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

**Hearing on "The State of Religious Liberty in America"**

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**Chairman King, Ranking Member Cohen, and Distinguished Members of the Subcommittee**: Good afternoon and thank you for the invitation and opportunity to offer testimony at today's hearing on "The State of Religious Liberty in America." My name is Hannah Smith, and I am Senior Counsel at Becket, a non-profit, public-interest law firm dedicated to protecting religious liberty for people of all faiths. At Becket, we have defended Buddhists, Christians, Jews, Hindus, Muslims, Native Americans, Sikhs, and Zoroastrians. We have litigated several cases before the United States Supreme Court, all of which have resulted in favorable decisions, including the Little Sisters of the Poor in *Zubik v. Burwell*,[1] *Holt v. Hobbs*,[2] *Burwell v. Hobby Lobby,*[3] and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[4]

Today, I'd like to illuminate the state of religious liberty in America through the prism of recent cases to focus on two principles. The first principle is that government must provide equivalent legal protections to religious groups when it provides those same protections to secular groups. The second principle is that

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[1] *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (religious ministries' RFRA challenge to the Affordable Care Act's HHS mandate).

[2] *Holt v. Hobbs,* 135 S. Ct. 853 (2015) (a Muslim prisoner's RLUIPA challenge to a ban on religious beards).

[3] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (a closely-held Christian family business's RFRA challenge to the Affordable Care Act's HHS mandate).

[4] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (a religious school's defense of the ministerial exception under the First Amendment).

religious organizations that perform so much of our country's charitable works should not be discriminated against merely because of their religious status.

## I. Religious Freedom Means Ensuring that Religious Groups Receive Protections on Equal Footing with Secular Groups.

A recent Becket victory involving Sikhs in the Army demonstrates how religious liberty cases are generally not about providing exceptional treatment to religious groups, but are instead about ensuring that protections given for secular purposes are not withheld from religious groups simply because they are religious.

Sikhism is the world's fifth-largest religion. Two of the core tenets of the Sikh faith include maintaining uncut hair and wearing a turban, which signify the inherent dignity and equality of every individual. These religious tenets have not prevented Sikhs from serving admirably in militaries around the world, including in Australia, Canada, India, and the United Kingdom.[5] Service in the armed forces has always been—and continues to be—a central part of the Sikh identity. The Sikh martial tradition dates back to the late 17th century,[6] and Sikhs have earned a reputation as being among the world's best warriors.[7]

Until fairly recently, the same was true in the United States, where Sikh soldiers served valiantly since the World War I era.[8] From the beginning, since 1775, the U.S. military has broadly protected the religious liberty of its troops. But, in 1981, the military broke from that tradition when it imposed a ban on beards.[9] This ban included multiple exceptions for secular reasons, allowing the military to accommodate nearly 100,000 soldiers with beards for medical or tactical reasons, including Special Forces Operators.[10] But other than a few rare cases, the rule did

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[5] Compl. at 2, *Singh v. Carter*, No. 1:16-cv-00399 (D.D.C. Feb. 29, 2016), http://www.becketfund.org/wp-content/uploads/2016/02/Complaint-final.pdf.

[6] Compl. at 9-10, *Singh v. Carter*, No. 1:16-cv-00399, http://www.becketfund.org/wp-content/uploads/2016/02/Complaint-final.pdf.

[7] Mem. in Supp. of Appl. for TRO and Appl. for Prelim. Inj. at 7, *Singh v. Carter*, No. 1:16-cv-00399 (D.D.C. Feb. 29, 2016) (hereinafter "TRO Memo"), http://www.becketfund.org/wp-content/uploads/2016/02/Combined-Memo-in-Support-of-TRO-and-PI.pdf.

[8] Compl. at 2, *Singh v. Carter*, No. 1:16-cv-00399, http://www.becketfund.org/wp-content/uploads/2016/02/Complaint-final.pdf.

[9] TRO Memo at 20, *Singh v. Carter*, No. 1:16-cv-00399, http://www.becketfund.org/wp-content/uploads/2016/02/Combined-Memo-in-Support-of-TRO-and-PI.pdf.

