



Written Statement of the American Civil Liberties Union

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**Submitted to the House of Representatives
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary**

***Oversight Hearing on
the Religious Freedom Restoration Act and
the Religious Land Use and Institutionalized Persons Act***

**held on
February 13, 2015**

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The goal of the ACLU's work on freedom of religion and belief is to guarantee that all are free to follow and practice their faith, or no faith at all, without undue governmental influence or interference. Since its founding in 1920, the ACLU has worked to protect religious believers of all backgrounds and faiths,¹ whether it is defending a student's right to read his Bible during free reading periods at his school in Tennessee,² the right of a Muslim man to wear religious headwear in a courtroom in North Carolina,³ or the rights of persons in prisons, jails, and other places of detention to practice their faith.⁴ The ACLU also advocates for laws and policies that heighten protections for religious exercise.⁵

Thank you for this opportunity to submit a statement for the record for the Oversight Hearing on the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). There is a need for affirmative protections for religious exercise and yet there is also a need to ensure that religious exercise cannot be used to discriminate against or otherwise harm third parties or override other significant interests.

Freedom of Religion and Belief

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Given our robust, longstanding commitment to the freedom of religion and belief, it is no surprise that the United States is among the most religious, and religiously diverse, nations in the world. Indeed, religious liberty is alive and well in this country precisely because our government cannot tell us whether, when, where, or how to worship.

As enshrined in the First Amendment to the U.S. Constitution, religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government neither prefers religion over non-religion nor favors particular faiths over

¹ "ACLU Defense of Religious Practice and Expression," <http://www.aclu.org/aclu-defense-religious-practice-and-expression>.

² Press Release, ACLU, "ACLU-TN Protects Student's Right to Read Bible at School" (Mar. 31, 2014), <https://www.aclu.org/religion-belief/aclu-tn-protects-students-right-read-bible-school>.

³ ACLU of N.C., "Report: Man Removed from Lenoir Courthouse for Wearing Religious Attire" (July 3, 2012), <http://acluofnc.org/blog/report-man-removed-from-lenoir-courthouse-for-wearing-religious-attire.html>.

⁴ *E.g.*, ACLU, "Holt v. Hobbs," <https://www.aclu.org/religion-belief/holt-v-hobbs>.

⁵ One example: Religious liberty advocates, including ACLU, Anti-Defamation League, Becket Fund for Religious Liberty, and Christian Legal Society, asked the Under Secretary of Defense for Personnel and Readiness to revise regulations governing religious accommodations so that religiously observant service members and prospective service members who wear head coverings, uncut hair, or beards may continue to do so while serving our nation. Letter from Coalition to Jessica Wright, Under Sec'y of Def. for Pers. & Readiness (Apr. 2, 2014), <https://www.aclu.org/religion-belief/coalition-letter-regarding-religious-accommodation-military>.

others. These dual protections work hand-in-hand, allowing religious liberty to thrive and safeguarding both religion and government from the undue influences of the other.

Applying these religious liberty principles in a society where there are countless different religious beliefs and preferences, and harmonizing them with other core rights in our pluralistic society—rights of free speech, equality, privacy, etc.—is not always easy. But at a minimum, religious freedom means the following: We have the right to a government that neither promotes nor disparages religion generally, nor any faith, in particular. We have the absolute right to believe whatever we want about God, faith, and religion. We have the right to act on our religious beliefs, unless those actions harm others.

In practice, this means that the government should not promote prayer or other religious exercise and messages, coerce religious worship and belief, or give special preference or benefits to any particular faith or to religion generally. At the same time, religious liberty requires that the government permit a wide range of religious exercise and expression for people of all faiths, in public or in private. Government officials may not impede such religious exercise unless it would threaten the rights, welfare, and well-being of others or violate the core constitutional ban on governmental promotion of religion.

The Road to RFRA and RLUIPA

The ACLU has long believed that religious freedom encompasses heightened protections for religious exercise. In 1990, however, a divided Supreme Court in *Employment Division v. Smith* concluded that society cannot function where “each conscience is a law unto itself,” and held, in an opinion written by Justice Scalia, that laws that impose a substantial burden on religious exercise but do not directly target religion need only be rationally related to a legitimate government interest.⁶ People from many faiths and denominations, legal experts, and civil liberties advocates, including the ACLU, saw this as a drastic change in constitutional protection for religious liberty. The *Smith* standard would not adequately protect those requesting an exemption that primarily affects the requester and would not burden third parties, like the five-year old Native American boy who was suspended from school for violating the dress code because he wore his long hair in braids.⁷

Yet even prior to *Smith*, the right to exercise one’s religion was never without limits, and it shouldn’t be.⁸ “To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”⁹ It has long been understood that religious exercise should not interfere with others’ rights, safety, and an ordered society.¹⁰

⁶ *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

⁷ See *A.A. v. Needville Indep. Sch. Dist.*, 611 F. 3d 248 (5th Cir. 2010).

⁸ See, e.g., *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

⁹ *U.S. v. Lee*, 455 U.S. 252, 259 (1982).

¹⁰ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Watson v. Jones*, 80 U.S. 679, 728 (1872).

Passage of RFRA

Democrats and Republicans, people of all faiths, and groups that cared generally about civil liberties formed a broad coalition to advocate for a congressional response to the *Smith* decision. In 1993, Congress passed and President Bill Clinton signed the Religious Freedom Restoration Act (RFRA) to “restore” the heightened constitutional protections that applied before *Smith*. RFRA asks whether the law places a “substantial burden” on religious exercise. If yes, the government regulation needs, in the words of the statute, to “further a compelling government interest” using the “least restrictive means.” Thus, minimal burdens were not supposed to trigger RFRA protection and even substantial burdens on religious exercise must be tolerated where the countervailing interest is significant. Those interests found to be compelling pre-*Smith* included, among others, combating discrimination, ensuring the comprehensiveness or administrability of a government program, and conformity with the Constitution.¹¹ Moreover, pre-*Smith* cases did not give unlimited protection to claims of infringement on religious exercise—the cases not only allowed the government to regulate religious exercise based on its compelling interests, such as “prevent[ing] tangible harm to third persons,”¹² but also required an accounting of the burdens religious exercise may pose on third parties.¹³

RFRA in Practice

RFRA Inapplicable to States and Attempts to Fix

RFRA was written very broadly, applying to all federal and state laws. In 1997, the Supreme Court in *City of Boerne v. Flores*¹⁴ struck down RFRA as applied to the states. Many groups that were part of the RFRA coalition came together to advocate for a new bill, the Religious Liberty Protection Act (RLPA), to apply strict scrutiny to state laws that imposed a substantial burden on religious exercise.

But this alliance soon fractured over concerns that RLPA could be used as a defense to civil rights statutes. In the 1990s, landlords across the country had begun to argue that they should have a right to discriminate against unmarried couples based on their religious objections to cohabitation, notwithstanding state and local civil rights laws prohibiting discrimination on the basis of marital status. For instance, the U.S. Court of Appeals for the Ninth Circuit in *Thomas v. Anchorage Equal Rights Commission*¹⁵ applied a standard of review very similar to RFRA’s to the landlords’ claim that compliance with such a law burdened the landlords’ religious beliefs. The court held that the governmental interest in preventing marital status discrimination was not

¹¹ See, e.g., *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 575 (1983); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1368-69 (9th Cir. 1986); *Lee*, 455 U.S. at 258; *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

¹² Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 886 (1994).

¹³ E.g., *Estate of Thornton*, 472 U.S. at 709-10; see also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”).

¹⁴ 521 U.S. 507 (1997).

¹⁵ 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000). For other cases involving claims of religious freedom to discriminate in the rental of housing, see *Smith v. Fair Emp. & Housing Comm’n*, 913 P. 2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P. 2d 274 (Alaska 1994); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994). The landlord was successful in *Desilets*.

compelling. As a result, the landlords did not have to comply with that civil rights law. Even though the *Thomas* decision was later vacated on other grounds, the decision demonstrated that RFRA might indeed be used to permit discrimination. At the same time, there were also claims by religiously affiliated employers seeking exemptions from contraceptive equity laws that provide equal benefits for women employees and dependents, which would have resulted in discrimination.

The ACLU was particularly concerned about the hard-won protections at the state and local level that afforded civil rights protections not found in federal law, including protections for LGBT people.¹⁶ As a result, the ACLU sought to add language to RLPA to ensure that it could not be used to discriminate or deny the rights of others. When such efforts were unsuccessful, the ACLU withdrew its support for the bill, and raised strong concerns about the ways that it could be used to allow discrimination.¹⁷ RLPA ultimately failed.

Troubling RFRA Claims

RFRA continues to be used in the very ways that were troubling two decades ago—it's being used to abridge others' rights. For example, during the Bush administration, World Vision, a faith-based organization that ran a taxpayer-funded juvenile justice program, asked the Department of Justice to excuse it from a statutory nondiscrimination provision and allow it to hire only those who share similar Christian beliefs. In a break with precedent and sound reasoning, the Justice Department's Office of Legal Counsel (OLC) maintained that RFRA could be used by religiously affiliated organizations to discriminate in employment, thereby compelling taxpayer support for such discrimination.¹⁸

As part of the Affordable Care Act, the federal government issued a rule that requires employers to cover contraception without a co-pay in their employees' health plans. Dozens of cases around the country were filed by for-profit corporations using RFRA to challenge the rule. These corporations, employing thousands of people, objected to some or all contraceptive coverage based on their owners' sincerely held beliefs and sought exemptions from the rule. But such exemptions would amount to discriminating against their employees and would mean employees and their dependents' health insurance coverage fails to meet their health care needs.

¹⁶ There are also examples of religious liberty defenses being raised in many other contexts, including race discrimination, *e.g.*, *Bob Jones Univ.*, 461 U.S. at 604, and sex discrimination, *e.g.*, *Fremont Christian Sch.*, 781 F.2d at 1368-69 (9th Cir. 1986).

¹⁷ See *Hearings on H.R. 1691 Before the Subcomm. On the Const. of the H. Comm. On the Judiciary*, 106th Cong. 165 (statement of Christopher Anders) (1999), available at <https://www.aclu.org/religion-belief/testimony-legislative-counsel-christopher-anders-hr-169-religious-liberty-protection>; see also James M. Oleske, Jr., *Obamacare, RFRA, and the Perils of Legislative History*, 67 Vand. L. Rev. *En Banc* 77, 84-87 (2014) (discussing congressional debate on RLPA and noting Rep. Bobby Scott's concerns about RLPA's impact on civil rights claims).

¹⁸ Mem. for the Gen. Counsel, Office of Justice Programs, from John P. Elwood, Dep. Ass't Att'y Gen., 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). The Bush Administration sought to repeal these provisions (White House, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved," available at <http://georgewbush-whitehouse.archives.gov/government/fbc/religious-hiring-booklet-2005.pdf>), but each time Congress refused to do so.

Last summer, in *Hobby Lobby v. Burwell*,¹⁹ the Supreme Court held that RFRA permits closely held corporations to use their religious beliefs to take away benefits guaranteed to their employees by law—something the Court has never before sanctioned. In so doing, the Court radically redefined the understanding of a “substantial burden” on religious exercise. Rather than engaging critically with this question, as courts had in the past, the Court simply accepted Hobby Lobby’s assertion that there was a burden that was substantial.²⁰ And although the Court seemed to reaffirm the principle that exemptions under RFRA must avoid harm to third parties,²¹ as of today, this is not the case. Hobby Lobby and the other companies that made RFRA claims may now refuse their employees and dependents the health care benefit of contraception, which medical experts recognize as critical to ensuring women’s health and well-being. As a result, the women employed there could be left with inadequate health insurance coverage.

Looking Ahead

The need for affirmative protections for religious exercise is real and is equally true today as it was when *Smith* was decided. The ACLU recently brought a RFRA challenge to Army regulations that would bar a Sikh student from enlisting in Army ROTC unless he complied with all Army grooming and uniform rules, which would require him to immediately cut his hair, shave off his beard, and remove his turban, all of which violate his faith.²² He is dismayed that the military has asked him to make the impossible decision of choosing between the country he loves and his faith, especially considering the Army has already permitted three other Sikhs to serve while wearing their articles of faith.²³ This is exactly what RFRA was designed to do—provide for exemptions or accommodations for religious exercise when doing so would not cause harm to others.

As explained above, however, RFRA’s application isn’t limited to these sorts of cases. Even though the majority said its holding in *Hobby Lobby* was limited, we don’t yet know what impact the case may have on other areas of the law, including anti-discrimination measures and insurance coverage for other health care. What we *can* be sure of is that many individuals and institutions may now feel emboldened to assert religious objections to other laws. The question will then be how courts will assess these potential claims and whether they will adequately account for costs to third-parties, like employees, students, or customers.

In light of the troubling ways in which RFRA is being used, there is ongoing discussion of another legislative fix for RFRA. This time it must clearly and explicitly ensure that religious exercise cannot be used to discriminate against or otherwise harm others.

