgia from recognizing the validity of a legal divorce based on a Bet Din tribunal arbitration granted in another state or Israel.

Bet Din tribunals follow the requirements of secular arbitration law and arbitrate a range of disputes including divorce. Inherent to such divorce arbitration is the issuance of a Jewish divorce called a "Get." An observant Jewish person cannot get remarried without obtaining both a civil divorce and a Get. Operating within constitutional parameters, there are numerous cases from throughout the country where courts have summarily issued civil divorce decrees based on Bet Din marital arbitration settlements or incorporated such tribunals' factual determinations into rulings.

However, in the Jewish faith a woman is prohibited from giving a Get to her husband. Only a man has the right to obtain a Get and give it to his wife. Of course this prohibition runs afoul of Georgia and U.S. constitutional equal protection principles. As a result, HB 895 would likely void any Bet Din arbitration of a marriage dissolution, as well as prohibit a Georgia court from issuing a divorce decree based on a Bet Din marital arbitration proceeding and settlement, or incorporating factual determinations from such a proceeding. Furthermore, HB 895 would also likely invalidate in Georgia a divorce issued in

another state court based on a Bet Din marital arbitration. There would be the same issue for divorces of Jews in Israel all of which are issued by Bet Dins.[1]

Consequently, HB 895 would have several detrimental effects on observant Jews, Israelis, or any Jewish persons divorced in Israel. First, it would likely prohibit the religious accommodation of a Jewish couple in Georgia using Bet Din binding martial arbitration to resolve their divorce and compel them to use a secular means of divorce arbitration or resolution contrary to their religious beliefs.

Second, as to an observant Jewish person who obtained or obtains a legal divorce in another state or Israel based on a Bet Din marital arbitration and who moves to Georgia, HB 895 would be a serious obstacle to remarriage in Georgia. As HB 895 would likely invalidate the out-of-state divorce, the legislation would prevent him or her from getting remarried in Georgia without first obtaining a new legal divorce solely from a court or civil authorities, which would be a particularly significant obstacle for a Jewish person divorced in Israel.

Third, HB 895 also raises issues of nullification of existing Georgia marriages with regard to an observant Jewish person who prior to adoption of the bill obtained a legal divorce within or outside Georgia based on a Bet Din marital arbitration and remarried within the State of Georgia. The measure's broad application to "any court, arbitrator, administrative agency, or other adjudicative, arbitrative or enforcement authority" does not appear to be limited to future rulings or decisions. Therefore, upon adoption of HB 895, a prior divorce based on a Bet Din marital arbitration may be invalid. This means that within the State of Georgia the first marriage would remain intact and the second marriage would be invalid.

In addition to the Jewish faith, other religious groups in our nation utilize religious tribunals as arbitrators. For instance there are Christian religious panels such as the Peacemakers Ministries/Institute for Christian Conciliation functioning in a similar manner to Bet Din tribunals. Such tribunals also may not afford the same fundamental or due process rights as the Georgia or U.S. Constitutions, including certain preferences for men. Therefore, HB 895 could raise similar issues relating to arbitrations of martial dissolution or other issues conducted by such tribunals. Furthermore, given HB 895's broad application to "other formal or informal tribunals," it could interfere with the internal governance of churches and other houses of worship within Georgia.

Although the detrimental impact of HB 895 is clear, the need for this legislation most certainly is not. There simply is no documentation of unjust application of foreign law in Georgia's judicial system. The reason being is that there is long-standing legal precedent against enforcing foreign laws that violate public policy; and our state and federal constitutions already prohibit excessive entanglement with religion or religious laws. Consequently, the measure is redundant and unnecessary.

This position corresponds to an American Bar Association Resolution and Report rejecting application of foreign law legislation and constitutional amendments. The Report concluded:

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[1] In Israel, the legislature (the Knesset) has specifically designated the "law of Torah" (Jewish written law) to apply to all marriages and divorces. "[T]he religious court system was established mainly by the Palestine Order-in-Council 1922-1947, sections 47, 51-56. The religious court system is financed by the State and is generally restricted to matters of marriage and divorce." *See* Ruth Levush, A Guide to the Israeli Legal System (Jan. 15, 2001) *available at* http://www.llrx.com/features/israel.htm#Religious

> *Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. Accordingly, the American Bar Association should oppose the enactment of such laws.*

And the Resolution states:

> *That the American Bar Association opposes federal or state laws imposing blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law.*
>
> *That the American Bar Association opposes federal or state laws imposing blanket prohibitions on consideration or use by courts or arbitral tribunals of the entire body of law or doctrine of a particular religion.* [2]

Georgia case law and the Georgia and U.S. Constitutions already prohibit fundamentally unfair or unconstitutional application of foreign or religious law in our legal system. HB 895 is wholly unnecessary and it is harmful to religious freedom. We therefore urge the Judiciary Committee to reject this ill-advised legislation.