[10] Compl. at 24, *Singh v. Carter*, No. 1:16-cv-00399; *see also Singh v. McHugh*, 109 F. Supp. 3d 72, 96 (D.D.C. 2015), http://www.becketfund.org/wp-content/uploads/2016/02/Complaint-final.pdf.

not allow beards for religious reasons.[11] This ban resulted in the near total exclusion of Sikhs from the U.S. military.[12]

Against this backdrop, in 2016, Becket teamed up with the Sikh Coalition and the law firm McDermott Will & Emery to petition the Army to grant a religious accommodation to West Point graduate, Army Ranger, and Bronze Star Medal recipient Captain Simratpal "Simmer" Singh.[13] After receiving this request, the Army ordered Captain Singh to undergo a series of tests that other soldiers permitted to wear beards for medical reasons have not been required to complete.[14] Becket brought a lawsuit in federal district court for the District of Columbia under the Religious Freedom Restoration Act, also known as RFRA, to prevent the discriminatory testing and to obtain an accommodation for Captain Singh.[15]

RFRA is a statute that was passed in the wake of the Supreme Court's 1990 decision in *Employment Division v. Smith*, which cut back traditional constitutional protections for religious liberty.[16] In the wake of the *Smith* decision, a bipartisan coalition of elected officials, scholars, and advocacy groups united to restore protections for religious freedom. They understood that such heightened protection was necessary to protect this fundamental American liberty. When RFRA was passed in 1993, the bill "was supported by one of the broadest coalitions in recent political history," with sixty-six religious and civil liberties groups, "including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations."[17] RFRA was introduced in the House by then-Representative

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[11] Compl. at 25, *Singh v. Carter*, No. 1:16-cv-00399, http://www.becketfund.org/wp-content/uploads/2016/02/Complaint-final.pdf.

[12] *Id.*

[13] *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016).

[14] *Id.* at 233.

[15] *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016).

[16] *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

[17] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210, 244 (1994), http://www.law.virginia.edu/pdf/faculty/hein/laycock/73tex_l_rev209_1994.pdf; *see also id.* at 210 n.9 ("The Coalition for the Free Exercise of Religion included: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran

Charles Schumer, and it attracted no less than 170 co-sponsors from both political parties. The bill was unanimously approved in committee, and, after several years of congressional hearings, the full House subsequently passed the bill by a unanimous vote.[18] The Senate's companion bill was jointly presented by Senators Orrin Hatch and Edward Kennedy. It garnered a bipartisan group of 58 co-sponsors and passed the full Senate by a vote of 97-3.[19] In his signing remarks, President Clinton noted "what a broad coalition of Americans came together to make this bill a reality" and that "many of the people in the coalition worked together across ideological and religious lines."[20]

In the *Singh* case, the court relied on RFRA to rule in Captain Singh's favor and ordered the Department of Defense to cease all discriminatory testing against Captain Singh and gave him temporary protection.[21] After this RFRA victory in court, the Army granted a temporary accommodation that allowed Captain Singh to serve with his religious beard, unshorn hair, and turban in place for up to one year.[22]

At the beginning of 2017, following Becket's successful litigation, the Army issued new regulations providing that—except in rare circumstances—sincere followers of the Sikh faith will no longer be forced to abandon their religious

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Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism. . . . The American Bar Association did not formally join the Coalition, but repeatedly endorsed the bill."); American Bar Association, Statement of Support for the Religious Freedom Restoration Act of 1993 (Mar. 11, 1993).

[18] H.R. Rep. No. 103-88 (1993).

[19] S. Rep. No. 103-111 (1993).

[20] Statement by President on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993), https://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf.

[21] *Singh v. Carter*, 168 F. Supp. 3d 216, 235-36 (D.D.C. 2016).