¹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁰ *Id.* at 2778-2779.

²¹ *See id.* at 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (religious accommodation would have “precisely zero” impact on third parties).

²² *Singh v. McHugh*, No. 1:14-cv-01906 (D.D.C. filed Nov. 12, 2014).

²³ Iknoor Singh, “The Army Is Making Me Choose Between My Faith and My Country,” *Huffington Post*, Nov. 12, 2014, http://www.huffingtonpost.com/iknoor-singh/sikh-army-rotc_b_6147686.html.

RLUIPA

The Religious Land Use and Institutionalized Persons Act (RLUIPA) story is quite distinct from RFRA. RLUIPA was enacted after RLPA could not pass. RLUIPA, in contrast to RFRA and RLPA, is very limited in scope. It was designed to address specific, well-documented problems experienced by institutionalized persons and in land use.²⁴ The ACLU helped lead efforts to enact this important statute.

In legislating protections for prisoners, Congress addressed “frivolous or arbitrary barriers” that impeded prisoners’ religious exercise and sought to alleviate “egregious and unnecessary” prison restrictions on religious liberty.²⁵ As a result, RLUIPA fosters prison safety. First, it creates even-handed procedures and promotes non-arbitrary and fair decisions by prison officials, which in turn promote promote safety.²⁶ Second, accommodating prisoners’ free exercise of religion also can moderate the harsh impact of prison life and promote rehabilitation, thereby further enhancing prison safety.²⁷

When applying these protections, the Supreme Court has made clear that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,”²⁸ and any “accommodation must be measured so that it does not override other significant interests.”²⁹ Justice Ginsburg succinctly explained this principle: an accommodation was permitted under RLUIPA because it “would not detrimentally affect others.”³⁰ The Court explained that a prison may be justified in denying an accommodation should the request be “excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective function of [the] institution.”³¹ It is reassuring that the Court’s RLUIPA jurisprudence has clearly set forth the existing obligation to account for whether an accommodation would impose a burden on others or override significant interests like safety.

Just last month, the Supreme Court unanimously ruled that RLUIPA protects a Muslim prisoner who sought to grow a half-inch beard in accordance with his religious beliefs.³² The ACLU filed an amicus brief in that case on behalf of the prisoner.³³ The ACLU has used RLUIPA to defend other prisoners’ free exercise rights:

²⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 715 & 716 n.5; 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

²⁵ *Cutter*, 544 U.S. at 716 (citations omitted).

²⁶ Br. for Former Corr. Officials as *Amici Curiae* in *Holt v. Hobbs*, No. 13-6827 (May 29, 2014), 20-28, available at <https://www.aclu.org/religion-belief/holt-v-hobbs-amicus-brief>.

²⁷ *Id.* at 12-20.

²⁸ *Cutter* at 720 (citing *Estate of Thornton*, 472 U.S. 703).

²⁹ *Id.* at 722.

³⁰ *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J. concurring).

³¹ *Cutter*, 544 U.S. at 726.

³² *Holt*, 135 S. Ct. at 867.

³³ See Br. for Former Corr. Officials as *Amici Curiae* in *Holt v. Hobbs*.

- The ACLU and the ACLU of Wyoming sent a letter protesting the Wyoming Department of Corrections’ practice of prohibiting prisoners from wearing religious headgear outside of their cells.³⁴
- The ACLU of Alabama represented a prisoner seeking to wear his hair unshorn in accordance with his Native American faith.³⁵
- The ACLU of Michigan successfully represented Muslim and Seventh-Day Adventist prisoners in a religious class action challenging two Michigan Department of Corrections policies: one which accommodated Jewish prisoners by providing kosher meals while denying Muslim prisoners halal meals, while the other failed to excuse inmates from their work assignments on the Sabbath.³⁶
- The ACLU and affiliates in Florida and Texas filed friend-of-the-court briefs supporting Jewish prisoners’ right to receive a Kosher diet.³⁷

These cases are all examples where the requested accommodations do not harm other prisoners or other significant interests.

RLUIPA also covers religious land use. One of the most important provisions prohibits governmental action that discriminates on the basis of religion or religious denomination.³⁸ This ensures that land-use laws can’t target a pastor’s ministry to serve and provide housing to those in need³⁹ and zoning decisions can’t discriminate against minority faiths, such as denying a zoning permit for a Muslim prayer space based on community objections.⁴⁰

* * *

There is certainly a need for affirmative protections for religious exercise. At the same time, there is also a clear need to ensure that religious exercise is not used and cannot be used to discriminate against or otherwise harm third parties or override other significant interests.

Thank you for the opportunity to submit this statement for the record. Should you have any questions, please contact Dena Sher, Legislative Counsel, (202) 715-0829 or dsher@aclu.org.

³⁴ Carrie Ellen Sager, “Why Is Wyoming Discriminating Against Jewish Prisoners?” ACLU Blog of Rights (Jan. 10, 2014), https://www.aclu.org/blog/prisoners-rights-religion-belief/why-wyoming-discriminating-against-jewish-prisoners_

³⁵ ACLU of Ala., 2004 Legal Docket, *available at* <http://www.aclualabama.org/WhatWeDo/LegalDockets/2004%20Docket%20page%202.pdf>

³⁶ ACLU of Mich., Legal Docket (Jan. 2015), <http://www.aclumich.org/courts/legal-dockets#9religion>; Press Release, ACLU of Mich., “ACLU, Michigan Corrections Settles Religious Freedom Lawsuit” (Nov. 21, 2013), <http://www.aclumich.org/issues/halal/2013-11/1894>.

³⁷ Br. for ACLU, ACLU of Fla., & Becket Fund for Religious Liberty, *Amicus Curiae in U.S. v. Fla. Dep’t of Corr.*, No. 14-10086-D (May 28, 2014), *available at* <http://www.becketfund.org/wp-content/uploads/2014/05/CA11-Kosher-Amicus-Brief-as-filed1.pdf>; Br. for ACLU, ACLU of Tex., *Amicus Curiae in Moussazadeh v. Tex. Dep’t of Criminal Justice*, No. 09-40400 (Jan. 13, 2012), *available at* <https://www.aclu.org/religion-belief/moussazadeh-v-tdej-amicus-brief>.

³⁸ 42 U.S.C. § 2000cc(b)(2).

³⁹ Press Release, ACLU of Ala., “ACLU Files Lawsuit to Protect Pastor’s Right to Practice His Christian Faith” (Aug. 27, 2014), <http://aclualabama.org/wp/aclu-files-lawsuit-protect-pastors-right-practice-christian-faith/>.

⁴⁰ Press Release, ACLU, “Muslim Prayer Space Granted Permit in Kentucky” (Nov. 9, 2010), <https://www.aclu.org/religion-belief/muslim-prayer-space-granted-permit-kentucky>.

Testimony of

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Submitted to the

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

Written Testimony for the Hearing Record on

**“Oversight of the Religious Freedom Restoration Act and
the Religious Land Use and Institutionalized Persons Act”**

February 13, 2015

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for this opportunity to present testimony for the oversight hearing on the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

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 practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement. We have more than 120,000 members and supporters across the country.

Americans United supports reasonable and appropriately tailored religious accommodations and exemptions when they would alleviate a true burden on religion. Such accommodations and exemptions should never be granted, however, when they would impinge on the rights or otherwise harm the interests of others. Religion is not a trump card that supersedes all other interests or that can justify imposing significant burdens on others. This position is what led us to support the passage of both RLUIPA and the RFRA.

RLUIPA and Its Application

RLUIPA provides protection solely in land use cases and to institutionalized persons. 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.¹ Likewise, those in prison who adhere to minority faiths also still face difficulties obtaining accommodations for kosher meals,² access to worship spaces and materials,³ and the right to wear religious garb.⁴ RLUIPA is still needed to address these concerns, to alleviate true burdens on religious adherents without causing significant harm to third parties.

¹ See, e.g., 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 See, e.g., *Rich v. Crews*, 2014 WL 523018, No. 1:10-cv-00157-MP-GRJ (N.D. Fla. Feb. 10, 2014) (involving a Jewish inmate seeking access to kosher meals).

³ See, e.g., *Pevia v. Shearin*, 2015 WL 790471, No. ELH-14-0631 (D. Md. Feb. 24, 2015) (involving a Native American utilizing RLUIPA to gain access to religious services).

⁴ See, e.g., Letter from the ACLU to Robert Lambert, Director of the Wyoming Department of Corrections, Jan. 10, 2014, <https://www.aclu.org/files/assets/WDOC%20Kippah%20Letter%201-9-14.pdf> (challenging a prison practice denying Jewish inmates the ability to wear a yarmulkes).

RFRA and Its Application

In *Employment Division of Oregon v. Smith*,⁵ 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, including Americans United, 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.⁶ 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 that were frequently used by supporters were that the bill 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,⁷ and a public school from forbidding a student to wear a yarmulke.⁸

Noticeably absent from that list of examples: that RFRA would allow corporations to ignore non-discrimination and public health laws; that government officials could deny citizens services, such as marriage licenses, to which they are entitled; or that government contractors and grantees could ignore non-discrimination provisions or service requirements because of their religious beliefs. Indeed, when Congress passed RFRA 22 years ago, supporters, including Americans United, intended for the bill to act as a shield to protect religion, not a sword to harm others.

Over the years, however, we have seen increasing attempts to use RFRA as a sword. These attempts include using RFRA to deny women access to healthcare and attempts to use RFRA to trump non-discrimination protections.

Recent Supreme Court Cases

In the last year, the Supreme Court issued opinions under both RFRA and RLUIPA. We believe that the Court got it right in the RLUIPA case, *Holt v. Hobbs*,⁹ but wrong in the RFRA case, *Burwell v. Hobby Lobby Stores, Inc.*¹⁰

Holt v. Hobbs

In January, the Court issued a unanimous opinion in *Holt v. Hobbs*, ruling that a prison policy prohibiting an inmate from wearing a ½-inch beard for religious reasons violated

⁵ 494 U.S. 872 (1990).

⁶ See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

⁷ 139 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

⁸ 139 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

⁹ 135 S.Ct. 853 (2015).

¹⁰ 134 S.Ct. 2751 (2014).

RLUIPA. We filed an *amicus* brief that supported the inmate in this case and believe this case was properly decided.¹¹

First, there was no evidence in the record that petitioner's request was anything other than a sincere attempt to comply with a religious duty in a way that is consistent with the conditions and demands of confinement. Second, it was clear that the policy did not further the prison's compelling interest in maintaining safety. As explained by the magistrate judge who was viewing the plaintiff at the time, "it's almost preposterous to think that you could hide contraband in your beard."¹² Third, allowing an inmate to wear a beard did not cause any harm to others.

Holt is a perfect example of the how RFRA and RLUIPA were intended to work.

Burwell v. Hobby Lobby

In June 2014, the Supreme Court issued its opinion in *Hobby Lobby*, holding that closely held for-profit corporations were covered by RFRA and do not have to provide health care insurance coverage for contraception if their owners claim doing so would violate their religion. We believe the Court decision was wrong in several regards.

First, the majority opinion detached RFRA from pre-*Smith* case law even though the Act itself states that its purpose was 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."¹³

Second, the Court failed to engage in a real analysis of whether the alleged religious burden on the plaintiffs was substantial. Instead, the Court simply stated that it "is not for us to say that their religious beliefs are mistaken or insubstantial."¹⁴ As explained by Justice Ginsburg, the majority opinion "barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial."¹⁵ But, "RFRA, properly understood, distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake."¹⁶ If the Court had properly performed this analysis, it would have concluded that requiring a corporate entity to provide insurance coverage that its employees may or may not use is too attenuated to constitute a substantial burden.

¹¹ Brief for Americans United for Separation of Church and State as *Amicus Curiae*, *Holt v. Hobbs*, 135 S.Ct. 853 (2015) https://au.org/files/pdf_documents/14-5-29_Holt-Hobbs-AU_Amicus.pdf.

¹² *Holt*, 135 S.Ct. at 863.

¹³ 42 U.S.C. § 2000bb(b) (1993).

¹⁴ *Hobby Lobby*, 134 S.Ct. at 2779.

¹⁵ *Id.* at 2798 (Ginsburg, J., dissenting).

¹⁶ *Id.* (quoting *Kaemmerling v. Lappin*, 553 F. 3d 669, 679 (D.C. Cir. 2008)).

Third, although the majority acknowledged that it “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,”¹⁷ it discounted the real harm that granting the sought exemption would have on women. The Court’s decision allows employers like Hobby Lobby to forgo providing any coverage for contraception, leaving women without the ability to access contraception without cost barriers – a deterrent for many women for whom any additional cost can be burdensome. And, it removes a woman’s ability to make decisions about her own reproductive health and family needs, and instead places that power in the hands of a corporation.

