ADVANCING FAITH, FAMILY AND FREEDOM

Written Statement of Family Research Council

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House of Representatives Judiciary Committee

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Hearing on "The State of Religious Liberty in America"

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Chairman King, Ranking Member Cohen, and Members of the Sub-Committee: Thank you for convening this hearing regarding the importance of protecting religious freedom. We want to highlight the importance of religious freedom protections that ensure government cannot discriminate against individuals and entities because of their sincerely held religious beliefs.

Americans have long enjoyed protections under the First Amendment which encompass a right to avoid government coercion and punishment for living in accordance with their deeply held beliefs. Religious freedom is not merely an American right, although it is foundational to the very existence of the United States. It is a fundamental, inherent human right that inheres to all human beings, of all faiths, everywhere around the world, simply because they bear the image of God. Americans understand this, whether it involves protecting the conscience of those opposed to fighting in wars, the right of pro-life doctors and health care professionals who object to performing abortions, or the myriad other ways our individual consciences might be compromised by government directives. These rights must always be vigilantly protected and guarded against ever-present encroachment. Unfortunately, we've seen a renewed assault on religious freedom and individual rights. This legal assault is exacerbated by new, progressive, and suffocating cultural advocates whose increasing power is only matched by their intolerance of dissent. Indeed, it seems increasingly impossible for Americans to agree to disagree.

Background

The First Amendment to the U.S. Constitution in part provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The first half of this excerpt is what is known as the Establishment Clause, and the latter half is known the Free Exercise Clause. The aim of the Free Exercise Clause is relatively clear from its text – to protect individuals wishing to freely exercise their faith from being restricted in doing so by the government. Historically, its interpretation by the U.S. Supreme Court and other courts has been less clear, and has not always achieved this aim.

Earlier cases provided for a relatively strong free exercise of religion. In *Sherbert v. Verner*,[i] and *Wisconsin v. Yoder*,[ii] the Supreme Court explained that before the government could infringe and burden religious practice protected by the Free Exercise Clause, it has to show that its burdensome regulations are advancing a compelling government interest, and are the least restrictive means to advance this interest. This framework is known as "strict scrutiny," and is the toughest standard for the government to meet when measuring whether its action infringes on constitutional rights.

Yet in its 1990 decision *Employment Division v. Smith*,[iii] the Supreme Court significantly restricted free exercise rights, holding that laws infringing on religious exercise did not violate the First Amendment as long as they were neutral and generally applicable. In *Smith*, an individual sought and was denied unemployment benefits by the State of Oregon because he used peyote – a criminalized, controlled substance – yet he claimed his use of peyote was a religious practice protected by the Free Exercise Clause. The Supreme Court rejected this claim, holding that if a neutral and generally applicable law (such as the uniformly applicable criminal law in this case) happens to infringe on religious practice, such a law does not violate the Free Exercise Clause. The Court distinguished its earlier cases of *Sherbert* and *Yoder*, thus avoiding having to overrule them.

Many rightly saw *Smith* as a reduction in the protection afforded religious liberty, and the reaction to the Court's decision was overwhelming. A coalition of groups from across the religious and legal spectrum – from the Southern Baptists to the ACLU – came together to urge Congress to pass a law restoring strong protections for free exercise claims. The political support for such a law was also overwhelming, including strong backing from Democratic Congressional leaders such as Senator Ted Kennedy, Congresswoman Nancy Pelosi, Congressman Chuck Schumer, and Congressman Jerry Nadler. In 1993, the federal Religious Freedom Restoration Act (RFRA)

was passed unanimously by the U.S. House, 97-3 by the Senate, and signed into law by President Clinton. Upon signing RFRA into law, President Clinton described the event as "majestic" – it demonstrated "our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished." He reminded us we should not be "embarrassed to … advocate a course of action simply because they believe it is the right thing to do, because they believe it is dictated by their faith."[iv]

While the First Amendment's protections are applied to federal and station action, in 1996, the U.S. Supreme Court held in *City of Boerne v. Flores*[v] that RFRA's protections only apply to *federal* and not state and local regulations. Since then, state legislators and governors across the country have responded by passing laws modeled after the federal RFRA in order to protect religious exercise in the face of overly burdensome state and local regulation. But not all states have a state RFRA, and even a person claiming RFRA protections has a high burden of proof in claiming its protections.