[22] Press Release, Becket, Finally! US Army allows Sikh Bronze Star Medalist to serve (Apr. 1, 2016), http://www.becketfund.org/army-retreats-anti-sikh-stance/.

turbans, unshorn hair, or beards to serve their country in the Army.[23] The new rules also promise that the religious accommodations will last throughout a soldier's career and can only be denied or rescinded by the Secretary of the Army or his designee.[24] RFRA and the Army's new regulations create a better, stronger America by allowing religious individuals, such as Sikhs, to serve without having to choose between their faith and their country.

Captain Singh's case demonstrates an important principle that should be uncontroversial: the government should not deny protections without justification to religious individuals and groups when it is willing to offer those same protections to other groups. This "equal treatment" principle is demonstrated by a number of other Becket cases.

For example, Becket defended a Muslim community in Murfreesboro, Tennessee, when it tried to build a new mosque to accommodate its larger numbers. But the Muslim community's efforts were met with vocal protests, vandalism, arson, and even a bomb threat. Ultimately, a state court ruling imposed heightened legal requirements that did not apply to any other houses of worship. Becket stepped in, joined by the Obama Administration's Department of Justice, and filed a federal lawsuit, arguing that Muslim groups should not be subjected to different standards than Christian churches. We prevailed, and the Muslim community completed its mosque in time to celebrate Ramadan, one of the holiest times in the Muslim religious calendar.[25] Employing the equal treatment principle in other land use contexts, Becket has also successfully defended an evangelical church prohibited from operating in a district where private clubs were allowed, as well as a synagogue prohibited from locating in a district where clubs and lodges were allowed.[26]

Another example of this principle in practice is found in Becket's successful litigation defending the Lipan Apache Native Americans. There, the federal

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[23] Press Release, Becket, Sikh soldiers are back! (Jan. 4, 2017), http://becketlaw.org/sikh-military-victory/.

[24] *Id.*

[25] Becket, *Islamic Center of Murfreesboro v. Rutherford County, Tennessee*, http://becketlaw.org/murfreesboro/ (last visited Feb. 13, 2017).

[26] *Elijah Grp., Inc. v. City of Leon Valley, Tex.*, 643 F.3d 419 (5th Cir. 2011); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). These cases were decided under the Religious Land Use and Institutionalized Persons Act (2000) (RLUIPA). RLUIPA passed both Houses of Congress with unanimous bipartisan support and was signed into law by President Clinton. RLUIPA provides broad protection against government burdens in two areas: religious land use and the religious exercise of prisoners.

government denied permits to certain Native Americans for their religious use of sacred eagle feathers, while at the same time granting permits to museums, scientists, zoos, farmers, and other tribes to use eagle feathers for other purposes.[27] In 2006, the government commissioned an undercover raid, known as "Operation Pow Wow," to infiltrate sacred Native American ceremonies and to confiscate their feathers.[28] Relying on RFRA, the U.S. Court of Appeals for the Fifth Circuit pushed back on this government action, and ruled that the government could not deny eagle feather permits to the Lipan Apaches when it granted permits to other groups.[29] The government has since signed a historic settlement agreement, admitting it was wrong to seize the eagle feathers and recognizing the Lipan Apache's right to use eagle feathers in observance of their Native American faith.[30]

This equal treatment principle was central to the Supreme Court's decision in another Becket case involving a Muslim prisoner who sought to grow a religiously mandated half-inch beard.[31] In *Holt v. Hobbs*, the Court received an emergency *pro se* petition from the prisoner seeking to avoid having his beard forcibly shaved by prison officials.[32] This prison refused to allow religious beards, even though it allowed beards for medical reasons, and the vast majority of prisons in the country would have allowed such a beard.[33] The Supreme Court reinforced the rule that the government cannot employ arbitrary double standards to grant exemptions to some groups and not to others, and the Court issued a unanimous victory for the Muslim prisoner.[34]

Finally, this principle is at the heart of Becket's Supreme Court case defending the Little Sisters of the Poor in their challenge to the Affordable Care Act's Department of Health and Human Services (HHS) mandate. In that case, one in three Americans do not have a health care plan that is subject to the mandate that

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[27] Becket, *McAllen Grace Brethren Church v. Jewell*, http://becketlaw.org/mcallen-grace/ (last visited Feb. 13, 2017); *see also McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

[28] Becket, *McAllen Grace Brethren Church v. Jewell*, http://becketlaw.org/mcallen-grace/ (last visited Feb. 13, 2017).