Justice Ginsburg, who joined the majority in *Hobbs* but issued a strong dissent in *Hobby Lobby*, described the main difference between these cases: “Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. ____ (2014), accommodating petitioner’s religious belief in [*Holt v. Hobbs*] would not detrimentally affect others who do not share petitioner’s belief.”¹⁸

Fortunately, *Hobby Lobby* is a narrow decision that should not be extended beyond the specific facts before the Court. Unfortunately, the decision has motivated and emboldened many to push even harder to use RFRA in nefarious ways, such as continuing to deny women access to healthcare and trying to discriminate against others.

In addition, the decision is likely to harm religious freedom in ways its proponents had never contemplated: it has rightfully made many less likely to support even very narrow religious exemptions. As part of its least restrictive means analysis, the Court concluded that the closely-held corporations deserved an exemption under RFRA because the regulation already provided an accommodation to religious non-profit organizations. In short, the government’s decision to accommodate some—even though that accommodation was not required by the Free Exercise Clause or RFRA—resulted in the government having to accommodate all—even though the difficulty of administering the exemption and the harm caused to employees was of much greater significance. A lesson many have taken from *Hobby Lobby*, therefore, is that the government should reject all religious exemptions or RFRA could demand that the exemptions be drastically expanded.

The Misappropriation of RFRA

Unfortunately, *Hobby Lobby* is not the only example of a misuse of RFRA.

Several non-profit organizations continue to challenge the Affordable Care Act regulations that require employers that provide group health insurance plans to cover

¹⁷ *Id.* at 2801 (Ginsburg, J., dissenting)(quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

¹⁸ *Holt*, 135 S.Ct. at 867 (Ginsburg, J., concurring).

contraception.¹⁹ They argue that the religious accommodation is insufficient and violates RFRA. Under the regulations, religious non-profit organizations are “eligible for an accommodation to the contraceptive coverage requirement, whereby once they advise that they will not pay for the contraceptive services, coverage for those services will be independently provided by an insurance issuer or third-party administrator.”²⁰ These groups do not have to contract, pay, refer, or arrange for coverage of contraceptives at all. Nonetheless, these groups claim that the accommodation violates RFRA because the government is requiring them to fill out a form or otherwise notify the government that they want to utilize the exemption.

What these groups are really arguing is that RFRA guarantees them a full exemption from the insurance mandate. But a full exemption is not warranted for these organizations. Lifting the inconsequential burden of notifying the government would impose a huge burden on the women these organizations employ, as they would lose coverage entirely.

Claims that RFRA can be used to trump nondiscrimination laws are also becoming more common. For example, some have argued that RFRA allows faith-based organizations to ignore nondiscrimination requirements that govern government grants and contracts. The idea that religious organizations should be allowed to take government funds *and* claim a religious exemption to get out of the terms required by the grant or contract is outrageous. Yet, it is happening today. An erroneous George W. Bush-era Justice Department, Office of Legal Counsel memo argues that, under RFRA, faith-based grantees can dismiss statutory requirements that prohibit grant funds from being used for religious hiring discrimination.²¹ And, when President Obama signed an Executive Order last summer to prohibit government contractors from discriminating in hiring against LGBT employees, detractors immediately argued that RFRA could be used to undermine these newly issued protections.²²

Similar claims are being made under state RFRAs. Most recently, the Alliance Defending Freedom sent legal memos to government clerks in states with marriage equality, making the unsound assertion that, under state RFRAs, government officials who oppose same-sex marriage based on religion can and should refuse to issue marriage

¹⁹ See, e.g., *University of Notre Dame v. Sebelius*, 743 F. 3d 547, 548 (7th Cir. 2014); *Priests for Life v. U.S. Dept. of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

²⁰ *Geneva College v. Sec’y U.S. Dept. of Health & Human Serv.s*, Nos. 13–3536, 14–1374, 14–1376, 14–1377, 2015 WL 543067 (3d Cir. Feb. 11, 2015).

²¹ 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).

²² Sarah Posner, *Will Anti-LGBT Government Contractors Have a RFRA Claim*, RELIGION DISPATCHES, <http://religiondispatches.org/will-anti-lgbt-government-contractors-have-a-rfra-claim/>

licenses to same-sex couples.²³ And, private businesses are waging failed attempts to use state RFRA to trump state non-discrimination laws.²⁴

Conclusion

Americans United supported the passage of RFRA and RLUIPA because we believed they would provide protection to individuals whose religious beliefs were truly burdened and it would not be used to justify material harm to third parties. We still support these laws, but only in so far as they provide appropriate and narrowly-tailored religious exemptions in these circumstances. We have significant concerns about how many are trying to misappropriate RFRA and use it to trump non-discrimination laws and deny women healthcare services. If Congress decides to address these misuses, it should do so by ensuring that RFRA cannot be used to harm third parties.

²³ See, e.g., Memorandum from Alliance Defending Freedom to Rhode Island Clerks Responsible for Issuing Marriage Licenses (July 31, 2013), available at <http://www.adfmedia.org/files/RIClerksMemo.pdf>.

²⁴ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) cert. denied, 134 S. Ct. 1787 (Apr. 7, 2014); *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm'n June 2, 2014) (final agency order) https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf; *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Jan. 7, 2015), https://www.aclu.org/sites/default/files/assets/2015-02-18--ord._denying_defs._msj_and_granting_pls._and_wa_states_msj.pdf.

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February 27, 2015

The Honorable Bob Goodlatte
Chairman
Subcommittee on the Constitution and Civil Justice
of the Committee on the Judiciary
2142 Rayburn HOB
Washington, DC 20515

RE: Testimony Submitted for Hearing: Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, held on February 13, 2015

Dear Chairman Goodlatte and Members of the Committee:

I commend the Committee for taking up oversight of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). It has been fifteen (15) years since RFRA was re-enacted and RLUIPA first enacted. In the interim we have learned a great deal about both, which can guide adjustments to these laws to more fully serve the public good.

By way of introduction, I hold the Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University, where I have taught for 25 years. I am one of the leading church-state scholars in the United States. In particular, I focus on the dangers posed to children in religious settings, including sexual and physical abuse, medical neglect, abandonment, and child marriages in polygamous communities.

Before joining the faculty at Cardozo Law School, I had the privilege of clerking for Justice Sandra Day O'Connor of the United States Supreme Court and Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit. I am the author of *God vs. the Gavel: The Perils of Extreme Religious Liberty* (Cambridge University Press 2014), and track the developments under RFRA, RLUIPA, and the state RFRA's on www.RFRAPERILS.COM. I represented the City of Boerne, Texas, in its successful constitutional attack on RFRA in *Boerne v. Flores*, 521 U.S. 507 (1997). I have represented numerous victims of child sex abuse in cases in which religious entities have invoked RFRA or its state counterparts, and numerous cities in religious land use cases, and I have written extensively on the issues around RFRA and RLUIPA, most recently, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. AND POL. J. ____ (2015), available at <http://ssrn.com/abstract=2568813>.

After reviewing the testimony submitted for this hearing, I believe it is necessary to add the following testimony for the permanent record, because it provides concrete proposals to cure some of the negative impacts of the RFRA/RLUIPA formula.

The RFRA/RLUIPA formula protects religious conduct in the following way: if a religious actor succeeds in proving that a law imposes a “substantial burden” on religious conduct, the burden shifts to the government to prove that the law serves a “compelling interest” in the “least restrictive means” for the one believer.

One of the significant problems with the RFRA/RLUIPA formula is that it is opaque to legislators and voters, and another is that it is novel, and, therefore, it is impossible to predict actual impact once in the hands of judges. There are three features of the RFRA/RLUIPA formula that contribute to its inherent opacity:

(1) ***The title is misleading.*** RFRA did not “restore” prior doctrine, as the Supreme Court has confirmed repeatedly. *Holt v. Hobbs*, 135 S.Ct. 853, 859-60 (2015); *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2761-62 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S.Ct. 1211, 1220 (2006); *Boerne v. Flores*, 521 U.S. 507, 532-34 (1997); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993) (five months before RFRA was enacted, the Court rejected the “least restrictive means” test proposed by the church for purposes of strict scrutiny under the Free Exercise Clause).

(2) ***It is impossible to know what laws will be disabled by its one-size-fits-all formula.*** The specific goals of particular, religious entities are typically suppressed beneath the generic “religious liberty” language. The Coalition for the Free Exercise of Religion never included a single religious extremist organization, whether it was Al Qaeda, the racist Council of Concerned Citizens for America, or the white and black supremacist gangs in the prisons. Nor did the Coalition members disclose specific agendas, *e.g.*, overcoming the fair housing laws to exclude from rentals unmarried couples, unwed mothers, and same-sex couples. This latter agenda was in place as early as 1993 when the first RFRA was enacted, but not publicly disclosed until later, which is one of the reasons that the liberal civil rights groups originally and misguidedly backed RFRA.

(3) ***RFRA’s operative language is legalistic constitutional doctrine, which was never applied in the courts before RFRA was enacted.*** This feature compounds its second defect above, and leads to RFRA’s many unintended, indeed unimagined, applications and results.

I am on the record for the proposition that RFRA is unconstitutional, but for purposes of this Oversight Hearing, I leave that issue aside to offer the following observations and conclusions regarding specifics of the RLUIPA/RFRA formula. Each of these is the product of grappling with RFRA and RLUIPA issues in my scholarly work, the courts, and the classroom for nearly 20 years.

1. The “Least Restrictive Means” Test. I believe that the most problematic element of the RFRA/RLUIPA formula is the “least restrictive means” test. As I mention above, it truly was never part of the Court’s doctrine. Religious litigators sought it fervently for a number of years, but the Court never adopted it (even for purposes of strict scrutiny), and the Court has confirmed this fact in its own cases repeatedly. *See above.* The heated response to *Employment Div. v. Smith*, 494 U.S. 872 (1990),

that drove to the enactment of RFRA was motivated in fact by disappointment that the push for this test had definitively failed, not because the Court had “abandoned” its previous doctrine.

The “least restrictive means” analysis is an invitation to judicial activism, because it invites courts to imagine if there is any lesser restrictive alternative to the one lawmakers enacted—regardless of economic, policy, or political feasibility. The judges’ imaginations are not cabined in any way, which led the Supreme Court to conclude in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2759-60 (2014), that the Affordable Care Act’s contraception mandate failed RFRA on the theory that it would have been less restrictive had the ACA subsidized contraception for every woman in the country—even though such a policy was never politically or economically feasible. Even more recently in *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015), the Supreme Court held itself out as an expert on prison management, chastising prison authorities for not choosing the option of having prison guards comb inmates’ beards rather than having a no-beard policy. Finally, in an early RFRA case, a Vermont court held that a man who refused to pay child support for religious reasons could not be subject to contempt of court for his failure to pay, because there were less restrictive means of enforcing the law against him. *Hunt v. Hunt*, 162 Vt. 423, 436-438, 648 A.2d 843, 853-54 (1994). This last argument that a RFRA requires watering down criminal punishment or civil penalties is not uncommon.

The RFRA/RLUIPA “least restrictive means” element further sends the message to believers that they have a “right” to force every law to be shaped to them, without regard to how their actions affect or harm third parties. I believe this mode of thinking, which only appeared in United States law when RFRA was enacted in 1993, is directly responsible for the claims of a right to discriminate that are now motivating so many state RFRA’s. This trend needs to stop now, because there are numerous groups in the United States that would take a right to discrimination to even darker corners, whether it is gender, race, or disability, as the Southern Poverty Law Center so courageously documents. SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/>.

My concern about the “least restrictive means” test goes beyond the win-loss RFRA/RLUIPA record to the broader question of what it means to be an American. As I have argued in *God vs. the Gavel: The Perils of Religious Liberty* (Cambridge University Press 2014) and elsewhere, this is a message that is both dangerous to the vulnerable and also antithetical to America’s needs in the war on fanatical Islamic terrorists and other radical groups inside and outside of the United States. How can America stand for the rule of law on the world stage when it is saying to Muslim parents who force their girls to undergo female genital mutilation or other parents in sects like the Followers of Christ (who have let their children die from easily treated diseases) that they should be able to insist on watered down penalties through the least restrictive means test?

Recommendation: I suggest that Congress eliminate the misguided “least restrictive means test” from the RFRA/RLUIPA formula and put public policy back into its own hands.

2. RFRA’s Endangerment of Children. As the RFRA formula has migrated from Congress to the states, it has carried with it increasing risks for children. Those who defend RFRA argue that the children’s cases are no argument against RFRA, because the protection of children always serves a “compelling interest.” This is a half-truth. Yes, they are correct on the compelling interest test, but they are leaving out the “least restrictive means” analysis. That element has opened the door to watering down laws that protect children. Most recently RFRA allowed a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints to refuse to testify in a child labor law case. *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572, at *1, *4 (D. Utah Sept. 11, 2014) (The U.S. Department of Labor and U.S. Attorney’s Office in Utah investigated potential child labor

violations during harvest activities at a pecan ranch, seeking an FLDS member to explain how the ranch operated; court held for the FLDS member, holding that compelling the FLDS member to testify was not the least restrictive means to obtain information for the investigation). As discussed above, it is also an argument to reduce penalties on parents who harm their children.