A person claiming RFRA protections must establish in court that 1) He or she has a sincerely held religious belief, *and* 2) His or her belief is tied to a religious practice that is substantially burdened by the government. Even if a person proves things, the government can still burden religious practice if it can show that 1) Its regulation advances a compelling government interest, *and* 2) The burden is the least restrictive means of furthering that interest. People bringing claims under RFRA have to overcome *multiple* hurdles before they are entitled to relief, as RFRA claims are not always successful, even when a burden on religious exercise is well established. These situations make it apparent a balancing test is not always ideal – for some circumstances, legislatures need to provide clear exemptions and protections.

Religious Freedom Protections Needed Today

Currently, religious freedom protections are deficient in several ways. There are a number of circumstances in which First Amendment protections should apply, but state and federal laws are insufficient to provide religious exercise protections, including:

- Businesses, universities, and non-profit organizations still need protections of their freedom to belief in the context of the HHS "contraceptive" mandate. This is particularly true because *Burwell v. Hobby Lobby* did not apply to for-profit entities, and making a profit should not prevent an individual or entity from exercising its conscience.
- The Stormans family in Washington State did not want to stock certain abortion-causing drugs at their pharmacies due to their religious convictions, but the state refused to provide a religious exemption in its regulation. Washington does not have a state RFRA, so the Stormans' claim relied on the Free Exercise Clause. The courts, however, rejected this claim on the grounds that the state regulation complied with *Smith* and was neutral and generally applicable. It is possible that even if Washington had a RFRA, the courts may have found a compelling interest in requiring pharmacies to supply certain drugs. Thus, even with a RFRA, it is possible the Stormans religious exercise would not have been adequately protected.
- Child welfare and adoption organizations have been pressured by governmental authorities to compromise their religious views regarding what types of families to place children into, or to stop providing their services to children and parents. The state of Illinois and the local governments in Boston, the District of Columbia, and San Francisco have already discriminated against and severed partnerships with longstanding adoption and foster care providers serving needy children because these governments don't like the beliefs of these organizations. This forced organizations like Catholic Charities, which had served the community for years, to close their doors rather than violate their sincerely held religious beliefs.[vi]

- Individuals and entities need protection in states where Obamacare subsidizes health care plans with elective abortion in order to avoid violating their consciences by being forced to buy a healthcare plan that supports abortion. Twenty-five states have health care programs subsidized by Obamacare that cover elective abortion and 57% of all plans in these states cover elective abortion. In fact, in five states plus the District of Columbia, there are no pro-life health care plan options.[vii] In addition, in five states, 85 to 96% of the plans cover elective abortion, leaving their residents extremely limited pro-life options. People, like Alan Howe of Vermont, have sued over this, and while Alan has received an individual exemption, many Americans who have complained about being forced to be a part of a plan covering abortions still need protection.[viii]
- Individuals, companies, and other entities need explicit protection from loss of tax exempt status or deduction eligibility in the context for their religious positions on marriage or sexuality. During oral argument in *Obergefell v. Hodges*, the federal government hinted it would discriminate against universities, merely because they believe marriage is between a man and a women when Solicitor General Donald Verrilli admitted that the tax-exempt status of religious institutions that define marriage as the union of one man and one woman would "be an issue" if the Supreme Court found a constitutional right to same-sex marriage—which it did.
- Many religious organizations and conventions, like State Baptist conventions, partner with the military to deliver marriage enrichment programming and military religious program contractors provide youth programming. These programs should not be forced to compromise their beliefs in terms of their hiring or standards of conduct in order to partner with the government.
- Current federal regulations require health care providers to provide hormone therapy and sex reassignment surgery to transgender persons attempting to change their gender, even when doing so would violate their sincerely held religious beliefs.
- Multiple businesses have suffered religious freedom violations at the hands of their own state governments. Small businesses like Sweet Cakes by Melissa, or Arlene's Flowers, may seek small business loans or licenses from the federal government, and they should not be precluded from following their conscience as a condition of receiving a license or loan simply because they believe marriage is the union of one man and one woman.
- Private colleges like Gordon College in Massachusetts have been placed under scrutiny by federally recognized private accrediting bodies simply because the schools adhere to the historic Christian commitment to abstinence and natural marriage. If Gordon College were to have lost its accreditation status because of its beliefs regarding marriage, there would be no protections in place to ensure its students would not lose their financial student aid.[ix]
- Organizations are being threatened with being ineligible for charitable giving campaigns because of their religious beliefs on marriage. This is currently happening to the American Family Association in Connecticut.
- Military Service members like Chaplain Wes Modder, who was disciplined for counseling according to his Christian world-view on marriage, and Sergeant Phillip Monk, who suffered adverse action because he voiced his views on sexuality, still need protection.
- The state of California discriminated against judges by barring them from joining membership organizations like the Boy Scouts due to those organizations' positions on natural marriage.[x]
- The states of Michigan and Georgia discriminated against counseling students and punished them because they could not, in good conscience, counsel someone looking to further a same-sex relationship.[xi] The state licensing board in Maine forced a social worker with a decades-long career to defend his license before a state board because he said that he believed kids should have a mom and a dad.[xii] Federal employees who may find themselves in the same positions as these individuals, or as Fire Chief Kelvin Cochran or Dr. Eric Walsh, also need protection.