[29] *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

[30] Press Release, Becket, Native Americans win, feds flee feather fight (June 14, 2016), http://www.becketfund.org/eagle-feathers-historic-settlement-agreement/?utm_content=buffer91b14&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

[31] *Holt v. Hobbs*, 135 S. Ct. 853 (2015); Becket, *Holt v. Hobbs*, http://becketlaw.org/holt/ (last visited Feb. 13, 2017).

[32] *Holt*, 135 S. Ct. at 859, 861.

[33] *Holt*, 135 S. Ct. at 860, 866.

[34] Becket, *Holt v. Hobbs*, http://becketlaw.org/holt/ (last visited Feb. 13, 2017); Press Release, Becket, 9-0 Supreme Court Victory for Religious Liberty (Jan. 20, 2015), http://www.becketfund.org/holtvhobbsvictory/.

HHS has sought to impose on the Little Sisters of the Poor.[35] Since the promulgation of the mandate, the federal government has been unable to explain why it is willing to exempt big corporations, its own military healthcare system, other churches, and small businesses, yet it will not offer the same protection to a group of nuns serving the elderly poor.[36]

In sum, protections given to secular groups should not be withheld from religious groups simply because they are religious. RFRA—and its sister statute RLUIPA—are two of the primary laws that allow courts to take a close look at these kinds of cases and to prevent the government from employing double standards that penalize religious individuals and groups.[37] This equal treatment principle is vital to ensuring robust religious liberty protections for people of all faiths in our country.

## II. Provisions Like State Blaine Amendments Are Used to Penalize Religious Groups Who Serve the Most Vulnerable.

Religious organizations that perform so much of our country's charitable work should not be discriminated against merely because of their religious status. America's faith communities feed the poor, assist people suffering from HIV and AIDS, fight pollution, house the homeless, and provide many other services. In fact, religious organizations contribute $1.2 trillion annually to American society—more than Apple, Google and Amazon combined—according to a study published this year in the Interdisciplinary Journal of Research on Religion.[38] Yet some states have laws on the books that make it difficult for religious groups to do their good work. These problematic laws include Blaine Amendments.

Blaine Amendments are state constitutional provisions that prohibit religious organizations from receiving public funds. The amendments are named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.[39] Although the

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[35] *Understanding Who Is Exempted by the New HHS Mandate* http://thelittlesistersofthepoor.com/who-is-exempt-from/ (last visited Feb. 13, 2017).

[36] *What is the Solution?* http://thelittlesistersofthepoor.com/#solution (last visited Feb. 13, 2017).

[37] See Becket, Religious Freedom Restoration Act Central, http://www.becketfund.org/rfra (last visited Feb. 13, 2017).

[38] Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, Interdisciplinary J. of Research on Religion, 2016, Article 3, http://www.religjournal.com/pdf/ijrr12003.pdf.

[39] The original text of the proposed amendment is:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall

federal amendment failed, similar state constitutional amendments were largely successful. Blaine Amendments originated during a period of widespread nativism and anti-Catholic prejudice.[40] Their purpose was to protect the majority's control over government programs against the growing population of Catholic immigrants. Blaine Amendments refer to Catholic schools and other organizations as being "pervasively sectarian,"[41] but the U.S. Supreme Court in recent years has recognized that this doctrine was "born of bigotry" and "should be buried now."[42] The Court has made clear that since Blaine Amendments "ha[ve] been linked with anti-Catholicism," they merit especially close scrutiny.[43]

Today, the vast majority of states have provisions placing some form of restriction on government aid to "sectarian" schools and other religious ministries.[44] These Amendments are frequently used to keep religious organizations from partnering with the government to provide essential social services for people in need.