If the vast majority of the children’s cases are unsuccessful under RFRA, as its advocates repeatedly assert, the only beneficiaries of the law as it relates to children are church lawyers. RFRA and its state counterparts have led to one unnecessary case after another. *United States v. Brown*, No. CIV. 07-5037, 2007 WL 2746608, at *1 (W.D. Ark. Sept. 18, 2007) *aff’d*, 312 F. App’x 828 (8th Cir. 2009) (RFRA does not provide legal right to grow or distribute marijuana); *Fernandez v. Mukasey*, 520 F.3d 965 (9th Cir. 2008) (No substantial burden to religious exercise, since lack of qualifying relative was not due to aliens' Catholic beliefs, which did not prevent adopting child as qualifying relative.); *Gary S. v. Manchester School Dist.*, 374 F.3d 15 (1st Cir. 2004) (RFRA does not give private school attendees the right to receive all the services that public school children receive under the rubric of free and appropriate public education); *In re Watson*, 309 B.R. 652 (B.A.P. 1st Cir. 2004) *aff’d*, 403 F.3d 1 (1st Cir. 2005) (RFRA does not protect right to use income to pay for religious private school education.); *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist.* No. I-1, 942 F. Supp. 511 (W.D. Okla. 1996) *aff’d sub nom. Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist.* No. I-L, 135 F.3d 694 (10th Cir. 1998) (Compelling children to go to school does not substantially burden religious exercise.); *Nieuwenhuis by Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ.*, 996 F. Supp. 855 (E.D. Wis. 1998) (RFRA claim fails because a refusal to extend benefits available in a public school to students enrolled in private school does not burden religious exercise.); *In re Three Children*, 24 F.Supp.2d 389 (D. N. J. 1998) (RFRA does not compel the Court to establish this privilege because the government’s interest in investigating/prosecuting crimes outweighs the incidental burden on free exercise.); *Battles v. Anne Arundel Cnty. Bd. of Educ.*, 904 F. Supp. 471, 477 (D. Md. 1995) *aff’d*, 95 F.3d 41 (4th Cir. 1996) (State statute monitoring home school program does not substantially burden religious exercise.”); *Thiry v. Carlson*, 887 F. Supp. 1407 (D. Kan. 1995) *aff’d*, 78 F.3d 1491 (10th Cir. 1996) (Although condemnation would impose burden on religious practices of plaintiffs, burden was not so substantial as to give rise to claim under the RFRA and plaintiffs failed to establish any violation of rights guaranteed by free exercise clause of First Amendment.); *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995) (parents' economic burden of providing their hearing-impaired child with required cued speech services because they sent the child to a private religious school that did not receive such services funded by the county, did not substantially burden the parents' free exercise of religion under RFRA.); *Klemka v. Nichols*, 943 F. Supp. 470, 473 (M.D. Pa. 1996) (Arrest during memorial service did not violate RFRA); *Adoption of Brooke*, 42 Mass. App. Ct. 680, 679 N.E.2d 569 (1997) (Mother's own exercise of religion was not burdened where her rights with respect to the designation of the religion of her child's adoptive parents were terminated when she did not surrender the child for adoption.); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (App. Div. 1997) (While the First Amendment to the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity remains subject to regulation for the protection of society.); *Harless by Harless v. Darr*, 937 F. Supp. 1339 (S.D. Ind. 1996) (School policy restricting times and place for distribution of printed matter by students and requiring prior approval does not violate RFRA); *A.H. ex rel. Hernandez v. Northside Indep. Sch. Dist.*, 916 F. Supp. 2d 757 (W.D. Tex. 2013) (School requirement of wearing school badge for ID did not violate substantially burden free exercise); *Jeffs v. State*, No. 03-10-00272-CR, 2012 WL 601846 (Tex. App. Feb. 24, 2012) (Home search in relation to criminal investigation did not violate RFRA); *Combs v. Homer Ctr. Sch. Dist.*, 468 F. Supp. 2d 738 (W.D. Pa. 2006) *aff’d in part, vacated in part, remanded sub nom. Combs v.*

Homer-Ctr. Sch. Dist., 540 F.3d 231 (3d Cir. 2008) (Pennsylvania statute specifying home education programs did not substantially burden exercise of religion, and thus did not violate Pennsylvania Religious Freedom Protection Act); *Ex parte Snider*, 929 So. 2d 447 (Ala. 2005) (Order providing that religious training of child during visitation with ex-wife was not to involve training that was disparaging or critical of ex-husband's religious beliefs did not violate ex-wife's free exercise of religion).

The RFRA's are layered on top of pre-existing religious exemptions.¹ It is a fact that when RFRA was enacted there were already many troubling religious exemptions affecting the safety and health of children, including vaccination exemptions (that now threaten our collective herd immunity); medical neglect exemptions (that have paved the way to deaths of children across the country, most recently in Idaho); and education exemptions or failures to enforce education requirements in religious schools (that have disabled children in multiple faiths), among others. Why, in the world, would Congress want to further incentivize harm to children in religious settings in this way?

Recommendation: I suggest an exemption of all children's issues from RFRA. If there are going to be laws that permit adults to violate the laws that protect children, that debate needs to be specific and in full sunlight.

3. **Attorneys fees.** Both RFRA and RLUIPA permit religious claimants to obtain attorneys fees and have created a cottage industry for lawyers to litigate on behalf of religious entities against the government on issues that never would have been in federal court before.

That means taxpayers are being forced to underwrite the government's necessary defenses to RFRA/RLUIPA attacks on neutral, generally applicable laws, from civil rights to child protection to protecting the character of the residential neighborhoods that mean so much to so many Americans. Typically in these cases, the attorneys fee provisions have been particularly insidious, because even if the religious entity cannot or will not win on the merits, the only way out of expensive federal litigation for local, state, and federal governments is through a settlement that includes attorneys fees.

Recommendation: I suggest adding a proviso in RFRA/RLUIPA limiting fees in these cases to circumstances where the religious claimant can prove by a preponderance of the evidence in civil cases and beyond a reasonable doubt in criminal cases that the claimant will prevail under the law. In all other cases, each side bears its own attorneys fees and costs. That will right the balance to some extent and discourage the frivolous cases and the strike suits in which lawyers for believers, churches, synagogues, and temples threaten local and state governments with "millions in attorneys fees" to force them to cave to the detriment of their citizens before a lawsuit is even filed and where the claim is borderline or weak.²

¹ RFRA's are layered on top of every religious exemption, including tax exemptions. I sincerely wonder why religious entities have not yet invoked it to get around numerous taxes they do have to pay.

² There is no way to track how many times a government entity has simply conceded a RFRA claim to avoid the costs of litigation, to the detriment of other citizens, but in my experience it is common.

Thank you for this opportunity to add these thoughts on the most serious problems with the RFRA/RLUIPA formula to the permanent public record. As a believer myself, it is my hope that the United States can be returned to common sense and ordered religious liberty and away from the troubling path it is now on.

Sincerely,

A handwritten signature in black ink, appearing to read "Marci A. Hamilton", with a long horizontal flourish extending to the right.

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law

**Written Testimony of the
Secular Coalition for America
Submitted to the Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
for the Hearing on
“Oversight of the Religious Freedom Restoration Act and the Religious Land Use and
Institutionalized Persons Act”
February 13, 2015**

The Secular Coalition for America submits this testimony to the Subcommittee on the Constitution and Civil Justice of the United States House of Representatives Committee on the Judiciary for the hearing entitled: “Oversight of the Religious Freedom Restoration act and the Religious Land Use and Institutionalized Persons Act.” This testimony will only focus on the current interpretation of the Religious Freedom Restoration Act and its impacts.

The Secular Coalition for America is the leading organization promoting the viewpoints of nontheistic Americans and their federal policy concerns. Headquartered in Washington D.C., and founded in 2005, our mission is to increase the visibility of and respect for nontheists in the United States, and to protect and strengthen the secular character of our government as the best guarantee of freedom for all Americans. We are members of the Coalition for Liberty and Justice, which is a coalition of civil rights, civil liberties, religious, non-religious, LGBT and women’s organizations which fights against religious exemptions. We believe that religious liberty and the protections granted to individuals under the Religious Freedom Restoration Act have been converted from measures designed to protect to tools used to ostracize and discriminate.

The Religious Freedom Restoration Act Has Strayed From The Original Intent Of Its Authors and Supporters

In 1993, the outcome of the United States Supreme Court’s restricted interpretation of the Constitution’s Freedom of Religion clause in *Employment Division vs. Smith* in 1990 brought together a broad coalition of organizations that worked with a bipartisan group of legislators to draft the Religious Freedom Restoration Act (RFRA). Designed to enhance protections for religious minorities from prosecution under otherwise neutral laws of general applicability, the law sought to restore the compelling interest test to “[strike] a sensible balance between religious liberty and competing prior government interests” that the Smith decision eliminated.¹

¹ 42 U.S.C. § 2000bb "Congressional findings and declaration of purposes of the Religious Freedom Restoration Act."

In the twenty years since its passage, however, the original intent of restoring balance was increasingly manipulated to support unreasonable demands under the guise of religious freedom. The concept of religious liberty was exponentially expanded from the rights of an individual to hold personal beliefs to actions which impose those beliefs on others and cause harm to third parties. This outrageous distortion was codified by the recent U.S. Supreme Court *Burwell v. Hobby Lobby Stores, Inc.* interpretation of RFRA to allow the religious practice of an employer to be imposed upon employees.

Far from its birth right as a shield to protect minority religious beliefs, RFRA is now a weapon. It a sword wielded in the name of the religious majority, cutting a path for the “righteous” and cutting down those who do not observe their tenets. In *Hobby Lobby* millions of women were left vulnerable, their healthcare, families, and futures now beholden to their employer’s religious beliefs and practices. Across the country “religious liberty” is used to justify discrimination towards the LGBT community. Several states have or are considering adopting their own Religious Freedom Restoration Acts, authorizing religiously motivated discrimination by businesses to deny service and civil rights in a way not seen for half a century.

This continuously expanding misuse of religious freedom has capabilities far beyond a sword to become a weapon of mass destruction, undoing years of anti-discrimination statutes and leaving all protected classes vulnerable. As legal interpretations continue to construe RFRA as trumping anti-discriminations protections for third parties, this future is quickly becoming our new reality.

The Religious Freedom Restoration Act Needs To Be Restored To Its Original Purpose

In her dissent to the *Hobby Lobby* case, Justice Ruth Bader Ginsburg noted that, “Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.”² This radical departure from the intent of the RFRA runs counter to the protection of freedom.

The values enshrined in RFRA are worth preserving, but limitations are required to best protect the rights of all Americans. The Religious Freedom Restoration Act should be updated to prevent third party harms and restore the true intent of the legislation. An individual is given rights so long as they do not infringe upon the rights of others. The current language and interpretation of RFRA leaves countless Americans susceptible to having their rights infringed because of the beliefs of their neighbors, co-workers, employers, or community. To first step in restoring the balance originally sought with RFRA’s enactment is increasing protections for third parties.

² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S., 66 (2014)

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

Hearing

“Oversight of the Religious Freedom Restoration Act and the
Religious Land Use and Institutionalized Persons Act”

Testimony of the Center for Reproductive Rights

March 2, 2015



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The **Center for Reproductive Rights** (the “Center”) is a non-profit, public-interest organization dedicated to the advancement of reproductive rights under the U.S. Constitution and as fundamental human rights, both in the United States and throughout the world. The Center’s domestic and global programs engage in litigation, policy analysis, legal research, and public education to advance women’s equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services.

Because laws granting religious exemptions to otherwise-applicable laws are frequently discussed in the context of reproductive health care, the Center continuously tracks religious-refusal policies, both in the United States and around the world. It has been particularly engaged in the discussion regarding the Affordable Care Act’s contraceptive-coverage benefit, from testifying before the Institute of Medicine’s panel on preventive services in 2010 to serving as the lead counsel for a Supreme Court *amicus* brief in *Burwell v. Hobby Lobby*,¹ representing leading international and comparative law scholars who explained why Hobby Lobby’s claims fly in the face of global norms.

INTRODUCTION AND SUMMARY OF TESTIMONY

The U.S. Supreme Court decision in *Burwell v. Hobby Lobby* departed from the original purpose of the Religious Freedom Restoration Act (“RFRA”) by allowing it to be invoked to protect one person’s religious exercise even where such exercise imposes a significant and tangible burden on another person. Prior to *Hobby Lobby*, no court had made such a holding – either under RFRA or under the Free Exercise Clause.² The Center offers this testimony to provide a global context for the debate over the proper limits on religious exercise to protect the rights of others, specifically with regard to reproductive health care services.