Sincerely,

Shelley Rose |Interim Regional Director

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[2] The ABA resolution and report can be found at the following link - http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_113a_authcheckdam.pdf (last visited February 10, 2014)

ARIZONA REGIONAL OFFICE

February 24, 2014

The Honorable Janice K. Brewer
Arizona Governor
Executive Tower
1700 West Washington Street
Phoenix, AZ 85007

Governor Brewer:

On behalf of the Anti-Defamation League (ADL), we write to urge you to veto Senate Bill 1062, an act relating to "free exercise of religion. Although ADL is an ardent advocate of religious freedom for all Americans, this unnecessary legislation would be detrimental to the welfare of Arizonians.

This legislation could have the unintended consequence of severely impacting individual rights and allowing economic power to dictate the free exercise of religion.

Even in those cases where private enforcement of the challenged laws survive application of strict scrutiny, the legislation would result in more lengthy and costly litigation to claimants and a greater burden on our already inundated court system.

Arizona already provides robust religious freedoms, but this unnecessary legislation will likely prove costly and harmful to the State and its citizens. In light of these unintended, but very detrimental consequences, we urge you to veto these bills.

Sincerely,

Miriam Weisman
ADL Arizona Regional Board Chair

Tracey K. Stewart
ADL Arizona Assistant Regional Director

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ARIZONA REGIONAL OFFICE

January 16, 2014

Dear Senator Begay,

On behalf of the Anti-Defamation League (ADL), we write to urge you to oppose Senate Bill 1062, an act relating to "free exercise of religion" when it is heard by the Senate Committee on Government and Environment on January 16, 2014. Although ADL is an ardent advocate of religious freedom for all Americans, this unnecessary legislation would be detrimental to the welfare of Arizonians.

Arizona already provides greater religious freedom protection for its citizens and religious institutions than the Free Exercise Clause of the First Amendment to the U.S. Constitution. Indeed, in response to the U.S. Supreme Court's 1990 decision in *Division v. Smith*, Arizona adopted a Religious Freedom Restoration Act, entitled "Free exercise of religions protected" (hereafter "RFRA"). See A.R.S. § 41-1493.01. The *Smith* decision lowered the level of constitutional scrutiny required to uphold federal, state or local laws that are neutral towards religion, but nonetheless burden religious exercise. The RFRA restored the pre-*Smith* standards by requiring government to demonstrate the "strict scrutiny" standard – the highest constitutional standard – where a neutral law or practice substantially burdens religious exercise.

The RFRA seeks to strike a balance between free exercise rights and the State's welfare and safety interests. SB 1062, however, would undermine these interests for two reasons. First, SB 1062 would vastly expand the meaning of government action to include private enforcement of state or local laws where no government entity is a party to the lawsuit. Currently, an action only can brought under the RFRA, or for that matter under the federal Religious Land Use and Institutionalized Person Act or Religious Freedom Restoration Acts, where government – whether state or local – actually substantially burdens religious exercise. Therefore, the legislation would be unprecedented in that it could be used as a defense to private enforcement of important state laws or local ordinances which are traditionally enforced by private citizens.

Second, SB 1062 would vastly expand the individuals and entities that could bring actions under RFRA. Currently, the RFRA only applies to an individual, religious assembly or religious institution. The bill would expand the RFRA's definition of "person" to include "[a]ny individual, association, partnership, corporation, church, religious assembly or institution, estate, trust, foundation or other legal entity." This is particularly troublesome. This broad definition of person would essentially include any for-profit business corporation or business entity providing them with a powerful affirmative defense to the enforcement of any state law or local ordinance which the entity deems religiously offensive.