One current case on the U.S. Supreme Court's docket, *Trinity Lutheran Church v. Pauley*, illustrates the problems associated with Blaine Amendments. In *Trinity Lutheran*, Missouri's Blaine Amendment prevented a religiously affiliated preschool from receiving a state grant to refurbish its playground even though other non-religious schools could receive funds to do the very same thing.[45] The state program provides grants for recycled shredded tires to make playgrounds softer and safer for children. Trinity Lutheran's grant application ranked fifth out of 44 applicants based on the overall quality of the intended project, the number of people who would benefit from the improved playground, and the quality of the school's

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> ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Berkley Center for Religion, Peace, and World Affairs, *The Blaine Amendment*, https://berkleycenter.georgetown.edu/quotes/the-blaine-amendment (last visited Feb. 14, 2017).

[40] Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 659 (1998).

[41] *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

[42] *Id.* Justice Breyer also acknowledged this tainted history in his *Zelman v. Simmons-Harris* dissent. *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002).

[43] *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004).

[44] Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 Engage: J. Federalist Soc'y Prac. Groups 111, 112 (2011), http://www.fed-soc.org/publications/detail/the-state-of-blaine-a-closer-look-at-the-blaine-amendments-and-their-modern-application

[45] High Court to Consider Discrimination Against Church Playgrounds, http://www.becketfund.org/trinity-lutheran-scotus-amicus/ (Apr. 21, 2016) (last visited Feb. 13, 2017).

recycling education programs. But Missouri denied the grant solely because the preschool is associated with a church. This blatant discrimination prompted Trinity Lutheran to sue the state of Missouri. Trinity Lutheran is represented by Alliance Defending Freedom.[46] Becket filed a friend-of-the-court brief with Stanford Law Professor Michael McConnell, defending Trinity Lutheran's right to participate in the scrap tire grant program on equal footing with secular organizations.[47]

Finally, in a recent Becket case, *Center for Inquiry v. Jones,* we represented Prisoners of Christ, a small nonprofit prison ministry that has partnered with Florida to help recently released prisoners reenter society.[48] For as little as $14 a day in state funds, Prisoners of Christ provides important services, including substance abuse counseling, free housing, clothing, food, personal finance training, transportation, medical services, and job search training. With a success rate at nearly *three times* the national average, Prisoners of Christ has helped over 2,300 former inmates get back on their feet. In the past two years, 90% of program participants have avoided crime, compared to the state average of 30%.[49] Despite these impressive results, an activist group sued—relying on Florida's Blaine Amendment—to stop Florida from partnering with this faith-based group to prevent crime.

In the Prisoners of Christ case, we successfully defended the prison ministry by highlighting the bigotry behind state Blaine Amendments. As a result, Prisoners of Christ continues to partner with Florida to get prisoners back on their feet and help society by lowering recidivism rates. We hope that the Supreme Court's decision in *Trinity Lutheran* will similarly recognize the negative effects of state Blaine Amendments and hold that Trinity Lutheran should be able to receive scrap tire program grants on equal terms with secular groups.

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[46] Petition for Certiorari, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (2016), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/Trinity-Lutheran-Cert-Petition.pdf (last visited Feb. 13, 2017).

[47] Brief *Amicus Curiae*, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (2016), *available at* http://www.becketfund.org/wp-content/uploads/2016/04/Trinity-Lutheran-Amicus-Final.pdf (last visited Feb. 13, 2017).

[48] Becket, *Center for Inquiry v. Jones*, http://www.becketfund.org/center-for-inquiry-v-jones (last visited Feb. 13, 2017).

[49] *Id.*; Becket, *Why did atheists sue Florida's ex-convict rehab program*, YouTube (Feb. 23, 2016), https://www.youtube.com/watch?v=wNkcSglOopQ&feature=youtu.be&list=PLw8rG-JShioRul-zclpEZnm093WFdizgj.

## III. Conclusion

Becket applauds Congress's commitment to the principle that religious liberty is fundamental to freedom and to human dignity, and that protecting the religious rights of others—even the rights of those with whom we may disagree—ultimately leads to greater protections for all of our rights.

I thank you for your time and look forward to answering any questions you may have.