Other nations have weighed the rights of conscientious objectors against the rights of patients who seek access to health care, including reproductive health services. Their approach is instructive. Although it is still a relatively new issue, most countries recognize some degree of protection for conscientious objectors who have religious objections to particular health care services. However, none would recognize the claims of Hobby Lobby and others that this protection extends to corporate entities and allows an objector to obstruct access to services.

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 U.S. 2751 (2014).

² See, e.g. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (holding that a tax exemption for religious periodicals “burden[ed] nonbeneficiaries by increasing their tax bills”).

Insofar as other constitutional democracies have addressed these issues, they have not recognized a non-religious organization's request for exemption from a law requiring it to provide health insurance that includes coverage for the full range of legal contraception. Foreign courts, international human-rights bodies, and medical organizations all recognize that access to affordable contraception is a fundamental component of a woman's liberty, dignity, and equality.

Many foreign states provide robust protections for conscientious objectors for whom providing a medical procedure would involve breaching a deeply held religious view. But those states couple the recognition of conscientious objection rights with the guarantee that women have access to the health care services to which they are entitled. Accordingly, the exercise of conscientious objection is regulated in order to give effect to both rights. As such, while a conscientious objector can refuse to provide a specific medical service, court decisions, laws, regulations, and medical codes of ethics require the objector to ensure that the patient is able to receive the service from a non-objector.

Moreover, when anyone other than a person who directly participates in the medical procedure asserts a right of conscientious objection, that assertion has been rejected. We are unaware of any decision by a foreign court or human-rights tribunal extending the right of conscientious objection to a for-profit corporation, much less where the issue in question is providing insurance coverage for basic health care services such as contraception.

GLOBAL LEGAL DEVELOPMENTS CONFIRM THAT HEALTH CARE IS AN ESSENTIAL COMPONENT OF WOMEN'S HUMAN RIGHTS AND MAY NOT BE CIRCUMSCRIBED BY THE ASSERTION OF RELIGIOUS CONVICTIONS BY OTHERS

The argument that has been advanced before this Subcommittee and elsewhere—a for-profit corporation's claim of a religious exemption from a public health law requiring insurance coverage for safe, lawful, affordable contraceptives—has not been recognized by foreign courts or other international tribunals. To the extent such courts and tribunals have addressed similar issues, they have rejected assertions of conscientious objector status by anyone other than individuals who directly participate in providing a medical service.

A. Foreign And International Law Serves As A Useful Touchstone for Resolution of This Perceived Conflict

Respect for religious liberty, the separation of church and state, and equal protection of the law are all values the United States shares with other constitutional democracies.³ Just as we have influenced the jurisprudence of other states, so too do we benefit from understanding how foreign nations that share many of our legal attributes, traditions, and history have confronted similar questions. “[T]he way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances” offers concrete evidence of solutions to common problems. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting); see also *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“These countries are our ‘constitutional offspring’ and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.”).

In particular, this Subcommittee can benefit from examining the way in which foreign courts have construed the principles of “liberty,” “dignity” and “equality” in similar cases. See *Lawrence v. Texas*, 539 U.S. 558, 572-573, 576-577 (2003). As the U.S. Supreme Court has explained, “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Indeed, the Court has a long history of looking to the practices of other democratic states to resolve previously unexamined questions. For example, when state mandatory vaccination laws were challenged as unconstitutional in the early twentieth century, the Court looked to the practices in several European countries to satisfy itself that the restraints on liberty entailed by the law were reasonable in light of current understandings of scientific knowledge and the practices of other

³ See Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int’l L. 593, 598-599 (1997) (tracing the traditional American constitutional safeguards for disestablishment and freedom of religion from the American founders to the French Revolution, the creation of an independent India, and Nelson Mandela’s political leanings as reflected in the Constitution of the Republic of South Africa); see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 (“Everyone has the right to freedom of thought, conscience and religion * * * . Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”).

governments. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905); see Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* 111 (2010).

The way foreign and international law has treated conscientious objections to the provision of reproductive services can aid this Subcommittee in understanding how to strike the appropriate balance between ensuring access to basic health care and protecting conscientious objection based on religious convictions.

B. The Opinion Of The World Community Supports Access To Health Care And Family Planning, Including Contraception

The U.S. Supreme Court has long recognized the link between women's access to family-planning services and their autonomy: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

International human-rights and health institutions have also recognized this basic fact. For example, an analysis by the World Health Organization (the directing and coordinating authority for health within the United Nations) confirms that women's ability to control their fertility represents "a profound shift in the lives of women," and "an opportunity for enhanced participation in public life." World Health Organization, *Family Planning: A Health and Development Issue, a Key Intervention for the Survival of Women and Children 1-2* (2012).⁴

International instruments on population and development, which set priorities for global sustainable development, emphasize the equality and empowerment of women. For example, the 1994 International Conference on Population and Development (ICPD) Programme of Action (the Cairo consensus), adopted by the United States and 178 other countries, explicitly affirmed that reproductive rights are human rights. The ICPD found that reproductive rights are grounded in

⁴ Available at http://apps.who.int/iris/bitstream/10665/75165/1/WHO_RHR_HRP_12.23_eng.pdf. See also U.N. Development Programme, *Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World* 128 n.90 (2013) (concluding, based on a study of 97 countries, that "higher fertility is associated with lower labour force participation of women during their fertile years" and that "on average, each additional child reduces female labour force participation 5-10 percentage points for women 20-44"); David Canning & T. Paul Schultz, *The Economic Consequences of Reproductive Health and Family Planning* 6, *The Lancet* (July 10, 2012), available at <http://www.mamaye.org/sites/default/files/evidence/The%20economic%20consequences%20of%20reproductive%20health%20and%20family%20planning.pdf> (concluding that evidence from Asia and Africa suggests that fertility declines from access to family planning "change the social and economic position of women, reducing gender inequality and allowing women more opportunity to enter formal employment").

fundamental freedoms that are already recognized in national laws and international human rights instruments, such as rights to life, non-discrimination, privacy, and the right to be free from inhumane and degrading treatment.⁵ The ICPD concluded that guaranteeing women’s reproductive health rights is critical for achieving gender equality and ensuring women’s full participation in all aspects of society, and it called on states to effectuate these commitments by investing in family planning. To emphasize the point, the ICPD urged states to “make available a full range of effective [contraceptive] methods.”⁶ The United States not only affirmed the Cairo consensus, but was also a leading voice at the conference⁷ and has championed the ICPD framework ever since.⁸

International human rights standards have increasingly articulated protection for reproductive rights, particularly in the area of contraception. For example, the Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights (ICCPR), has recognized that a woman’s ability to control her reproductive decision-making through the use of contraception is deeply rooted

⁵ International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995). Subsequent international consensus documents are in accord. For example, the Beijing Platform for Action, which elaborated on the commitments made in the ICPD Programme of Action, specifically acknowledged the role that sexual and reproductive health plays in women’s equality. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 92, U.N. Doc. A/CONF.177/20/Rev.1 (1996); see also Christina Zampas, *Legal and Ethical Standards for Protecting Women’s Human Rights and the Practice of Conscientious Objection in Reproductive Healthcare Settings*, 123 *Int’l J. Gynecology & Obstetrics* S63, S64 (2013); Christina Zampas & Ximena Andión-Ibañez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 *Eur. J. Health L.* 231, 234 (2012).

⁶ International Conference on Population and Development, *supra*, ¶¶ 7.2, 7.5(a), 7.12, 7.14(c). The ICPD also condemned draconian population policies, including forced sterilization, thereby affirming that coercive laws, policies and practices that fail to respect individuals’ autonomy and decision-making must be eliminated. *Ibid.*

⁷ See, e.g., Albert Gore, U.S. Vice President, Statement at the International Conference on Population and Development (Sept. 5, 1994) (“here at Cairo, there is a new and very widely shared consensus * * * . The education and empowerment of women, high levels of literacy, the availability of contraception and quality health care—these factors are all crucial.”), *quoted in* International Conference on Population and Development, *supra*, at 176.

⁸ Hillary R. Clinton, U.S. Secretary of State, Remarks on the 15th Anniversary of the International Conference on Population and Development (Jan. 8, 2010) (“[W]e are rededicating ourselves to the global efforts to improve reproductive health for women and girls. Under the leadership of this Administration, we are committed to meeting the Cairo goals.”), *available at* <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135001.htm>.

in fundamental rights such as the right to equality and nondiscrimination.⁹ The Human Rights Committee has recommended the repeal of laws that ban contraceptive access¹⁰ as well as laws requiring or coercing sterilization.¹¹ It has also recognized that cost is a key barrier to contraceptive access and has urged governments to make contraception widely available and affordable.¹²

As a state party to the ICCPR, the United States has agreed to respect, protect, and fulfill the right of women's equality enshrined in the Covenant. In fulfilling its reporting obligations under the ICCPR, the United States has cited the Affordable Care Act as evidence of our nation's compliance with our treaty obligation to ensure

⁹ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Albania*, ¶ 14, U.N. Doc. CCPR/CO/82/ALB (Dec. 2, 2004); Human Rights Committee, *Concluding Observations: Hungary*, ¶ 11, U.N. Doc. CCPR/CO/74/HUN (Apr. 19, 2002); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/ML (Apr. 16, 2003); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Viet Nam*, ¶ 15, U.N. Doc. CCPR/CO/75/VNM (July 26, 2002).

¹⁰ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*, ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012).

¹¹ Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); Human Rights Committee, *Concluding Observations by the Human Rights Committee: Peru*, ¶ 21, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2000); Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Peru*, ¶ 13, CCPR/C/PER/CO/5 (2013); Human Rights Committee, *Concluding Observations: Czech Republic*, ¶ 10, U.N. Doc. CCPR/C/CZE/CO/2 (2007); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 13, U.N. Doc. CCPR/C/SVK/CO/3 (2011); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 12, U.N. Doc. CCPR/CO/78/SVK (2003).

¹² Human Rights Committee, *Concluding Observations: Republic of Moldova*, ¶ 17, U.N. Doc. CCPR/C/MDA/CO/2 (2009); Human Rights Committee, *Concluding Observations: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (2004); Human Rights Committee, *Concluding Observations: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (2000); Human Rights Committee, *Concluding Observations: Poland*, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Oct. 27, 2010). Consistent with the ICCPR, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which the United States has signed but not ratified, directs States to "eliminate discrimination against women in the field of health care in order to ensure * * * access to health care services, including those related to family planning." CEDAW art. 12(1). Recommendation 24 of CEDAW's interpretive committee has elaborated on the content and meaning of art 12 by noting that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers." See Report of the Committee on the Elimination of Discrimination against Women, 20th & 21st Sess., Jan. 19-Feb. 5, June 7-25, 1999, ch. I, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999).

equal access to health care to all segments of society, including women and racial and ethnic minorities.¹³

The United States has also pointed to the Affordable Care Act as evidence of its compliance with other international human-rights commitments. In October 2013, the United States cited the Affordable Care Act in its report to the U.N. Committee on the Elimination of Racial Discrimination, as one way that the country is complying with the Committee's 2008 recommendation that it take steps to "facilitate[e] access to adequate contraceptive and family planning methods"¹⁴ in order to reduce persistent health disparities in women and minorities.¹⁵ Similarly, in the Universal Periodic Review of the United States by the Human Rights Council, the United States cited the Affordable Care Act as evidence of its compliance with international human rights duties to end discrimination against women in health care.¹⁶

Consistent with these international standards, U.S. foreign policy makes access to family planning a cornerstone of U.S. efforts to promote women's equality around the world. In remarks to the Third International Conference on Family Planning in November 2013, Secretary of State John Kerry reaffirmed the United States' investments in family planning programs as critical to furthering women's equality around the world: "And we'll need to find new ways to remind people that when women and girls are better able to stay healthy and pursue new opportunities, they are also better able to contribute to the success of their families, their communities,

¹³ Human Rights Committee, *Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America*, ¶ 90, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

¹⁴ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (2008).

¹⁵ Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention: Seventh to Ninth Periodic Reports of States Parties Due in 2011: United States of America*, ¶ 139, U.N. Doc. CERD/C/USA/7-9 (Oct. 2, 2013); see also *id.* at ¶ 196 ("The United States is also increasing women's access to health care through the ACA which, inter alia, ensures that more women have access to health care services for healthy pregnancies * * * .").

¹⁶ Human Rights Council, *Working Group on the Universal Periodic Review: National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1*, ¶ 37, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) ("[O]ur recent health care reform bill also lowers costs and offers greater choices for women, and ends insurance company discrimination against them.").

their countries and the world. The fact is, when women and girls thrive, so do the people around them.”¹⁷

C. The Foreign And International Authorities That Recognize A Limited Right To Conscientious Objection Give Priority To Women’s Right To Access Reproductive Health Care

Where a right to conscientious objection has been recognized, foreign and international authorities have required that the exercise of an objection must not interfere with a woman’s access to reproductive health services. Consistent with the clear consensus on the importance of birth control to the health of women and families, access to contraception is necessarily included in the health services that are given priority over the objection.