Should the individuals and groups be excluded from the public square, their freedom to believe steamrolled, their freedom curtailed, and their good work forced to end because of their religious beliefs? To do so would be manifestly unfair and unjust. And thus, it is important to provide explicit religious freedom protections, in the vein of the First Amendment, to Americans wishing to engage in a variety of activities. Congress, and states as well, should pass legislation to prohibit government discrimination against people due to their religious beliefs.

Conclusion

Penalizing people for what they believe should be unacceptable in any civilized democracy founded on principles of pluralism, and is certainly unacceptable to Americans. A government that punishes people for their beliefs is more reminiscent of the Soviet Bloc than of Western Democracy. No governmental authority in the United States of America should ever discriminate against, punish, or penalize people based on their sincerely held religious beliefs. The above individuals and groups, along with many others, still need this protection today.

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[i] 374 U.S. 398 (1963).
[ii] 406 U.S. 205 (1972).
[iii] 494 U.S. 872 (1990).
[iv] Remarks on Signing the Religious Freedom Restoration Act of 1993, Nov. 16, 1993, http://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf.
[v] 521 U.S. 507 (1997).
[vi] Discrimination Against Catholic Adoption Services, U.S. Conference of Catholic Bishops, http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm.
[vii] *See* Abortion in Obamacare, Family Research Council & Charlotte Lozier Institute, downloads.frc.org/EF/EF16K14.pdf.
[viii] No treatment under Obamacare for HIV+ man because he won't pay for abortions, Alliance Defending Freedom, Jan. 14, 2015, http://www.adfmedia.org/News/PRDetail/9482
[ix] Recently, Gordon College was sued by a professor who didn't like the fact that the school's president had signed a letter with other faith leaders asking President Obama to include a religious exemption in his executive order banning LGBT discrimination by federal contractors. The professor claimed the school retaliated against her for publicly criticizing the signature. If a Christian school cannot preserve its faith tenets against members of its own community who would disrupt them, religious liberty does not exist in America today. Colleen Flaherty, *Fallout from Speaking out*, Inside Higher Ed, Apr. 29, 2016, https://www.insidehighered.com/news/2016/04/29/gordon-professor-says-she-was-punished-criticizing-colleges-request-exemption
[x] Emily Green, *California Judges Must Cut Ties with the Boy Scouts*, NPR, Mar. 16, 2015, http://www.npr.org/2015/03/16/392360308/california-judges-must-cut-ties-with-the-boy-scouts
[xi] *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), http://www.ca6.uscourts.gov/opinions.pdf/12a0024p-06.pdf; *Keeton v. Anderson-Wiley et al.*, 664 F.3d 865 (11th Cir. 2011), http://www.ca11.uscourts.gov/opinions/ops/201013925.pdf
[xii] David Hunsaker, *Same-sex marriage: Why Should Utahns Even Care?*, Standard Examiner, Sept. 9, 2014, http://www.standard.net/Guest-Commentary/2014/09/09/Same-sex-marriage-Why-should-Utahns-even-care