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As a result, SB 1062 could have the unintended consequence of severely impacting individual rights and allowing economic power to dictate the free exercise of religion. For instance, under the proposed legislation, the following would be permitted:

- An employer could raise SB 1062 as defense to an employee's equal pay claim under A.R.S. §23-341 arguing that his or her religious beliefs require that men be paid more than women.
- The legislation could be used as defense to paying statutorily accrued interest on liens or other amount owed to individuals or private entities based on a religious objection to paying interest.
- A secular corporation with religious owners could refuse to hire someone from a different religion, so as to avoid paying a salary that might be used for a purpose that is offensive to the owners' religious views.
- A Christian-owned hotel chain might refuse to rent rooms to those who would use the space to study the Koran or Talmud.
- A Muslim-owned cab company might refuse to drive passengers to a Hindu temple.

Even in those cases where private enforcement of the challenged laws survive application of strict scrutiny, the legislation would result in more lengthy and costly litigation to claimants and a greater burden on our already inundated court system.

Arizona already provides robust religious freedoms, but this unnecessary legislation will likely prove costly and harmful to the State and its citizens. In light of these unintended, but very detrimental consequences, we urge you to oppose SB 1062.

Sincerely,

Tracey Stewart
Arizona Assistant Regional Director

February 20, 2014

Chairman Willard and Members of the House Judiciary Committee:

On behalf of the Anti-Defamation League (ADL), we urge the Judiciary Committee to oppose House Bill 1023 (HB 1023) in its current form when it is heard in committee.

ADL is a strongly pro-religion, national human relations and civil rights organization. For a century, we have been an ardent advocate for religious freedom for all Americans – whether in the majority or minority.

The purpose of HB 1023 is to provide for stronger protection of religious exercise than currently provided for under the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990). In the *Smith* decision, the U.S. Supreme Court lowered the level of constitutional scrutiny required to uphold federal, state or local laws that are neutral towards religion, but nonetheless burden religious exercise.

ADL has supported federal and state laws with a similar purpose. Indeed, we actively supported the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C §2000bb et seq., and Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc et seq., as well as similar state laws. The purpose of RFRA and RLUIPA was to restore the pre-*Smith*, "strict scrutiny" constitutional standard. Specifically, in its purposes section, RFRA states,

> *The purposes of this chapter are – to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened ...*

Adopted by Congress in 1993, RFRA was applicable to federal and state laws. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court limited RFRA's applicability to federal law. As a result, in 2000 Congress adopted RLUIPA, which applies to federal, state and local laws affecting religious land use or institutionalized persons. To fill the gap left by the *City of Boerne* decision, multiple states adopted state Religious Freedom Restoration Acts modeled after RFRA, including AZ, CT, FL, ID, IL, MO, NM, OK, PA, RI, SC, TX and UT.

Unlike RFRA and RLUIPA, HB 1023 would not return Georgia back to the pre-*Smith* standard. Rather, it would create an entirely new standard altogether. RFRA and RLUIPA apply the strict scrutiny standard only to neutral laws that

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substantially burden religious exercise. HB 1023, however, does not limit its application to government action that substantially burdens religious exercise. Rather, it applies to any government action that merely "burden[s]" the exercise of religion.

Furthermore, to justify its action a government entity, whether state or local, would be required to demonstrate constitutional strict scrutiny by the clear and convincing evidence standard. This evidentiary standard is far more stringent than the customary preponderance of evidence standard used in civil cases. Keep in mind, demonstrating constitutional strict scrutiny is already exceedingly difficult. HB 1023's use of this rigid evidentiary means that in virtually all cases an individual, legal entity or association will prevail where a trivial burden on religious exercise is shown.

As a result, HB 1023's far reaching and overbroad standard would likely have detrimental unintended consequences.

- It would create a strong new affirmative for criminal defendants charged with drug-related crimes, sexual assault or rapes of spouses or children, or child endangerment.
- It would allow law enforcement to refuse assignments that they find religiously offensive such assisting or guarding a religious institution of a different faith, a pharmacy that sells prescription contraception, a liquor store, a butcher shop selling pork or beef, or a casino.
- It would allow public hospital employees including physicians, nurses, or administrators to refuse to assist patients, even on an emergency basis or process any paper work that they find to be religiously offensive such as in-vitro fertilization, blood transfusions or psychiatric care.
- It would allow any public employee adhering to an extremist religion, including Nation of Islam, Christian Identity, or Odinism to refuse providing service to an Asian, White, Black, Jewish or Hispanic person.

In light of these detrimental consequences, we urge the Judiciary Committee to amend HB 1023 so that it corresponds to the pre-*Smith* standard set forth in RFRA and RLUIPA.

Sincerely,

Shelley Rose
Interim Regional Director

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