1. Where conscientious objection is recognized, its exercise is regulated to ensure that women can still access reproductive health care

Many nations’ health care regimes offer robust protections to individuals for whom directly providing a particular health service would violate a deeply held religious belief. But, in general, systems that extend conscientious-objection protections pair the ability of an individual to invoke the right with a guarantee that patients may access health care services from a non-objecting party.¹⁸

Numerous authorities that have recognized conscientious objection in health care have done so in the context of pregnancy-termination services. We have identified only one decision addressing conscientious objection to the provision of contraception, and the result was an unequivocal endorsement of women’s access to birth control.

In that case, the European Court of Human Rights ruled that pharmacists did not have a right to conscientiously object to providing contraceptive pills to customers with valid prescriptions. *Pichon and Sajous v. France*, App. No. 49853/99 (Eur. Ct. H.R. 2001) (English translation).¹⁹ The pharmacists invoked Article 9 of

¹⁷ John Kerry, U.S. Secretary of State, Video Remarks on Third International Conference on Family Planning, Washington, D.C., Nov. 12, 2013, *available at* <http://www.state.gov/secretary/remarks/2013/11/217523.htm>.

¹⁸ The notion of a right of conscientious objection in the context of health care is a relatively new phenomenon. “In contrast to conscientious objection to military service, until quite recently, conscientious objection by health care professionals does not appear to have been a familiar occurrence.” Mark R. Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis* 14 (2011).

¹⁹ *Available at* <http://www.strasbourgconsortium.org/document.php?DocumentID=4942>.

the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), which provides “the right to freedom of thought, conscience and religion.” *See id.* at 3. But the court reasoned that Article 9 “does not always guarantee the right to behave in public in a manner governed” by one’s religious beliefs. *Id.* at 4. The court concluded that conscientious objection by pharmacists could not disrupt the regulated sale of contraceptives under French law. “[A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy,” the pharmacists “cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products * * *.” *Ibid.*

Decisions addressing conscientious objection in the context of pregnancy-termination services likewise have prioritized women’s access to health services. The European Court of Human Rights has held that, if a state permits conscientious objection by health professionals, it has a corresponding obligation to protect the rights of patients:

For the Court, States are obliged to organise their health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

R.R. v. Poland, App. No. 27617/04, at 47 (Eur. Ct. H.R. 2011).²⁰ In that decision, the court ruled a woman’s right to respect for her private life—which encompasses “the right to personal autonomy and personal development”—was violated because Polish law did not provide an effective mechanism for her to obtain diagnostic tests to determine fetal abnormality following her doctors’ refusal to conduct such tests on grounds of conscience. *Id.* at 39-40, 47-48; *see also P. & S. v. Poland*, App. No. 57375/08, Eur. Ct. H.R. (2012) (reaffirming that states must ensure that conscientious objections do not interfere with patients’ rights to obtain services).

Numerous other high-court decisions, many from predominantly Catholic countries, prioritize the protection of women’s access to health services. In Colombia, for instance, the Constitutional Court held that “since the conscientious objection is not an absolute right, its exercise is limited by the Constitution itself; that is, it cannot violate the fundamental rights of women.” Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 2009, Sentencia T-209/08, ¶ 4.6 (Colom.). In order to protect women’s rights, the court required that, “if a doctor alleges a conscientious objection, he must immediately send the woman * * * to

²⁰ Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911>.

another doctor” who can provide the treatment. *Id.* ¶ 4.3; *see id.* Conclusion ¶ 11. And the court reiterated that, “although health professionals are entitled to express their conscientious objection, they cannot abuse this right * * * by not immediately referring the pregnant woman to another physician that is willing to perform the procedure.” *Id.* ¶ 5.13.²¹

National bodies that regulate the medical profession impose similar requirements. For example, Portugal’s Ministry of Health requires health care institutions to ensure women’s access to abortion services where the procedure is otherwise unobtainable because of the conscientious objections of health care professionals. *Interrupção Voluntária Da Gravidez/Serviços Obtertricia*, Portaria No. 189/98 de 21 março 1998 (Port.). Likewise, the United Kingdom’s General Medical Council guidance instructs objecting physicians that they must “[m]ake sure that the patient has enough information to arrange to see another doctor who does not hold the same objection,” or if it is not practical for the patient to make arrangements, to make sure that arrangements are made—without delay—for another suitably qualified colleague to advise, treat or refer the patient.” General Medical Council, *Personal Beliefs and Medical Practice* ¶¶ 12(c), 13 (Mar. 25, 2013) (U.K.). Similarly, Norway conditions a doctor’s “refus[al] to treat a patient” on the patient’s “reasonable access to treatment by another doctor.” *Den Norske Legeforening* [Code of Ethics for Doctors], § 6 (Nor.) (translation on file with counsel).

International medical associations impose similar requirements, based on the principle that a doctor’s primary duty is to the patient. The World Medical Association (WMA), a global organization representing physician groups from more than 100 countries, including the American Medical Association, British Medical Association, and Canadian Medical Association, mandates that a “physician may not discontinue treatment of a patient * * * without giving the patient reasonable

²¹ Citing the decisions from the European Court of Human Rights and the Colombian Constitutional Court discussed in the text, the Inter-American Commission on Human Rights (IACHR) has addressed conscientious objection in the context of health professionals who object to “family-planning methods, emergency oral contraception,” and other reproductive health services. IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective* ¶¶ 94-95, 99 (2011), *available at* <http://www.oas.org/en/iachr/women/docs/pdf/womenaccessinformationreproductivehealth.pdf>. The Commission’s report recommended that “States must guarantee that women are not prevented from accessing information and reproductive health services, and that in situations involving conscientious objectors in the health arena, the States should establish referral procedures, as well as appropriate sanctions for failure to comply with their obligation.” *Id.* ¶ 99.

assistance and sufficient opportunity to make alternative arrangements for care.” World Medical Association, Declaration on the Rights of the Patient (1981).²²

The International Federation of Gynecology and Obstetrics (FIGO), which represents 125 national associations of gynecologists and obstetricians, recognizes that “physicians have an ethical obligation, at all times, to provide benefit and prevent harm for every patient for whom they care.” International Federation of Gynecology and Obstetrics, Resolution on “Conscientious Objection” (2006). FIGO’s “Resolution on ‘Conscientious Objection’” requires that objecting physicians refer their patients to another physician who will provide the service. *Ibid.* And when referral is not possible and delay would jeopardize patient health, such as in the case of emergency, the objecting physician must provide the service notwithstanding the objection. *Ibid.*

In the same vein, the World Health Organization has stated that while health care professionals may interpose a conscientious objection, “that right does not entitle them to impede or deny access to lawful * * * services,” and emphasized the duty of objecting physicians to refer patients to another provider, and provide care in an emergency situation. World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems 69 (2012).

Finally, the need to prevent harm to third parties is so strong that many health care regimes require even a conscientious objector to provide services in medical emergencies, when the patient’s life or health is at imminent risk. *See, e.g., Gazzetta Ufficiale della Repubblica Italiana*, Part I, 2 May 1978, No. 140, Art. 9 (It.) (“Conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.”);²³ Abortion Act, 1967, c. 87, § 4.2 (U.K.) (health professionals also not permitted to invoke conscientious objection where providing care “is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant

²² *See also* World Medical Association, About the WMA, <http://www.wma.net/en/30publications/10policies/14/>. The WMA’s pledge for newly admitted doctors states that “the health of my patient will be my first consideration,” and that “I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or *any other factor* to intervene between my duty and my patient.” World Medical Association, Declaration of Geneva (adopted 1948, revised 2006) (emphasis added), *available at* <http://www.wma.net/en/60about/index.html>; *see also* WMA Members’ List, <http://www.wma.net/en/60about/10members/21memberlist/index.html>.

²³ *Available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf.

woman”); Código Deontológico da Ordem dos Medicos, art. 37(3) (Port.) (similar) (translation on file with counsel).²⁴

2. Foreign and international authorities restrict the right of conscientious objection to individuals directly involved in providing the health care service

To the extent that other states and international organizations permit a health care provider to interpose an objection, such a right has generally been extended only to medical personnel directly involved in providing the service in question, and not to staff performing peripheral functions. “[O]nly professionals who otherwise would be required to perform services *directly* on patients can invoke grounds of conscience for the purpose of exemption.” Rebecca J. Cook & Bernard M. Dickens, World Health Organization, Considerations for Formulating Reproductive Health Laws 33 (2d ed. (2000) (emphasis added). Support staff who are not directly involved in patient care may not interpose an objection. *Ibid.*

As the Constitutional Court of Colombia noted, the right of health care providers to refuse to perform medical services “exclusively applies to direct service providers.” Sentencia T-209/08, *supra*, ¶ 4.2. Extending the right to a broader category of individuals would be improper, the Court held, because the duties of ancillary personnel “can hardly be found to have a real connection with moral, philosophical, or religious motives” that form a legitimate basis for an objection. Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009, Sentencia T-388/09 (Colom.).

In Norway, the conscientious objector provision status “applies only to health personnel who either perform or assist in the operation itself, and not to those who attend to, nurse or treat the woman before and after the operation.” The Act dated 13 June, 1975 no. 50 concerning the Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 5, ch. 11, § 20 (Nor.).

Similarly, Spain’s conscientious objector provision covers only those health care providers “directly involved” in the medical procedure because such limits are necessary to ensure the highest levels of access and quality of care. Ley Orgánica 2/2010, de 3 de marzo, de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo [Law of Sexual and Reproductive Health and Abortion] (2010) (Spain). Spanish courts have interpreted this provision to deny objector status to individuals with peripheral roles. S.T.S., Nov. 27, 2009 (209/08) (Spain). For example, a Spanish administrative court refused to recognize a family doctor as

²⁴ Available at <https://www.ordemdosmedicos.pt/index.php?lop=conteudo&op=9c838d2e45b2ad1094d42f4ef36764f6&id=84c6494d30851c63a55cdb8cb047fadd>.

a legitimate objector where he provided information and referrals for abortion but did not perform the procedure himself. Auto del Juzgado Contencioso-Administrativo No. 3 de Málaga, Pieza separada medidas provisionales No. 12.1/2011, Pmtto especial protección derechos fundamentales No. 39/2011, Apr. 5, 2011. The court found that the public interest in a health system that provides safe medical procedures takes precedence over a single doctor's objector status. *Ibid.*

A minority of jurisdictions allow a slightly broader category of non-medical personnel to refuse to perform their duties as long as their role is directly related to the procedure in which they would normally participate. For instance, Italian law permits auxiliary or non-medical personnel to conscientiously object to providing services that are specific to, and necessary for, the interruption of pregnancy and not merely incidental to it. *Legge 22 maggio 1978*, n.194, art. 9, *Gazzeta Ufficiale 22 maggio 1978*, n. 140 (Norme per la Tutela Sociale Della Maternità e sull'Interruzione Volontaria Della Gravidanza) [Italian Rules for the Interruption of Pregnancy] (It.). Persons providing medical assistance before and after the procedure are considered too attenuated to invoke conscientious objector status under the provision. *Ibid.*

The United Kingdom's conscientious objection provision does not distinguish between medical and non-medical personnel for purposes of claiming the right, but rather affords the right to anyone with duties requiring him or her to "participate in any treatment" under the Act. Abortion Act, 1967, c. 87, § 4 (U.K.). Courts in the United Kingdom have interpreted this clause to require the objector to have a role in the medical procedure itself. In 1988, the UK House of Lords upheld the Court of Appeals and lower court decisions to refuse to extend conscientious objector status to a doctor's secretary who was terminated for refusing to type a referral letter because her actions were too remote from participation in the procedure. *Janaway v. Salford*, HA [1988] 3 All ER 1079 (Eng.); see also *Doogan & Wood v. NHS Greater Glasgow & Clyde Health Board* [2013] CSIH 36 (Scot.) (conscientious objection may only be claimed by those "actually taking part in treatment administered in hospital or other approved place" (quoting Lord Keith in *Janaway*, HA [1988] 2 All ER 1079)), *appeal pending*.

The right afforded to Hobby Lobby and similar entities runs contrary to the view that only parties directly involved in providing a medical service are entitled to conscientious objector status. The direct providers here are the physicians who counsel their patients and prescribe contraception methods; there is simply no legal precedent for objections from anyone else. A private corporation that does not provide contraceptives but instead must sponsor an employee health plan that

covers contraception is far too attenuated to justify a claim of conscientious objection.²⁵

3. These limitations on conscientious objection comport with U.S. religious freedom jurisprudence

These limits imposed by foreign and international law on conscientious objection in health care are consistent with how the U.S. Supreme Court balanced the interests at stake in evaluating free exercise claims prior to *Hobby Lobby*. As the Court has stressed, “[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” *Gillette v. United States*, 401 U.S. 437, 461 (1971). Rather, “[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.” *United States v. Lee*, 455 U.S. 252, 259 (1982). Were it otherwise, “the professed doctrines of religious belief [would become] superior to the law of the land, and in effect [] permit every citizen to become a law unto himself.” *Reynolds v. United States*, 98 U.S. 145, 166-167 (1978).

Thus, in evaluating a claim to a religious-based exemption to a general law, the Court has repeatedly considered whether the claimed exemption would burden others. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). When the Court has upheld an exemption, it has usually done so after noting that the religious freedom asserted by plaintiffs did “not bring them into collision with rights asserted by any other individual.” *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 630, 633 (1943); see also *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (rejecting Free Exercise challenge to state Sunday closing law);

²⁵ Indeed, the employer is many steps removed from the services objected to here. Premium dollars—both the employer’s and the employee’s—are aggregated into a large pool, from which the health plan administrator pays claims to reimburse employees or health care providers for covered services. A woman seeking contraception will typically visit a health care provider and receive a prescription, and then must fill that prescription and decide to use the contraception. There are thus numerous intervening decisions between the employer’s sponsorship of the health plan and an individual employee’s use of contraception.

Moreover, health care benefits are appropriately viewed as a form of employee compensation – like wages but in a different form. Justin Falk, Congressional Budget Office, *Comparing Benefits and Total Compensation in the Federal Government and the Private Sector* 2, 4 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-04FedBenefitsWP_0.pdf; see also Buck Consultants, *Total Remuneration*, <https://www.buckconsultants.com/Services/Compensation/Totalremuneration.aspx> (last visited Jan. 24, 2014). It makes no more sense to allow an employer to selectively deny coverage for basic health care services based on a religious objection than it would to allow that employer to forbid an employee from using her wages to purchase contraception.

Sherbert v. Verner, 374 U.S. 398, 403 (1963) (distinguishing petitioner’s claims for unemployment benefits after being fired for refusing to work on her Sabbath day from cases rejecting free exercise challenges to government regulation of conduct that “posed some substantial threat to public safety, peace or order”).

When such a collision of interests exists, the Court has generally refused to grant an exemption to the law. For instance, in *Lee*, the Court explained that “[w]hen 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.” *Id.* at 261. The Court rejected the challenge to social security taxes in *Lee*, observing that “[g]ranted an exemption from social security taxes to an employer *operates to impose the employer’s religious faith on the employees.*” *Ibid.* (emphasis added); *cf. Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment) (“My own view may be shortly put: I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).

D. Foreign And International Authorities Have Thus Far Recognized Conscientious Objector Rights Only For Individuals, Not For-Profit Corporations

Although the question of whether a for-profit corporation can assert conscientious objection is relatively new, to the extent such an assertion has been addressed by foreign and international tribunals, it has been rejected. Conscientious objection in the health care context has only been recognized as extending to individuals. Foreign courts and tribunals have ruled that permitting institutions to conscientiously object to the provision of legal reproductive health services could interfere with the exercise of other fundamental rights, including the right to freedom of conscience of the employees working within such institutions and the right of women to access legal reproductive health services.

For example, the Colombia Constitutional Court has explicitly rejected an institutional right to conscientious objection. Colombian Constitutional Court cases: Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.); Sentencia T-209/08, *supra*; Sentencia T-388/09, *supra*; Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2012, Sentencia T627/12 (Colom.). In a 2006 decision, the court ruled that the right to conscientious objection does not extend to institutions such as clinics, hospitals and health centers; it is only applicable to natural persons. *See* Sentencia C-355/06, *supra*. The court found that institutional objection is not necessary because individuals who belong to or are employed by institutions can still exercise their right to freedom of conscience individually. *Ibid.* Additionally, in a 2009 decision, the Court

reiterated that conscientious objection is an “individual decision and not institutional or collective [decision].” Sentencia T-209/08, *supra*.

Likewise, the French Constitutional Council has recognized that freedom of conscience extends to individuals and not to institutions. The decision upheld the repeal of provisions of the Code of Public Health that permitted “heads of departments in public health establishments to refuse to allow terminations of pregnancy to be practised in their department.” Conseil constitutionnel [CC] [Constitutional Court] decision No. 2001-446DC, June 27, 2001, Rec. 74, ¶ 11 (Fr.).²⁶ Because the head of the department “retains the right under the relevant provisions [of] the Code of Public Health to refrain from terminating [pregnancies] himself; this safeguards his freedom of personal conscience, which cannot be exerted at the expense of that of other doctors and medical staff working in his service.” *Id.* ¶ 15. Moreover, permitting the conscientious objection of the department head to extend throughout the department would undermine the freedom of conscience of the other health care providers working within the institution. *Ibid.*

Laws in many other countries expressly limit conscientious objection rights to individuals and, by extension, refuse to extend the claimed right of conscientious objection to institutions. For example, the laws of Denmark provide that “doctors, nurses, midwives and social and health assistants, or students in these professions, for whom it is contrary to their ethic or religious beliefs to perform or assist in induced abortion, can apply for and be granted exemption.” Sundhedsloven, LBK nr. 913 [Health Act, Law Notification no. 913], at Chapter 28, Section 102, Copenhagen, Civilstyrelsen [Civil Affairs Agency].²⁷ Similarly, New Zealand’s conscientious objector provision extends protections only to a “medical practitioner, nurse, or other person.” Contraception, Sterilisation, and Abortion Act 1977 § 46 (2013).²⁸

²⁶ Available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf. The French Constitutional Council is an interpretive body whose decisions are binding on all public and administrative agencies. See Conseil Constitutionnel, General Presentation, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/presentation.25739.html> (last visited Jan. 24, 2014).

²⁷ Available at <https://www.retsinformation.dk/forms/r0710.aspx?id=130455&exp=1>.

²⁸ Available at <http://www.legislation.govt.nz/act/public/1977/0112/latest/DLM17680.html>. We are aware of only one country—Argentina—that offers a right of conscientious objection to an institution, and that right is limited. There, federal law, allows denominational institutions that provide health services to conscientiously object to the provision of reversible contraception. Decreto No. 1282/2003, May 23, 2003, art. 10. However, only individual medical providers can conscientiously object to abortion services and surgical contraception. Ministerios de Salud [Health Ministry], Guía Técnica para la Atención Integral de los Abortos No Punibles, June 2010, § 6.3.3; Ley (Footnote continued on following page)

That conscientious objection rights adhere only to individuals is consistent with our nation's heritage. The U.S. Supreme Court has repeatedly upheld general laws governing commercial or public activity against free-exercise challenges by institutions involved in those activities. For example, the Court held that the Free Exercise Clause did not require an exception to an IRS policy that tax-exempt status is available only to educational institutions that do not discriminate on the basis of race. *See Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

CONCLUSION

The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act were not intended to, and should not be construed to, allow persons or entities to use their religious beliefs to abridge the rights of others. Both of these laws, and the Free Exercise Clause, were intended to be shields, protecting the right of individuals to exercise their religion. They were never intended to be swords, to allow religious adherents to practice their religious beliefs at the expense of others' rights and wellbeing.

This core understanding of religious liberty – which is understood worldwide – has sadly been lost here at home in the wake of the Supreme Court's *Hobby Lobby* ruling, which fundamentally misconstrued the core of religious freedom. Congress must do what it can to restore the true meaning of religious liberty – that believers can practice their religion without imposing a burden on those who do not share their beliefs.

Respectfully submitted,

CENTER FOR REPRODUCTIVE RIGHTS
1634 Eye Street, N.W., Suite 600
Washington, DC 20006
www.reproductiverights.org

No. 26.130, Aug. 9, 2006, art. 1. In the Australian state of Western Australia, the provisions in the health act that relate to the performance of abortions indicate that “[n]o * * * hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion.” *Health Act 1911* (WA) § 334(2).

**Written Statement for the Record of Rabbi Jack Moline, Executive
Director of Interfaith Alliance**

**House Committee on the Judiciary Subcommittee on the
Constitution and Civil Justice**

**Hearing on “Oversight of the Religious Freedom Restoration Act
and the Religious Land Use and Institutionalized Persons Act”**

March 2, 2015

Chairman Franks, Ranking Member Cohen and members of the Subcommittee, thank you for the opportunity to submit this statement for the record on behalf of Interfaith Alliance for the hearing on oversight of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Person’s Act (RLUIPA). Interfaith Alliance, which seeks to mobilize people of all faiths and those of no particular faith tradition in defense of religious freedom, has a long history working on the implementation of both of these of the laws.

It is no coincidence that my organization celebrated its 20th anniversary last year - just one year after RFRA marked that same milestone. RFRA was born out of the anxiety and legal uncertainty created in the wake of the Supreme Court’s ruling in *Employment Division v. Smith*. Religious advocates and legal scholars alike recognized that ruling had dramatically changed the nature of religious freedom in America. If the plaintiffs in *Smith* had no claim because the law they violated did not specifically target their religious practice, then the protections we assumed for any number of religious practices and practitioners were called into question. Particularly as American religious life grew more diverse and less familiar, requiring that lawmakers had the knowledge and intent to target a religious practice appeared to be an untenable standard.

The founders of Interfaith Alliance saw that protecting the civil rights of all Americans and rectifying the damage done to religious freedom by *Smith* were profoundly linked. That is why, since our inception, Interfaith Alliance has partnered with people of a wide-range of faith traditions to ensure that no federal law or policy stands in the way of a person practicing the tenets of their own faith. Over the years both RFRA and RLUIPA have served as important legal and rhetorical tools toward achieving that goal.

However, even in the immediate aftermath of RFRA’s passage, it was clear that many advocates sought a drastically different definition of religious freedom than we – or, we believe, the framers of the Constitution – had in mind. The years after RFRA saw the ascendancy of a political movement that distorted religious freedom and sought to transform RFRA into a weapon to impose their own religious

ideology onto others. Activists have tried to turn RFRA into a private right to discriminate, seeking exemptions for private companies from non-discrimination policies. Others have sought the ability to foist their religious beliefs onto their employees by controlling their access to benefits and rights at work. This perspective seeks to present religious freedom and civil rights in opposition with one another, rather than forces that grow in tandem.

Since our inception, Interfaith Alliance has fought to counteract this dangerous view of religious freedom. Our work continues to be guided by these twin goals – to defend the personal rights of conscience for people of every faith, while pursuing a definition of religious freedom that expands the Constitution’s guarantee of freedom and equality for all. While we believe that RFRA, RLUIPA, and most importantly the First Amendment, support that approach, dissenting activists and their political and legal allies have not relented.

The proponents of a religious freedom that respects the civil rights of all were dealt a significant blow by the Supreme Court’s ruling in *Burwell v. Hobby Lobby Stores, Inc.* This case found that the owners of Hobby Lobby were entitled, under RFRA, to an exemption to the mandate that they provide comprehensive reproductive healthcare coverage to their employees. Emboldened by this decision, RFRA cases have been filed across the country seeking to wildly expand religious exemptions and grant certain people of faith the right to force their beliefs on those around them. In turn, the anger and resentment this decision has sparked across America threatens to alienate many of religious freedom’s most important allies and defenders.

All of us who cherish religious freedom – including the distinguished members of this Committee - must determine whether RFRA, as currently interpreted by the Supreme Court, is the right vehicle to defend our first freedom. Religious freedom rights are too important for us to allow them to be jeopardized by those who would use them to pursue their own sectarian, partisan agenda. If we allow the status quo to continue of Congress remaining inactive while activists push for the broad and vigorous implementation of the *Hobby Lobby* ruling, the very freedoms that RFRA sought to enshrine will be made vulnerable to attack from all sides.

There is a simple fix to RFRA that Interfaith Alliance and I would propose to you today. Congress should pass legislation that clarifies what many of us have always argued was the true intention of the Constitution: All Americans are guaranteed accommodations for their religious beliefs, unless such an accommodation would result in meaningful harm to identifiable third parties. Such a solution would enable RFRA to embody the idea that civil rights and religious freedom grow together.

Justice Ginsburg envisioned such an approach in her concurring opinion in the case *Holt v. Hobbs* that defended a Muslim prisoner’s right to grow a beard. She

wrote, “Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores*, accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”

The real lesson of RFRA is in how, after a dangerously misguided Supreme Court decision, religious advocates and civil libertarians came together with politicians from both parties and crafted a solution. The time has come for Congress to do so once again. I urge you to look past the political and religious divisions of today and come together to pass legislation that will protect the religious freedom of all and endanger the civil rights of none. Justice Ginsburg has given you a framework in her concurrence in *Holt* – let those words be your guide.

March 2, 2015

US House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
H2-362 Ford House Office Building
Washington, DC 20515

Re: Official testimony for the record on “Oversight of the Religious Freedom and Restoration Act and the Religious Land Use and Institutionalized Persons Act” Hearing held February 13, 2015.

Dear Chairman Franks, Ranking Member Cohen and Members of the Subcommittee:

For 40 years, Catholics for Choice has served as a voice for Catholics who believe that the Catholic tradition supports a woman’s moral and legal right to follow her conscience on matters of important personal decisions, including reproductive health decisions. Throughout the world, we strive to be an expression of Catholicism as it is lived by ordinary people. We are part of the great majority of the faithful in the Catholic church who disagrees with the dictates of the Vatican on matters related to sex, marriage, family life and the proper role of religion in the public sphere. We represent those who believe that Catholic teachings on conscience mean that every individual must follow his or her own conscience. While religious voices and traditions are a vital part of public discourse, religious views should not be given disproportionate weight in public policy discussions. We believe in a world where all voices—the voices of the religious and of the secular, of Catholics and non-Catholics alike—are heard in public policy discussions.

Catholic tradition upholds the right of employees to work in environments that respect their dignity as human beings and that are free from discrimination. Denying a woman healthcare coverage simply because of where she works is discriminatory and wrong. Using religion as tool to single out and control the behavior of those whose beliefs are different is also wrong and antithetical to our long-standing tradition of protecting human dignity. As Catholics, we are called by our faith to follow our consciences in all matters of moral decision-making and to respect the right of others to do the same.

PRESIDENT

Jon O'Brien

**EXECUTIVE
VICE PRESIDENT**

Sara Morello

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True religious freedom is an expansive rather than restrictive idea. It has two sides, freedom of religion and freedom from religion. It is not about telling people what they can and cannot believe or practice, but rather about respecting an individual's right to follow his or her own conscience in religious beliefs and practices, as well as in moral decision-making. The protections in place to preserve religious freedom do not—and should not be considered to—permit religious institutions or individuals to obstruct or coerce the exercise of another's conscience.

The Supreme Court's decision on *Hobby Lobby v. Burwell* was a disaster for women. A wider battle must now be fought against the gross distortion of religious freedom that lies at the heart of this decision. For it is incredible to suggest that an "institution" has a conscience. Institutions do not have consciences—individuals do.

We now need Congress to protect our individual religious liberty and women's reproductive health coverage, as well redress the error of granting corporations a religious conscience and thus the ability to discriminate against individuals who do not share their beliefs. The original champions of the Religious Freedom Restoration Act (RFRA) have stated that their intent—to preserve and protect the shield of religious freedom—has been turned on its head by the court. RFRA was never intended to be a sword to wield against others' religious freedom or a tool to undermine equality. Our government needs to fight for the rights and religious liberty of every woman and every American, not just those who have the ear of the powerful.

The United States Conference of Catholic Bishops (USCCB), the lobbying arm of the bishops, celebrated the *Hobby Lobby* ruling with a promise "to redouble our efforts to build a culture that fully respects religious freedom." The bishops don't seem to account for the general public, both Catholics and non-Catholics, who believe that corporations don't have "religious liberty" rights and that the conscience rights of workers must be protected.

Protecting the freedom of conscience for each and every American regardless of what their beliefs may be—for the atheist, for the LGBTQ employee of a Catholic institution, for the sexual assault victim who seeks care at a Catholic hospital—is indeed the job of the government. Expanding individual refusal clauses to include institutions, and exemptions for religious institutions, sacrifices the rights of individuals. Our public policies should seek to further the common good and to empower people to exercise their conscience-based healthcare decisions, not enable the privileged few to impose their beliefs on others.

Lawmakers of all political hues can come together to support a balanced approach to individual conscience rights. It makes sense for all those who want to provide more options to women seeking to decide when and whether to have a child. It makes sense for those who want to keep the government's involvement in healthcare to a minimum. And it makes sense for those who think that it is the government's role to facilitate the healthcare decisions that people want to make. Above all, it makes sense for a society that believes in freedom of religion—a right one can't claim without extending it to one's neighbor.

Those who would dismiss the conscience of others by imposing their views on society, distort a central concept of our democracy. The bottom line is that protecting conscience rights and preserving individual religious liberty are fundamental responsibilities of our government. Protecting individual conscience, ensuring access to affordable, quality care and ensuring that human dignity and equality before the law is preserved—these are not just ideals, they are basic tenets of our society and the right thing to do.

I thank the Subcommittee for inviting additional testimony on this important subject.

Sincerely,

A handwritten signature in blue ink that reads "Jon O'Brien". The signature is stylized, with the first name "Jon" and the last name "O'Brien" written in a cursive-like font.

Jon O'Brien



Testimony Submitted for the Record

**Gretchen Borchelt
Acting Vice President for Health and Reproductive Rights
National Women's Law Center**

**Hearing on Oversight of the Religious Freedom Restoration Act and the Religious Land
Use and Institutionalized Persons Act**

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

February 13, 2015

With the law on your side, great things are possible.

11 Dupont Circle NW ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax ■ www.nwlc.org

The National Women’s Law Center is a non-profit legal advocacy organization dedicated to the protection of women’s legal rights and the advancement of women’s opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women. The National Women’s Law Center submits this testimony regarding the Religious Freedom Restoration Act as interpreted by the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*

We believe *Hobby Lobby* was wrongly decided. By allowing employers to impose their religious beliefs on their employees and deny insurance coverage of birth control the employees are otherwise guaranteed by law, the decision threatens women’s health and well-being.

This testimony is submitted in order to identify the shortcomings of *Hobby Lobby*, the limits of that decision, and what is at stake moving forward, as Congress begins to address issues related to the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The *Hobby Lobby* Decision

On June 30, 2014, a deeply divided Supreme Court issued a 5-4 decision in *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties v. Burwell*.¹

Justice Alito’s opinion for the majority held, for the first time, that certain closely-held family-owned for-profit businesses like Hobby Lobby and Conestoga Wood are “persons” capable of exercising religion under RFRA, and can bring religious exercise claims under that law.² The majority then concluded, also for the first time, that RFRA permits a for-profit business to deny its employees birth control coverage.

In an opinion that focused primarily on the interests of employers and corporations, the rights and interests of women were largely absent. The decision leaves the women who work for these companies without a critical benefit in the health insurance they receive as compensation for their employment, and pay for through their premium contributions.

The Court’s decision to recognize for-profit corporations as “persons” capable for exercising religion is unprecedented, going far beyond the text and legislative history of RFRA. Indeed, an amicus brief submitted by 19 Senators – who were Members of Congress when both RFRA and the ACA were enacted – shows that Congress never intended to allow for-profit employers to have standing under RFRA, and RFRA was never intended to be read in a manner that would undermine the ACA’s birth control coverage requirement.³

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, Nos. 13-354, 13-356, 2014 WL 2921709 (June 30, 2014).

² *Id.* at 2768-69.

³ Brief for U.S. Senators Murray, Baucus et. al. as Amici Curiae in Support of Hobby Lobby Petitioners and Conestoga Respondents, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356).

As the brief explains, exempting secular, for-profit corporations from the birth control coverage requirement is “inconsistent with the plain language and legislative intent of RFRA.”⁴ Moreover, Congress did not intend for courts to permit for-profit corporations to use RFRA to deny employees access to health care benefits to which they are otherwise entitled.⁵ RFRA was intended to reinstate the protections for religious exercise that existed prior to the Supreme Court’s decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).⁶ Nothing in the legislative history suggests that Congress intended to enact any new protections for any new parties, and at that time, these protections had only been granted to individuals and religious non-profit organizations.⁷

Additionally, a brief submitted to the Supreme Court by 91 House Members carefully explains why, even if the plaintiffs were allowed to bring a RFRA claim, plaintiffs’ claims fail under each prong of the RFRA test.⁸

The Court ignored legislative history, Congressional intent, and its own precedent in allowing for-profit companies to bring a claim under RFRA, and in allowing RFRA to be used as a sword to discriminate against others. Moreover, the majority accepted, without the proper legal analysis, whether the birth control coverage requirement imposed a “substantial burden.”⁹

Additionally, the majority refused to engage in a discussion of the importance of birth control to women, their families, and society at large. Instead, the majority merely “assume[d]” that the government’s interest in the birth control benefit is compelling.¹⁰

Finally, in reaching its decision that the birth control requirement was not the least restrictive means for advancing the government’s compelling interest, the majority relied on alternatives that were not properly or fully briefed before the Court.¹¹

By allowing the owners of some for-profit companies to withhold health insurance coverage of birth control that is otherwise required by federal law, the majority decision makes it more difficult for women to access the basic health care they need, undermining the rights and economic stability of women workers and their families.

The Limits of the *Hobby Lobby* Decision

As bad as this decision is for the women who work for these companies, it is important that the Court’s decision in *Hobby Lobby* remain limited.

⁴ *Id.* at 2.

⁵ *Id.* at 2-3.

⁶ *Id.* at 6.

⁷ *Id.* at 10.

⁸ Brief of 91 Members of the U.S. House of Representatives as Amici Curiae in Support of the Government, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356).

⁹ *Hobby Lobby*, 134 S. Ct. at 2778-79.

¹⁰ *Id.* at 2780.

¹¹ *Id.* at 2781-82.

First, although the *Hobby Lobby* decision is the first time that the Supreme Court has ruled that any for-profit companies can establish a RFRA claim, the decision only applies to certain “closely-held” for-profits.

At the heart of the *Hobby Lobby* decision is the Court’s conclusion that a corporation can rely on RFRA when there is unity of interest between the owners and the corporation such that the corporation’s business practices reflect and promote the owners’ religious beliefs. The Court accordingly considered a variety of indicia that established that the individuals who owned and controlled the companies at issue shared sincere religious beliefs—beliefs that could be attributed to the corporation because of the unity of interests.¹² Only when the religion of the owners can be imputed to the corporation, can the corporation seek protection under RFRA; under these limited circumstances, the Court concluded that the owners’ religious exercise could be protected.¹³

Hobby Lobby, *Mardel*, and *Conestoga Wood Specialties* are each owned and controlled by a handful of members of a single family, all of whom have agreed to run their businesses in conformity with the owners’ shared religious practice.¹⁴ The Court relied on these corporate documents in establishing that the equity holders were operating the companies according to their religious beliefs. *Hobby Lobby*’s statement of purpose, for example, provided that the owners would “[h]onor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”¹⁵ Each family member also signed a “pledge to run the businesses in accordance with the family’s religious beliefs.”¹⁶ *Conestoga Wood Specialties*’s “Vision and Values Statement” also explicitly affirmed that the company’s business practices would “reflect [the owners’] Christian heritage.”¹⁷ And, the company’s board of directors adopted documents that also reflected the owners’ religious beliefs.¹⁸ According to the Court, the companies’ businesses practices further demonstrated that the families ran their companies in accordance with their shared religious beliefs.¹⁹

In other words, only “closely held” companies that “agree to run a corporation under the same religious beliefs”²⁰ can assert a successful RFRA claim under the *Hobby Lobby* decision.

Second, *Hobby Lobby* was focused solely on the question before it—whether the Affordable Care Act’s birth control coverage requirement violated the owners’ religious beliefs under

¹² *Id.* at 2774 (“The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.”).

¹³ *See id.* at 2768 (“A corporation is simply a form of organization used by human beings to achieve desired ends When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

¹⁴ *Id.* at 2764-66.

¹⁵ *Hobby Lobby*, 134 S. Ct. at 2766.

¹⁶ *Id.*

¹⁷ *Id.* at 2764.

¹⁸ *Id.*

¹⁹ *Id.* at n. 28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”).

²⁰ *Id.* at 2774.

RFRA.²¹ The decision does not invalidate other insurance coverage requirements. As the majority opinion explicitly states:

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.”²²

Similarly, the *Hobby Lobby* decision cannot be read to give a sword to those who discriminate in other ways. Specifically, the majority opinion disputes the dissent’s claim that the *Hobby Lobby* decision could provide a cloak for discriminating in hiring on the basis of race. The majority opinion makes it clear that “Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”²³

RFRA Post-*Hobby Lobby*

Since the *Hobby Lobby* decision in June, the Court has applied its ruling in one other case, *Holt v. Hobbs*.²⁴ The facts in *Holt* differed greatly from the facts in *Hobby Lobby*. Gregory Holt, a prisoner in an Arkansas prison, was barred from growing a half-an-inch long beard in accordance with his Islamic religious beliefs. The prison claimed that beards created security risks both because prisoners could hide contraband in them and prisoners could change their appearance by shaving. In January 2015 the Supreme Court unanimously ruled that by barring Holt from growing his beard, the prison had violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA uses the same standard as RFRA.

Justice Ginsburg, in her concurrence joined by Justice Sotomayor, focused on the key difference between the facts in *Holt* and in *Hobby Lobby*: “Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014), accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”²⁵ In other words, allowing Holt to grow a beard did not take away anyone else’s legal rights or impose his religious beliefs on them.

It is this key difference—harm to third parties—that we call upon Congress to make a priority as it considers RFRA and RLUIPA going forward. Congress must stand firm in the principle that religion should never be used as an excuse to discriminate or to harm others. Although the Supreme Court’s decision in *Hobby Lobby* unfortunately allowed that to occur in the case before it, it must not be allowed to happen again.

²¹ *Hobby Lobby*, 134 S. Ct. at 2759.

²² *Id.* at 2783.

²³ *Id.*

²⁴ *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

²⁵ *Id.* at 867.